

The Broker As Advisor

When Courts Impose a Duty to Recommend Coverage

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Introduction

The duty of an insurance broker is generally limited in nature. It consists of using reasonable care and diligence to procure the coverage requested by a client. The majority of courts who have examined the scope of a broker's duty have found it does not include recommending specific types or limits of coverage. This article analyzes the relationship between a broker and its client, discusses the circumstances under which a duty to advise will be imposed, and reviews the national trend indicating judicial reluctance to expand the duty of a broker.

The Limited Nature Of A Broker's Duty

In the majority of states, insurance brokers owe a limited duty to their clients, which generally consists of using reasonable care, diligence and judgment in procuring the insurance requested by the insured.¹ The broker's obligations to its client are typically satisfied when it secures the insurance requested from a competent, solvent insurer.²

1 *Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. W., Inc.*, 203 Cal. App. 4th 1278, 1283 (2012); *See also, e.g., Wilson v. James L. Cooney Ins. Agency*, 66 Mass. App. Ct. 156, 161 (2006); *National Farmers Union Standard Ins. Co. v. Souris River Telephone Mut. Aid Co-op.*, 75 F.3d 1268 (8th Cir. 1996); *Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41 (2002); *Mladineo v. Schmidt*, 52 So. 3d 1154 (Miss. 2010); *Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481 (Alaska 2001); *Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc.*, 512 N.W.2d 573 (Iowa 1994); *Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41 (2002); *Aden v. Fortsh*, 169 N.J. 64 (2001).

2 *See Mayo v. Am. Fire & Cas. Co.*, 282 N.C. 346 (1972).

Courts in Alaska,³ California,⁴ Illinois,⁵ Michigan,⁶ Minnesota,⁷ Missouri,⁸ New York,⁹ North Carolina,¹⁰ South Carolina,¹¹ Vermont,¹² Washington,¹³ and Wisconsin¹⁴ have all held that, absent exceptional circumstances, neither the broker nor the carrier has a duty to advise

3 *Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481 (Alaska 2001).

4 *Jones v. Grewe*, 189 Cal. App. 3d 950 (Cal. Ct. App. 1987).

5 *Cleary v. Country Mut. Ins. Co.*, 63 Ill. App. 3d 637 (1978).

6 *Marlo Beauty Supply, Inc. v. Farmers Ins. Grp. of Companies*, 227 Mich. App. 309 (1998).

7 *Tollefson v. Am. Family Ins. Co.*, 302 Minn. 1 (1974).

8 *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089 (10th Cir. 1999).

9 *Ambrosino v. Exch. Ins. Co.*, 265 A.D.2d 627 (N.Y. App. Div. 1999).

10 *Phillips by Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111 (1998).

11 *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465 (Ct. App. 1988).

12 *Hill v. Grandey*, 132 Vt. 460 (1974).

13 *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wash. App. 524 (1998).

14 *Cleary v. Country Mut. Ins. Co.*, 63 Ill. App. 3d 637 (1978).

an insured as to their coverage needs. The policy reasons supporting these rulings concern the practical difficulties of imposing such a duty. In *Tollefson v. Am. Family Ins. Co.*, the Supreme Court of Minnesota observed that it would be unreasonable to require surveillance of the insured's personal affairs so as to recommend the best possible coverage.¹⁵ The court specifically stated, "the number of vehicles operated, the occupation of the insured and his family, and the value of the property insured are but a few examples of constantly changing conditions which the insured is in a far better position to communicate to the insurer than the insurer is to determine on its own initiative."¹⁶

Similarly, the California Court of Appeal observed, "[o]rdinarily, the person seeking liability insurance knows better than the insurance agent the extent of his personal assets, and the premium he can afford or is willing to pay."¹⁷ This reasoning returns to the core of a broker's duty, which is limited to procuring the requested coverage. Requiring a broker to affirmatively investigate the insured's personal situation and recommend insurance different than that requested would go against the nature of the broker-insured relationship. While a broker may suggest alternative insurance policies, there is no affirmative requirement to engage in such an undertaking, "[a]n agent may point out to [the insured] the advantages of additional coverage and may ferret out additional facts from the insured applicable to such coverage, but he is under no obligation to do so."¹⁸ This rule is not unassailable, however. There are several exceptions that create an affirmative duty to recommend specific coverage.

When a Duty to Advise May Be Imposed

A duty to recommend specific types or limits of coverage will frequently be imposed when the following occurs: (1) The broker expressly agrees to provide recommendations regarding coverage¹⁹; (2) The broker holds himself out as an expert in the field of insurance sought by the client²⁰; or (3) The broker voluntarily provides advice that results in an uncovered loss.²¹ Ad-

15 *Tollefson*, 302 Minn. at 7.

16 *Id.*

17 *Jones*, 189 Cal. App. 3d at 956.

18 *Hill*, 132 Vt. at 468-69.

19 *Fitzpatrick v. Hayes*, (1997) 57 Cal. App. 4th 916, 927.

20 *Kurtz, Richards, Wilson & Co. v. Ins. Communicators Mktg. Corp.*, 12 Cal. App. 4th 1249 (1993); cf. *Wallman*, 200 Cal. App. 4th at 1312 (stating that conclusory allegations that broker "held himself out as an expert in insurance matters" were too vague to serve as exception to general rule.)

21 *Todd v. Malafronte*, (1984) 3 Conn App 16, 484 A2d 463; *Buente v. Allstate Ins. Co.*, 422 F. Supp. 2d 690 (S.D. Miss. 2006); *Poluk v. J.N. Manson Agency, Inc.*, 2002 WI App 286,

ditionally, in a minority of states, the existence of a long-term relationship can lead to a duty to advise regarding coverage.²²

In *Kurtz, Richards, Wilson & Co. v. Ins. Communicators Mktg. Corp.*, a California Court of Appeals noted that an agent may assume additional duties by agreement or by holding oneself out as having specific expertise.²³ In that case, the insurance broker claimed to be an expert with respect to the Tax Equity and Fiscal Responsibility Act of 1982.²⁴ The client relied upon this purported expertise with respect to coverage decisions.²⁵ This resulted in liability for the client, which bought suit against the broker.²⁶ The Court of Appeals found that the cross-complaint sufficiently stated a cause of action for professional negligence.²⁷

A duty to advise will often be imposed when a broker voluntarily provides coverage recommendations. Sometimes, a broker offers advice in response to a specific question from the client. Other times, the broker offers faulty recommendations while discussing coverage options. In *Todd v. Malafronte*, insurance agents incorrectly advised the owner of a dog kennel that she did not need workers' compensation insurance for a part-time summer employee.²⁸ The employee was later injured, and the owner was required to pay the damages out of pocket.²⁹ The owner brought suit against the insurance agents and their company, and judgment in favor of the owner was entered by the trial court and affirmed on appeal.³⁰

Similarly, in *Poluk v. J.N. Manson Agency, Inc.*, the personal representative of an estate brought a claim for negligence and misrepresentation against an insurance agent after a fire destroyed a building and the carrier denied coverage based on a vacancy exclusion in the policy.³¹ The personal representative informed the insurance agent that the building was in the pro-

653 N.W.2d 905 (Wis. Ct. App. 2002).

22 *Campbell v. Valley State Agency*, 407 N.W.2d 109, 112 (Minn. Ct. App. 1987)

23 (1993) 12 Cal. App. 4th 1249, 1257 (citing *Jones v. Grewe*, (1987) 189 Cal.App.3d 950).

24 *Id.* at 1255.

25 *Id.*

26 *Id.* at 1249.

27 *Id.* at 263.

28 *Todd, supra*, at 463-465.

29 *Id.*

30 *Id.*

31 2002 WI App 286, 653 N.W.2d 905 (Wis. Ct. App. 2002).

cess of being sold and the tenant was moving out. After being told this information, the insurance broker purportedly stated that the building would still be covered under the policy.³² The case went to trial and the jury found against the agent, who subsequently appealed.³³ The Court of Appeals held that the insurance agent had a duty to inquire further and inform the insured that the current policy may be inadequate.³⁴

A minority of states impose a duty to advise where the insured can show that there is "an intimate long-term relationship between the parties or some other special circumstance."³⁵ The required circumstances have been found when the broker (1) exercises broad discretion to service the insured's needs; (2) counsels the insured concerning specialized insurance coverage; (3) holds himself or herself out as a highly skilled insurance expert, with the insured's reliance thereupon; or (4) receives compensation above the customary amount for the expert advice provided.³⁶

The Indiana Court of Appeals recently found special circumstances giving rise to a duty to advise and recommend in *Meridian Title Corp. v. Gainer Group, LLC*. In that case, an insurance agent attempted to facilitate a resolution to a dispute between his insured and a third party. The agent also had a financial interest in avoiding any insurance claim. The court held that, under these facts, the agent owed a duty to the insured, "beyond its general duty to exercise reasonable care, skill and good faith diligence in obtaining the insurance policy; [agent] had a duty to advise [insured] regarding coverage

32 *Id.* at 912-913.

33 *Id.* at 905-907.

34 *Id.* at 911-912.

35 *Billboards "N" Motion, Inc. v. Saunders-Saunders & Associates, Inc.*, 879 N.E.2d 1135, 1142 (Ind. Ct. App. 2008); See also *Buelow v. Madlock*, 90 Ark. App. 466 (2005); *Zaremba Equip., Inc. v. Harco Nat. Ins. Co.*, 302 Mich. App. 7, 837 N.W.2d 686 (2013); *Myers v. Yoder*, 921 N.E.2d 880 (Ind. Ct. App. 2010); *Fremont Realty, Inc. v. P & N Iron Works, Inc.*, 39 A.D.3d 586 (N.Y. App. Div. 2007).

36 *Meridian Title Corp. v. Gainer Group, LLC*, 946 N.E.2d 634, 637 (Ind. Ct. App. 2011) (noting that the burden of establishing a long-term relationship or special circumstances lies with the insured.). The court of appeals of Michigan applied a different test to determine the existence of a special relationship, "(1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured." *Zaremba Equip., Inc. v. Harco Nat. Ins. Co.*, 302 Mich. App. 7, 837 N.W.2d 686 (2013).

under its policy."³⁷ The court went on to find that because the agent correctly advised the insured as to the contours of the policy, and never refused to assist the insured with a claim, he fulfilled his expanded duty.³⁸

Other courts have yet to apply exceptions relating to special relationships or circumstances.³⁹ In *Libow v. Fullerton & Co., Inc.*, the Ninth Circuit Court of Appeal was presented with an individual who had been securing insurance for a husband and wife for more than 50 years. He made nearly annual visits to discuss insurance needs and make recommendations. Neither of the insureds was particularly knowledgeable about insurance matters, and they relied on their broker as their only source of advice on insurance matters. Despite this longstanding relationship, the court held there was no duty to recommend specific coverage because that duty arises only when one of the three general exceptions to the limited duty of brokers applies.⁴⁰

While there is a strong majority supporting the limited nature of the broker-insured relationship, some exceptions may impose a duty to advise the insured or recommend specific coverage. It is imperative that the broker understand the nature of his or her relationship with the client in order to avoid giving rise to additional duties and potential liability.

Judicial Reluctance To Expand The Duty Of A Broker

A review of recent appellate decisions across the nation confirms judicial reluctance to expand the duty of a broker. Courts have been hesitant to create new exceptions to the general rule that a broker's duty is fulfilled when it secures the insurance requested from a competent, solvent insurer.⁴¹

In 2013, an appellate court in New York ruled that absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage.⁴² The appellate court found that plaintiff's request for defendant to procure the 'best policy value' for plaintiff's workers' compensation coverage was insufficient to trigger a duty to advise. The

37 *Meridian Title Corp.*, 946 N.E.2d at 638.

38 *Id.* at 639.

39 *Libow v. Fullerton & Co., Inc.*, 34 F. App'x 543, 546-7 (9th Cir. 2002); See also *Curry v. State Farm Mut. Auto. Ins. Co.*, 599 F. Supp. 2d 734 (S.D. Miss. 2009); *Emerson Elec. Co. v. Marsh & McLennan Companies*, 362 S.W.3d 7 (Mo. 2012); *Hill, Peterson, Carper, Bee & Deitzler, P.L.L.C. v. XL Specialty Ins. Co.*, 261 F. Supp. 2d 546 (S.D.W. Va. 2003).

40 *Libow*, 34 F. App'x at 546.

41 See *Mayo v. Am. Fire & Cas. Co.*, 282 N.C. 346 (1972).

42 *5 Awnings Plus, Inc. v. Moses Ins. Group, Inc.*, 108 A.D.3d 1198, 970 N.Y.S.2d 158 (4th Dep't 2013).

court noted that this was “the very kind of request that has been repeatedly held to be insufficient’ to trigger a special duty requiring defendant to advise plaintiff concerning its insurance coverage.”⁴³

In 2013, the California Court of Appeal reiterated the general rule of limited broker liability and refrained from imposing a duty to recommend coverage.⁴⁴ The court began its analysis by restating the general rule that “brokers owe a limited duty to their clients, which is only to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured.”⁴⁵ The insured’s argument against the broker relied in part on the idea that the broker was obligated to advise him of potential issues, and recommend alternate coverage, after a request for confirmation of coverage was sent to the broker.⁴⁶ The court flatly rejected this argument, stating that there was no evidence that the request sent by the insured asked the broker “to review the policy and modify it, where necessary, to comply with the terms of the request.”⁴⁷ The court thus relied on the idea that there is no affirmative duty to alter the procured insurance, or recommend new insurance, unless such an action is specifically requested by the insured.

In 2012, the Ohio Court of Appeal found that an insurance broker did not have a fiduciary relationship with the insured or a duty to advise of the amount of coverage necessary to cover potential damages to the insured’s off-site electronic data.⁴⁸ In support of this finding, the appellate court found that the broker and the insured had nothing more than an ordinary business relationship, and that the insured was in the best position to evaluate the amount of coverage necessary for the data.⁴⁹

A recent decision by the Michigan Court of Appeal provides an example of when a broker can become an advisor to the client.⁵⁰ The case of *Zaremba Equip., Inc. v. Harco Nat. Ins. Co.*, involved a broker who made coverage recommendations, misrepresented the coverage provided in the policy, and vol-

43 *Id.* at 1201 (citing *Catalanotto v. Commercial Mur. Ins. Co.*, 285 AD2d 788, 790 (2001)).

44 *Travelers Prop. Cas. Co. of Am. v. Superior Court*, 215 Cal. App. 4th 561 (2013).

45 *Id.* at 578.

46 *Id.*

47 *Id.* at 579.

48 *Tornado Technologies, Inc. v. Quality Control Inspection, Inc.*, (2012) 2012-Ohio-3451, 977 N.E.2d 122 (Ohio Ct. App. 8th Dist. Cuyahoga County 2012).

49 *Id.* at 127.

50 *Zaremba Equip., Inc.*, 302 Mich. App. at 18-19.

untarily assumed an obligation to appraise the property and calculate its replacement value.⁵¹ These actions “established a duty of care quite different from that of an ordinary insurance agent” and required the broker to advise and recommend coverage to the insured.⁵² While this decision may seem like a turn away from the generally limited nature of a broker’s duty, the special relationship found by the court arose out of “abundant evidence”⁵³ showing that the broker affirmatively stepped into the role of advisor. As such, the ruling does not represent an expansion of the special relationship exception.

In Pennsylvania, an appellate court held that an insurance agency, in its capacity as an insurance broker, owned no duty to the insureds to inspect their property before advising them about their insurance needs, and thus the insurance agency was not negligent in failing to inspect insured’s property or recommend flood insurance.⁵⁴ The Court reasoned that the insureds could inspect their own property and come to reasonable conclusion about the type and scope of coverage needed.⁵⁵ Additionally, it noted that imposing a duty on insurance brokers to inspect the property would be onerous.⁵⁶

The Supreme Court of Louisiana recently overruled a lower court decision to hold that an “insurance agent/broker had no duty to recommend coverage amounts or to determine whether the client is underinsured; rather the client had a duty to determine the amounts of coverage needed and to review the policy upon receipt to determine that those needs are met.”⁵⁷ Louisiana has historically been hostile to the idea of a limited broker duty.⁵⁸ This decision points to a potential shift

51 *Id.*

52 *Id.* at 18.

53 *Id.*

54 *Wisniski v. Brown & Brown Ins. Co. of PA*, (2006) 2006 PA Super 216, 906 A.2d 571.

55 *Id.* at 580.

56 *Id.* at 580.

57 *Isidore Newman Sch. v. J. Everett Eaves, Inc.*, 2009-2161 (La. 7/6/10), 42 So. 3d 352 (overruling *Isidore Newman Sch. v. J. Everett Eaves, Inc.*, 2008-1368 (La. App. 4 Cir. 8/5/09), 17 So. 3d 465, which held that “insurance broker breached duty of care owed to school to provide recommendations on the scope and amount of property and casualty insurance coverage that the school should purchase.”)

58 Louisiana was in the minority, holding that the broker-insured relationship itself created a duty to advise and recommend specific insurance. See *Succession of Barreca v. Weiser*, 2010-0574 (La. App. 4 Cir. 11/3/10), 53 So. 3d 481, 485, Fn. 3; *Taylor v. Sider*, 99-2521 (La.App. 4 Cir. 5/31/00), 765 So.2d 416; *Durham v. McFarland, Gay and Clay, Inc.*, 527 So.2d 403 (La.App. 4

of that state’s jurisprudence on the issue, bringing it more in line with the majority of states.

In 2010, the Indiana Court of Appeals refused to impose a duty to advise on a broker even though the insured requested that the broker obtain “full coverage” on its house.⁵⁹ The court found that “an insured’s expectation of ‘full coverage’ is not enough to impose a duty on an agent to provide advice to an insured regarding the amount of coverage that should be purchased.”⁶⁰ The court went on to hold that no intimate relationship or special circumstances existed because the insured had not purchased insurance through the broker before and did not consult with him regarding any special insurance needs.⁶¹ This evidences a further reluctance on the part of the judiciary to expand exceptions beyond their current boundaries.

In 2013, the court of civil appeals in Oklahoma ruled that the failure of an insurance agent to notify the insured that it may have insufficient coverage in the event of a total loss was not actionable.⁶² In reaching this conclusion, the court noted that an agent owes no fiduciary duties to a prospective insured or an established customer.⁶³

Taken together, these and other recent appellate decisions evidence a nationwide trend to limit the duties of an insurance broker.

Conclusion

In the majority of states, brokers owe a limited duty to their clients. While courts can impose a duty to recommend coverage, the broker frequently has the power to control when such a duty arises. By exercising care during client communications, a broker can decrease the likelihood that the scope of its duty will be expanded. While the law of brokers, agents, and insurers can be fraught with complications, a thorough understanding of the relevant law can aid all practitioners in serving their clients and protecting their interests.

Cir.1988).

59 *Myers*, 921 N.E.2d at 889.

60 *Id.*

61 *Id.* at 888.

62 *Cosper v. Farmers Ins. Co.*, 2013 OK Civ.App. 78, 309 P.3d 147 (Div. 3 2013).

63 *Id.* at 150 (citing *Swickey v. Silvey Companies*, 1999 OK CIV APP 48, ¶ 12, 979 P.2d 266, 269.)