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Insurance Law

New Law Makes No Change in Broker Liability

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The legislature has enacted into law, effective May 13, amendments to N.J.S.A.17:22A-26 and N.J.S.A.2A:53A-27, sponsored and supported by the Professional Insurance Agents of New Jersey (PIANJ). What is the effect of these amendments, if any, on current New Jersey law of broker liability?

Affidavit of Merit

"Insurance producers" (more commonly called brokers when representing the interests of insureds) is one of 16 categories of licensed persons in the affidavit of merit (AOM) statute, which requires an affidavit of merit stating that in reasonable probability professional performance fell outside acceptable standards. For medical malpractice defendants, the affiant must be medically licensed with particular expertise in the area or specialty involved, and must be board certified or have devoted at least five years in the specialty at issue.

The broker amendment to the AOM Act requires that the affiant be licensed "in this state" and have practiced in the field for the five years "immediately preceding the date of the occurrence." For other categories of licensed persons, the affiant must be licensed in any state and have practiced for at least five years but not necessarily within the five years immediately preceding the occurrence. Of course, the professional expert who actually testifies at trial, very seldom the author of the affidavit, is not bound by the requirements of the AOM. That broker amendment to the AOM is, therefore, quite insubstantial in its effect on present law.

Present Broker Liability Law

Aden v. Fortsh, 169 N.J. 64 (2001), sets forth the law of broker liability, namely negligence or deviation from accepted professional standard. In *Aden*, the opinion of plaintiff's expert was that the broker was liable to his client because he did not act in conformance with industry standards. The jury was charged that the law imposes on a broker the duty to have and to use that degree of skill and knowledge which brokers of ordinary ability and skill possess, and that this is the standard for the jury to consider in determining breach of duty as a substantial factor in causing plaintiff's loss. As charged by the court, the law:

> Imposes on the insurance broker the duty or obligation to have and to use that degree of skill and knowledge which insurance brokers of ordinary ability and skill possess and exercise in the representation of a client, such as the plaintiff Aden in this case. This is the standard by which to judge the defendant Fortsh in his placement and advice as to the insurance on this dwelling, condominium dwelling unit.

Aden at 73. That standard of liability has not been changed by the amendments.

The Insurance Producer Amendments

The language is:

> [A]n insurance producer shall exercise ordinary and reasonable care and skill in renewing, procuring, binding, or placing property and casualty insurance coverage … requested by an insured or prospective insured … [and] this section shall not limit or exempt an insurance producer from liability for negligence … or limit or prevent an insurance producer from asserting any defenses available at common law.

The liability of brokers for failure to properly perform their professional responsibilities remains the same.

In fact, the website of the PIANJ confirms this as the intent of the amendatory language: "This legislation would clarify that insurance producers are expected to exercise ordinary care and skill in renewing, procuring, binding or placing property/casualty insurance, and are fully liable for negligent actions."

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The Role of a 'Fiduciary'

What is a fiduciary? What triggers acceptable conduct of a fiduciary?

A fiduciary is one who, holding a relationship of trust, must prudently care for the assets of a client entrusted to him. For example, a trust company or the trust department of a bank, acts in a fiduciary capacity as to funds entrusted to it for safe keeping or investment. The handling of another's funds requires the fiduciary to act at all times for and in the interest of the one who has entrusted his or her assets.

After the above language stating that the broker will be subject to civil liability for his negligence it states that: "[W]hen the conduct upon which the cause of action is based involves the wrongful retention or misappropriation of any money that was received by the insurance producer as a premium deposit or as payment of a claim," he will be liable under the standard imposed on fiduciaries.

That language merely restates settled law as to the obligations of a fiduciary and doesn't have effect on the "ordinary and reasonable care and skill" standard of civil liability for failure to obtain the appropriate insurance policy. That was the law in *Aden*, and that is the law in the legislative amendments.

The only language in the amendments which might be argued to affect a broker's liability is the withdrawal of a "fiduciary" designation. Under the case law of New Jersey, the rights of an insured for broker negligence, as in the amendatory language, are not based on a fiduciary standard. The concept is essentially one of professional malpractice. *Aden* at 79.

Certain of the language in *Aden*, however, speaks in terms of a fiduciary relationship.

> That rule [that the conduct of the client in a professional malpractice action is relevant only if conduct of the client affirmatively impedes the professional in his or her performance by affirmative conduct] is premised on the heightened responsibilities of professionals in this State. Otherwise, the fiduciary relationship between the professional and the client may be undermined and professionals may be allowed to escape liability for their malpractice.

Aden at 78. Also: "The import of the fiduciary relationship between the professional and the client is no more evident than in the area of insurance coverage. Insurance intermediaries in this State must act in a fiduciary capacity to the client." *Id.*

This language merely reflects the professional duty owed by the broker to his client, which is measured simply by a professional negligence standard, "ordinary care and reasonable skill" of a broker. If the inclusion of the "fiduciary" language was to provide an argument that the *Aden* holding can be distinguished in future actions and failure of the insured to read the policy can act as comparative negligence, it is a failing argument.

The client, with no expertise, seeks the professional competence and expertise of the broker. The broker, by the very language of the amendments, owes a duty of ordinary care to the insured and is liable for negligent handling of the matter entrusted to him. The relationship of client and broker arises from the trust of the client seeking the expertise of a broker. This, of itself, does not implicate the duties of a "fiduciary" as contemplated in the law of fiduciary entrustment that triggers liability for breach of duty by a fiduciary. To stretch the accepted legal definition of "fiduciary," as one who is entrusted with the funds of a client, to a civil action negligence claim, would be the equivalent of attempting to prevent use of the measurement of a circle by redefining the circle as a square. The point is that the obligations of a broker to act in accordance with industry or professional standards represents settled case law, confirmed by the "ordinary care and skill" language of the amendments.

Social policy was the driving force of the court's decision to preclude comparative negligence chargeable to the insured by a passive failure to read a policy, to be properly obtained by one who holds himself out "as having more knowledge than members of the public with regard to the insurance policies and coverage they procure." *Aden* at 82. This is the underlying rationale in *Aden* for precluding a comparative negligence defense on the passive inaction of the client. The social policy for this result is broader than, and not necessarily dependent on, a "fiduciary" standard.

Conclusion

The language of the legislative amendments makes no change in the present standard for broker liability. The only language through which a broker's attorney might attempt to add a different dimension to a defense available to brokers for defeating or ameliorating a client's claim is the "fiduciary" language of the amendments. If, in fact, that language were urged to argue failure of the insured to read the language of the policy as the basis for a percentage of negligence assessed against the insured, it should fail of that purpose when tested in light of present law, and the civil liability language of the amendments as recognized by the industry sponsor of the legislation. ■