BROKER LIABILITY FOR FAILING TO PROCURE ADEQUATE INSURANCE: MAY BROKER ASSERT DEFENSE OF INSURED'S COMPARATIVE OR CONTRIBUTORY NEGLIGENCE BASED ON POLICYHOLDER'S FAILURE TO READ POLICY?

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Introduction

Brokers are professionals. They are also fiduciaries. Policyholders rely heavily upon the expertise of these insurance intermediaries[2] because of the extremely complex nature of the insurance industry and due to the specialized knowledge that is required to appreciate and understand all of its intricacies.[3]

Indeed, because of the complex nature of the insurance industry, the import of the fiduciary relationship between a professional and a client is no more paramount than in the area of

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[2]Insurance intermediaries are often referred to as "insurance brokers" or "insurance agents" and those terms are often used interchangeably. However, the broker and agent present different legal relationships *vis-a-vis* the policyholder and the insurer. The fundamental difference is that the "broker" represents the policyholder's interests whereas, generally, the "agent" typically represents the "insurer's" interests. *See, e.g., Weinisch v. Sawyer,* 123 *N.J.* 333, 339-40, 587 *A.*2d 615 (1991); 16 Appleman, *Insurance Law & Practice,* §8725 (1981). Because the primary focus of this article is on the issue of broker liability in failing to procure adequate insurance as requested by the policyholder, the insurance intermediary term "broker," rather than "agent," will be used throughout.

[3]*See Sobotor v. Prudential Prop. & Cas. Ins. Co.,* 200 *N.J. Super.* 333, 341, 491 *A.*2d 737 (App. Div. 1984); *see also, N.J.A.C.* 11:17A-4.10 ("An insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business.").

insurance coverage.[4] A broker engaged by a policyholder to procure insurance is required to exercise reasonable skill and is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the particular area in which the insured seeks protection. Where the broker neglects to procure the appropriate coverage requested - - because he fails to exercise the requisite skill or diligence expected of his profession - - he becomes liable to his principal, the insured, for the losses sustained.[5] In this regard, some jurisdictions have recognized that the broker, as other professionals, is held to a higher standard of care.[6]

What happens, however, when the broker supplies the insurance policy to the policyholder but the insured simply fails to read the policy? Let's assume that had the policyholder taken the time to read just the Declarations Page of the policy, the insured would have discovered immediately that the broker had not provided the coverage he or she requested. In that circumstance, may the broker in defending against a professional negligence claim brought by the policyholder assert as an affirmative defense contributory or comparative negligence on the part of the insured?

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[4]*See Aden v. Fortsh,* 169 *N.J.* 64, 78, 776 *A.*2d 792 (2001).

[5]*See Rider v. Lynch,* 42 *N.J.* 465, 476, 201 *A.*2d 561 (1964).

[6]*See Aden v. Fortsh,* 169 *N.J.* 64, 78, 81, 776 *A.*2d 792. In recognizing this "heightened responsibility" of the broker, the New Jersey Supreme Court in *Aden* observed:

> "Brokers . . . hold themselves out as having more knowledge than members of the public with regard to the insurance policies and coverage they procure. A broker is not an 'order taker' who is responsible only for completing forms and accepting commissions."

169 *N.J.* at 82, 776 *A.*2d 561.

The majority of courts that have addressed this issue have answered that question in the negative and, thus, in favor of the policyholder. The rationale of these decisions is predicated on the general notion that when an insured hires a professional broker, he/she does so to reduce, if not eliminate, the risk that an inadequate policy will be procured.[7] Recently, the New Jersey Supreme Court in *Aden v. Fortsh,* 169 *N.J.* 64, 776 *A.*2d 792 (2001), adopted this approach. That decision and others that have taken a pro-policyholder stance on this issue will be discussed in this article, as well as those court decisions that have reached a contrary result.

Majority View: Insured's Failure to Read Policy Does Not Bar Claim Against Broker.

One of the first cases to analyze this broker liability issue was *Israelson v. Williams,* 166 *A.D.* 25, 151 *N.Y.S.* 679*, appeal dismissed,* 215 *N.Y.* 684, 109 *N.E.* 1079 (1915). In that case, the plaintiff-policyholder (Wilson) hired a broker (Williams) to procure fire insurance for a property Wilson owned on Long Island, New York. Before procuring that insurance, the insured advised Williams that he already had other insurance in place on the property. Nonetheless, the broker procured a fire insurance policy that contained a provision making that policy void if there was other insurance on the property at the time it was issued, unless such additional insurance was expressly permitted. Although Williams provided Wilson with a copy of the insurance policy, the insured never reviewed it. Thereafter, a fire destroyed Wilson's property. Based on the provision requiring express permission for other insurance - - which permission was never received - - the

[7]However, that is not to say that the policyholder's failure to read the policy is completely irrelevant and may not be considered by the factfinder. *See* discussion, *infra.*

fire insurance carrier denied coverage. Wilson then sued the broker, claiming Williams performed his duties negligently.[8]

In defending against the professional negligence claim, the broker argued that because the plaintiff failed to read the policy that was "negligence *per se*" on the part of the insured which completely exonerated Williams from any claim of professional liability. The court rejected this argument, noting that the action was not between an insured and his insurer but, rather, was "between the insured and his own [broker] for a breach of duty to fulfill instructions."[9] Under these circumstances, the court reasoned the insured "had the right to rely upon a presumed obedience to his instructions on the part of his skilled [broker] and [the insured] was not negligent in taking steps to investigate the matter."[10]

A half century later, the rule articulated in *Israelson* was embraced by the Supreme Court of Oregon in *Franklin v. Western Pacific Ins. Co.,* 243 *Or.* 448, 414 *P.*2d 343 (1966), where the court also rejected the broker's argument that the policyholders had a duty to read their insurance

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[8]166 *A.D.* at 26, 151 *N.Y.S.* at 680.

[9]166 *A.D.* at 28, 151 *N.Y.S.* at 681.

[10]*Id.* However, *see Busker On The Roof Limited Partnership Co. v. M.E. Warrington,* 283 *A.D.* 2d 376, 725 *N.Y.S.* 2d 45 (2001), where court held that because insured had received policy of insurance months before the accident at issue occurred, the policyholder was "conclusively presumed to have known, understood and assented to its terms." 283 *A.D.* 2d at 377, 725 *N.Y.S.* 2d at 47. Thus, the insured was found to have no cause of action for professional negligence or breach of contract against the broker for procuring inadequate insurance coverage.

It is interesting to note that the court in *Busker* also held that brokers and agents "are not professionals and, thus, that claims against them do not sound in professional malpractice." 283 *A.D.* 2d at 376, 725 *N.Y.S.* 2d at 46 (*citing, Chase Scientific Research, Inc. v. NIA Group, Inc.,* 96 *N.Y.* 2d 20, 725 *N.Y.S.* 2d 592, 749 *N.E.* 2d 161).

policy and, thus, reinstated their lawsuit which had been dismissed on the pleadings. In *Franklin,* the broker contended that had the plaintiffs read their policy, they would have discovered the broker's negligence in procuring a fire insurance policy that was conditioned on plaintiffs maintaining an existing policy. Because this condition was never explained to the plaintiffs, they canceled their other policy of fire insurance. When a fire destroyed their property, they were left without adequate coverage. Relying principally on *Israelson,* the *Franklin* Court ultimately reasoned that the plaintiffs were entitled to depend on their broker to provide them with an insurance agreement consistent with their needs and instructions. Failure to do so stated a cause of action.[11]

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[11]243 *Or.* at 452-53, 414 *P.*2d at 345-46. In reaching this conclusion, the Oregon Supreme Court analyzed and treated the broker liability issue in *Franklin* in terms of a professional liability claim sounding in negligence. Thus, the court distinguished other Oregon decisions which held that a policyholder had no cause of action against his/her *insurer* when the policyholder failed to read the policy language. That is because when parties enter into a contract, be it an insurance agreement or otherwise, they have an obligation to read the contract and if they assent without doing so they cannot later come into court and legitimately argue that their agreement is different from that which is expressed in writing. 243 *Or.* at 452-53, 414 *P.*2d at 346. But in *Franklin* the court noted that, unlike those "contractual" cases involving an insured pitted against his/her insurer, here the issue concerned policyholders suing their broker for *negligently* failing to perform his professional obligations. In other words, the broker breached his duty owed the policyholders. *Id.* As such, plaintiffs' substantive claim against their broker in *Franklin* was essentially for tortious conduct (*i.e.,* professional negligence). Nonetheless, the court characterized and "construe[d] plaintiffs' cause of action as a breach of contract to procure insurance." 243 *Or.* at 453, 414 *P.*2d at 346.

Relying heavily on this subtle misnomer, the Oregon Supreme Court a quarter century later distinguished and refused to follow its decision in *Franklin.* In *Martini v. Beaverton Ins. Agency, Inc.,* 314 *Or.* 200, 838 *P.*2d 1061 (1992), the Oregon Supreme Court continued to characterize *Franklin* as a breach of contract case and expressly declined to extend its holding to negligence claims involving broker liability. 314 *Or.* at 206, 838 *P.*2d at 1064. The *Martini* Court went on to hold that an insured's failure to read the policy could be pled as an affirmative defense and amount to comparative negligence that would negate a broker liability claim for

In *Stock v. Adco General Corp.,* 96 *N.M.* 544, 632 *P.*2d 1182 (App.), *cert. denied,* 96 *N.M.* 543, 632 *P.*2d 1181 (1981), the plaintiff-policyholder owned a fleet of tractor-trailer units for which he sought physical damage insurance. He hired a broker to procure adequate coverage for his fleet and executed an application for insurance listing the vehicles and drivers who would be operating the units. The broker submitted the application form to the carrier and received an insurance policy which was sent to the policyholder, which the latter did not review. Nor did the broker read the policy. The policy, however, was not what was quoted to the broker by the carrier, nor did it comport with the application form and what the insured reasonably expected to receive. The policy contained a "named driver" endorsement which had never been discussed or requested. That endorsement omitted - - and thus did not cover - - one of the insured's driver's who was later involved in an accident for which coverage was denied. Because the broker also failed to review the policy, the broker never informed the insured of this lack of coverage.[12]

The insured sued his broker, the broker's agency and the carrier. The defendants claimed they were not liable because the policy was clear and unambiguous, and they further contended that had the insured read the policy he would have understood the vehicle and driver involved in the accident were not covered. They requested the trial court, in a bench trial, to find that plaintiff was contributorily negligent based on his failure to read the policy which he had for seven months

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professional negligence. *Id.* The Oregon Supreme Court in *Martini* thus concluded that it was reversible error for the trial court to have struck the broker's specification of comparative fault and when it further instructed the jury not to consider the policyholder's failure to read the insurance policy in assessing his comparative fault. 314 *Or.* at 212, 838 *P.*2d at 1068.

[12]96 *N.M.* at 545, 632 *P.*2d at 1183.

prior to the accident. The trial court rejected that invitation and that ruling was affirmed on appeal. The New Mexico appellate court held that the insured's failure to read the policy did not constitute contributory negligence under the circumstances, and that it was reasonable for the insured to expect that he would receive from the defendants comparable physical damage insurance coverage similar to what he had received previously from other agents and carriers.[13]

While most courts have held that an insured's failure to read the policy does not bar a professional negligence claim against a broker because that lack of review is generally justified under the circumstances, some courts have stated that legal principle as if it were without any qualification. For example, in *Grigsby v. Mountain Valley Ins. Agency, Inc.,* 795 *S.W.* 2d 372 (Ky. 1990), the insured owned two plants that served as a warehouse for consignment goods. The insured's broker procured bailed goods coverage for only one of the plants, the one for which such coverage was unnecessary. A fire occurred at the other plant, which was the plant that the insured had requested the broker to provide that very type of coverage. The insured sued his broker for professional negligence in failing to procure adequate coverage and the broker defended, claiming the insured was contributorily negligent for failing to have read the policy. The Kentucky Supreme Court rejected that defense - - apparently without any qualification - -

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[13]96 *N.M.* at 546, 632 *P.*2d at 1184. In so holding, the appellate court emphasized:

> "An insured has a right to presume that the policy received by him is in accordance with his application, and his failure to read it will, under this rule, not relieve the insurer or its agent from the duty of so writing it."

96 *N.M.* at 546, 632 *P.*2d at 1184 (*quoting* 17 Appleman, *Insurance Law & Practice* 32, §9406).

and made the following blanket statements:

> "Due to the highly technical nature of fire insurance policies, an insured may not be held contributorily negligent for the failure to read and understand his or her coverage."[14]
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> "We hold that a claim based upon the negligence of the agency to properly provide coverage is also not affected by the insured's failure to read and understand the policy."[15]
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> ". . . [T]he failure to read and understand a fire insurance policy furnishes no legal basis for the insured to recover on the negligence of the agency, nor does it furnish a defense to the agency against its own negligence. In other words, the insured's failure to read and comprehend the policy has no legal affect."[16]

The Kentucky Supreme Court's holding in *Grigsby*, thus, appears to have been based, in part, on the premise that fire insurance policies are "highly technical" in nature and, thus, cannot be understood by the average insurance consumer. However, that rationale appears inconsistent with the fact that had the insured read the policy at issue in *Grigsby,* he would easily have seen that it was procured for the wrong building. Simply put, there is nothing "highly technical" about listing and identifying the appropriate building to be covered in the insurance policy. That fact can be easily confirmed. Nor did the sophistication of the insured appear to have been an issue

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[14]795 *S.W.* 2d at 373-74.

[15]*Id.* at 374.

[16]*Id.*

either, since the insured in *Grigsby* was a businessman who purchased a commercial policy.[17]

In a somewhat similar approach to the holding in *Grigsby,* a Kansas appellate court in *Weinlood v. Fisher & Associates, Inc.,* 26 *Kan. App.* 2d 20, 975 *P.*2d 1226 (1999), held - - also without any apparent qualification - - that the insureds' failure to read their homeowner's policy was of no legal consequence and could not defeat a claim of professional negligence against their broker for failing to procure adequate coverage. In rejecting the broker's argument that the insureds had a duty to read their policy, the court emphasized that what was of critical importance was the fact the action involved a claim by insureds against their broker, and not against their insurer.[18] As such, the broker owed a duty to exercise the care, skill, and diligence of a reasonably prudent and competent agent in similar circumstances and, having failed to do so,

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[17]The *Grigsby* Court emphasized that its holding applied not only to broker professional negligence claims, but also to claims involving fraud. The Kentucky intermediate appellate court had injected the issue of fraud into the case, although that issue had never been raised by the parties at the trial level. The Kentucky Supreme Court reversed on that issue and, thus, focused solely on the negligence claim. 795 *S.W.* 2d at 373. *See also, Alfa Mutual Fire Ins. Co. v. Thomas,* 738 *So.* 2d 815 (Ala. 1999) (insured's failure to read policy was reasonable under the circumstances in this broker/fraud action, where the insured was practically illiterate and in her '70s; because the court found there was "justifiable reliance" by the insured on the broker's misrepresentations, the Supreme Court of Alabama upheld a finding of fraud against the broker which also resulted in award of punitive damages).

[18]26 *Kan. App.* at 20-22, 975 *P.*2d at 1227-28. In reaching this conclusion, the court made no distinction between sophisticated *vs.* unsophisticated insureds. The fact that the insureds were apparently unsophisticated and were claiming broker negligence based on a homeowner's policy does not appear to be of any legal significance to the court's holding. Indeed, the court relied upon a previous Kansas case, where a similar result obtained, which involved apparently sophisticated commercial parties. 26 *Kan. App.* 2d at 22, 975 *P.*2d at 1227 (*citing Marshel Investments, Inc. v. Cohen,* 6 *Kan. App*. 2d 672, 634 *P.*2d 133 (1981)(coverage dispute involving leased oil well)).

breached his duty owed the insureds.[19]

Other courts have placed certain qualifications on the policyholder's ability to prevail on a broker negligence claim for procuring inadequate coverage when the insured admits to not having read the policy. These courts have recognized that in certain situations the insured's actions may amount to contributory or comparative fault and, thus, the insured's conduct must be evaluated to determine whether, under the totality of the circumstances, that conduct was reasonable. In this textual analysis, courts will focus on whether the record supports a finding that the insured "justifiably relied" upon the broker's representations and actions.

For example, in *Fillinger v. Northwestern Agency, Inc. of Great Falls,* 283 *Mont.* 71, 938 *P.*2d 1347 (1997), the Montana Supreme Court concluded that while insureds do not have an "absolute" duty to read their policy, their failure to do so may amount to contributory negligence.[20] In *Fillinger*, the insureds operated a "guide and outfitting" business in Montana and provided guided hunting and "floating" trips for their customers. These trips included horseback riding activities. The broker knew what was involved in the insureds' business, including the use of horses. However, the broker failed to procure coverage for that particular activity and during a hunting trip guided by the insureds one of their customers was injured in a horse-related accident. After coverage was denied for that incident, the insureds sued their broker for, among other claims, negligent failure to procure the insurance coverage requested. A jury returned a verdict in favor of the policyholders and the broker appealed, claiming that it was error for the trial court to

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[19]26 *Kan. App.* 2d at 23, 975 *P.*2d at 1228.

[20]283 *Mont.* at 78, 938 *P.*2d at 1352.

have instructed the jury that the policyholders had no duty to read the policy.[21]

Finding the issue presented as being one of first impression, the Montana Supreme Court found persuasive the decisions of several jurisdictions holding that while the insured's failure to read the policy may amount to contributory negligence, that factor alone did not bar relief as a matter of law.[22] The court thus viewed the issue raised as not being whether the insureds had an "absolute" duty to read their policy; rather, the issue framed was whether there was evidence from which the jury could have found that, in the circumstances of that case, it was not unreasonable for the insureds not to have read the policy and whether the insureds acted reasonably in relying upon any representations made by their agent.[23] The court ultimately concluded there was

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[21]283 *Mont.* at 73-76, 938 *P.*2d at 1349-50.

[22]283 *Mont.* at 78, 938 *P.*2d at 1352. The court observed:

> "We are persuaded by the reasoning of this line of authority that an insured does not have an absolute duty to read their policy, but their failure to do so may amount to contributory negligence." *Id.*

[23]283 *Mont.* at 79, 938 *P.*2d at 1352. In analyzing this issue, the Montana Supreme Court placed heavy reliance on the Oregon Supreme Court decision in *Martini v. Beaverton Ins. Agency, Inc.,* 314 *Or.* 200, 838 *P.*2d 1061 (1992), where that court observed:

> "Insureds and insurance policies are not all alike. Insureds range from unsophisticated individuals who know nothing about insurance, to experienced business persons knowledgeable about insurance, to large corporations with batteries of lawyers. The relevant provisions of the policy may be simple (the address of the insured premises, for example) or complex. A jury should be allowed to consider two questions: Under the relevant circumstances, was it unreasonable in the light of foreseeable risks for the insured not to read the policy? If so, did the insured's unreasonable failure to read the policy contribute to the insured's damages?

substantial credible evidence in the record to support the jury's verdict in favor of the insureds.[24]

Most recently, the New Jersey Supreme Court addressed this broker liability issue in *Aden v. Fortsh*, 169 *N.J.* 64, 776 *A.*2d 792 (2001). At the outset of this comprehensive opinion, the court framed the issue on appeal as follows: "whether a policyholder's failure to read his policy may be asserted as comparative negligence in a professional malpractice action against an insurance broker."[25] The court answered that question in the negative, holding that:

> "[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."[26]

In *Aden,* the insured had purchased a condominium and contacted his broker to procure insurance for that dwelling. The insured advised the broker that he had paid approximately $50,000 for the condominium and that his personal contents in the condo were worth

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314 *Or.* at 210, 838 *P.*2d at 1067. The Montana Supreme Court in *Fillinger* also relied heavily on the decision rendered in *Fiorentino v. Travelers Ins. Co.,* 448 *F. Supp.* 1364 (E.D. Pa. 1978), which espoused a similar approach as in *Martini.* 283 *Mont.* at 78-79, 938 *P.*2d at 1352.

[24]283 *Mont.* at 80, 938 *P.*2d at 1353. The Montana Supreme Court in *Fillinger* also concluded that expert testimony was unnecessary where the policyholder claims his broker has failed to procure adequate coverage. "[W]e hold that in the context of an insurance agent's failure to procure requested coverage, expert testimony is not required as the issue is not one which involves technical insurance issues outside the common experience and knowledge of lay jurors." 283 *Mont.* at 84, 938 *P.*2d at 1356. *But see, Aden v. Fortsh,* 169 *N.J.* 64, 72-73, 776 *A.*2d 792 (2001), where New Jersey Supreme Court discusses expert opinion provided in context of case involving broker's failure to procure requested coverage.

[25]169 *N.J.* at 69, 776 *A.*2d 792.

[26]169 *N.J.* at 69-70, 776 *A.*2d 792.

approximately $16,000. While there was some dispute at trial as to the communications between the insured and his broker with respect to the type and amount of coverage that the broker was to provide, it was undisputed that the insured failed to read the policy; nor did the insured read the condominium association policy for purposes of determining whether that policy would cover both the exterior and the interior of his condominium. It was also undisputed that the broker procured a policy for the insured that only provided $1,000 in coverage in the event of damages to the dwelling.[27]

Subsequently, a fire damaged the insured's condominium and the insured paid approximately $20,000 in repairs for damages to the interior of his residence because, as noted, the insurance policy procured by the broker only provided $1,000 in dwelling coverage. The insured filed a complaint against the broker and his agency for negligently failing to procure adequate coverage for his condominium.[28] At trial, the jury returned a verdict in favor of the insured. During the trial, the court declined to accept the broker's recommended charge for a jury instruction for comparative negligence on the part of the insured. On appeal, the New Jersey intermediate appellate court reversed, holding that the trial court had erred in refusing to instruct the jury with regard to the insured's failure to read the policy.[29] The New Jersey Supreme Court granted certification and reversed.

In analyzing the broker liability issue, the court initially pointed out that the New Jersey

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[27]169 *N.J.* at 70-71, 776 *A.*2d 792.

[28]169 *N.J.* at 72, 776 *A.*2d 792.

[29]169 *N.J.* at 73-74, 776 *A.*2d 792.

Legislature had abolished contributory negligence in favor of the doctrine of comparative fault when it adopted the Comparative Negligence Act ("Act") in 1973.[30] The court further observed that the Act did apply to strict liability and negligence actions, including "civil actions for . . . professional malpractice . . ." However, the court emphasized the New Jersey Legislature had determined that *only jurors* could resolve allegations of the plaintiff's negligence under the Act and, thus, the Legislature allowed New Jersey courts to retain the authority to establish a "policy-based preclusion" of the fact-finder's consideration of the plaintiff's conduct.[31] That "policy-based preclusion," the court noted, had been applied, on most occasions, in the context of professional malpractice cases since those actions involved the breach of a professional duty that was not an everyday negligence claim but, rather, arose out of a special relationship between a professional and his/her client.[32] Citing recent precedent, the court observed: "[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."[33]

Nonetheless, the court went on to note that the conduct of the client in a professional malpractice action was not irrelevant and could be taken into account in determining whether a professional was negligent in rendering his or her services. The court expressly noted that if the

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[30]169 *N.J.* at 75, 776 *A.*2d 792; *See, L.* 1973, *c.* 146.

[31]169 *N.J.* at 75, 776 *A.*2d 792.

[32]*Id.*

[33]*Id.*

conduct of the client (*i.e.,* the insured) was the "sole proximate cause of the alleged tort," and it was not the fault of the professional, a jury could conclude that the professional was not liable.[34] The court also noted that comparative negligence principles could be applied in a professional malpractice case in which "the client's alleged negligence, although not necessarily the sole proximate cause of the harm, nevertheless contributed to or affected the professional's failure to perform according to the standard of care of the profession."[35]

Thus, for example, if a client interfered with a professional in his or her performance by withholding or failing to provide certain information to that professional concerning the matter for which the professional was hired that could have reduced a portion of the harm committed, the client's conduct in that situation "may constitute comparative negligence unless the professionals'

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[34]169 *N.J.* at 77, 776 *A.*2d 792.

[35]*Id.* In support of this principle, the court cited to several decisions, including *Steiner Corp. v. Johnson & Higgins,* 996 *P.*2d 531 (Utah 2000). There, two questions had been certified to the Utah Supreme Court by the federal district court dealing with issues related to professional malpractice in a case involving an actuarial firm that was alleged to have mishandled an employee's retirement plan. The questions certified were: "(1) whether, under Utah law, the negligent acts of a plaintiff in causing or contributing to the situation that the plaintiff hired a professional to resolve can be the basis for a comparative or contributory negligence defense; and (2) whether, under Utah law, a plaintiff's negligent acts in causing or contributing to the situation the plaintiff hired a professional to resolve can be considered in determining causation and damages." The Utah Supreme Court answered both questions in the negative. 996 *P.*2d at 531-32.

In reaching that conclusion with respect to the first issue, the court reasoned that "a preexisting condition that a professional is called upon to resolve cannot be the cause, either proximate or direct, of the professional's failure to exercise an appropriate standard of care in fulfilling his duties. To decide otherwise would allow professionals to avoid responsibility for the very duties they undertake to perform." *Id.* at 533. With respect to the second certified issue, the Utah Supreme Court reasoned that contributory negligence can only be employed as a defense "if that negligence is 'causally connected' to the injury." *Id.* at 534.

scope of employment included an obligation to prevent such conduct on the part of the client."[36] The court further emphasized, however, that professionals may not diminish their liability under the Act, "when the alleged negligence of the client relates to the task for which the professional was hired."[37] The court explained:

> "That rule 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."[38]

Against this backdrop - - and further pointing out that authoritative commentators on insurance law and other jurisdictions were in accord with its view - - the court noted that a New Jersey insured is entitled to rely upon and assume that his or her broker has performed their fiduciary duty when they are hired to procure adequate insurance coverage for their needs. Thus, the broker's duty will not be diminished when the policyholder fails to detect the broker's breach of that duty by failing to read the policy.[39] The court observed:

> "In view of New Jersey's tradition of holding insurance professionals and other fiduciaries to higher standards, we conclude that [the insured's] failure to read the insurance policy cannot be asserted as comparative negligence in an action against the broker for negligent failure to procure insurance."[40]

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[36]169 *N.J.* at 77, 776 *A.*2d 792.

[37]169 *N.J.* at 78, 776 *A.*2d 792.

[38]*Id.*

[39]169 *N.J.* at 80-81, 776 *A.*2d 792.

[40]169 *N.J.* at 81-82, 776 *A.*2d 792.

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> ". . . Unlike when an insured sues an insurer, in a malpractice suit a written contract is not being challenged. An insured who hires and pays a professional broker does so to reduce, if not eliminate, the risk that an inadequate policy will be procured.
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> We reaffirm New Jersey's longstanding tradition of holding professionals to high standards of care. . . [An insured's] conduct cannot be charged as negligence in actions in which the [insured] failed to detect error in the discharge of the very responsibility he or she hired a professional to perform."[41]

Minority View: Insured's Failure to Read Policy Bars Claim Against Broker.

Only a minority of courts have found that the insured's failure to read the insurance policy will bar the insured from later bringing a claim against his or her broker for professional negligence in their failure to procure adequate coverage. For example, in *Dahlke v. John F. Zimmer Ins. Agency,* 252 *Neb.* 596, 567 *N.W.* 2d 548 (1997), the Supreme Court of Nebraska held that so long as the policy provision at issue is clear and unambiguous, the insured's failure to review the policy will insulate the broker and his agency from any liability for allegedly not procuring adequate coverage.[42]

In *Dahlke,* the insured owned a roofing, construction and waterproofing business. One of the hazards of that business, which the insured sought to insure against, was "overspray." This is a condition that occurs when coating sprayed on a roof drifts to other property and causes

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[41]169 *N.J.* at 86-87, 776 *A.*2d 792.

[42]252 *Neb.* at 600, 567 *N.W.* 2d at 551.

damage. Consequently, the insured specifically obtained "overspray insurance" from his broker which, in the earlier years, provided a "per occurrence" deductible. That "per occurrence" deductible allowed the insured to pay only one deductible for each overspray incident, regardless of how many claims might have been brought as a result of that single incident.

However, there was a subsequent change in the policy language that provided for a "per claim" deductible. As a result of this change in language, the insured would have to pay a deductible for each claim resulting from a single incident. The insured never read any of the policies that were provided by his broker. Following an overspray incident resulting in several claims, the insurance company billed the insured for several deductibles arising out of that one incident. The insured sued his broker and its agency, claiming that the broker negligently failed to obtain the proper insurance and, further, that the broker failed to advise the insured that his policy had been changed to a "per claim" deductible.[43]

The Nebraska Supreme Court concluded that the language of the "per claim" deductible was clear and unambiguous and, thus, affirmed the trial court's grant of summary judgment. The court held the insured's failure to read the policy language was a complete bar to any liability on the part of the broker or his agency.[44]

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[43]252 *Neb.* at 597, 567 *N.W.* 2d at 550.

[44]252 *Neb.* at 599-600, 567 *N.W.* 2d at 551. The Nebraska Supreme Court had initially addressed this issue in a previous opinion, *Dahlke v. John F. Zimmer Ins. Agency,* 245 *Neb.* 800, 515 *N.W.* 2d 767 (1994) (*Dahlke* I). In *Dahlke* I, the Nebraska Supreme Court found that the insured did not have the opportunity to read the policy at issue because he had only received the "binder" for that insurance and not the policy itself. The court thus remanded the matter to the trial court to determine whether the insured had any opportunity to read the policy, or a prior policy, with similar language. In remanding the matter the court cautioned that, absent a reason

In *Busker On The Roof Limited Partnership Co. v. M.E. Warrington,* 283 *A.D.* 2d 376, 725 *N.Y.S.* 2d 45 (2001), the plaintiff-insured had purchased an abandonment insurance policy through his broker who was unaware that the policy contained a 90-day waiting period for coverage to be effective. Further, the amount of coverage purchased was for less than the insured had requested the broker to procure. A loss occurred, there was no coverage and the insured sued the broker and his agency for professional negligence and breach of contract. The insured admitted to not having read the policy prior to the loss for which recovery was sought.[45]

The court held that the insured's causes of action for professional negligence and breach of contract were properly dismissed, since the insured had received the subject policy months before the accident at issue had occurred and, thus, was "conclusively presumed to have known, understood and assented to its terms."[46] The court thus concluded that the insured had no cause of action against the broker or his agency for having procured inadequate coverage that was not in

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for the insured's failure to read the policy, if the policy language was clear and unambiguous the insured's failure to have read the policy provision would insulate both the broker and its agency from any liability. On remand, it was determined that the broker and his agency had issued policies previous to the one in question which the insured could have read and which contained almost identical language with respect to the "per claim" deductible provision. Consequently, the court concluded that the insured had an opportunity to read the relevant language of the policy. Because the insured did not read the policy language and because that policy language was clear and unambiguous, the broker and his agency were not found liable. 252 *Neb.* at 598-600, 567 *N.W.* 2d at 550-51.

[45]283 *A.D.* 2d at 376, 725 *N.Y.S.* 2d at 46.

[46]283 *A.D.* 2d at 377, 725 *N.Y.S.* 2d at 47.

accord with what the plaintiff had requested.[47]

A similar result obtains under Georgia law. In *Westchester Specialty Ins. Services, Inc. v. U.S. Fire Ins. Co.,* 119 *F.*3d 1505 (1lth Cir. 1997), the federal appeals court, applying Georgia law, noted that a broker who negligently fails to procure adequate insurance coverage as requested can be liable to the insured. But if the insured had a copy of the insurance policy in his possession and failed to read the policy so as to discover what risks were covered or not covered, the broker would not be liable because the insured is charged with the knowledge of the terms and conditions of that policy.[48]

The court further pointed out that the exception to this general rule, under Georgia law, applied to cases where the broker acted as an expert in procuring coverage and the insured relied on that broker's expertise. Under those circumstances, the broker could be liable for negligent procurement of inadequate insurance even if the insured had a copy of the policy and did not read it. However, even in those circumstances, if a review of the policy would have made it "readily apparent" to the insured that the coverage requested had not been issued by the broker, then the broker who acted as an expert could still escape liability.[49]

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[47]*Id.* The court also pointed out, although somewhat strangely, that the plaintiff-insured's claim for professional negligence was properly dismissed because, "it is clear that defendant insurance brokers and agents are not professionals and, thus, that claims against them do not sound in professional malpractice." 283 *A.D.* 2d at 376, 725 *N.Y.S.* 2d at 46. *See also,* footnote 10, *supra.*

[48]119 *F.*3d at 1509.

[49]*Id.* at 1509-10. *See also, Atlanta Women's Club, Inc. v. Washburne,* 207 *Ga. App.* 3, 427 *S.E.* 2d 18 (1992); *England v. Georgia-Florida Co.,* 198 *Ga. App.* 704, 402 *S.E.* 2d 783 (1991); *Jim Anderson & Co. v. ParTraining Corp.,* 216 *Ga. App.* 344, 454 *S.E.* 2d 210 (1995).

Ultimately, the federal appellate court remanded the matter because there were disputed issues of material fact as to whether the insurance policy was ambiguous, and whether the broker was acting as an expert in procuring product liability coverage for the insured.[50]

[50]119 *F.*3d at 1510-12.

Conclusion

The clear majority of courts that have addressed the issue - - whether an insured's failure to read the insurance policy will bar a claim against his/her broker for professional negligence for failure to procure adequate coverage - - have found in favor of the policyholder. Those courts have generally concluded that the broker may not escape liability by asserting comparative or contributory negligence on the part of the insured in having failed to read the policy language. The primary rationale for this majority approach is the generally accepted legal principle, that a broker is a professional who is specially trained and possesses special skills in the subject matter of insurance and, like any other client who hires a professional and enters into that special fiduciary relationship, the insured should be permitted to rely on the professional's expertise.

Determining broker liability in these professional negligence cases is a fact-sensitive inquiry. While some courts have espoused a rule favoring the insured in such cases as if it were "without qualification," most jurisdictions require an analysis of the totality of circumstances in determining, ultimately, if the insured could justifiably have relied on the broker's representations and whether the insured acted reasonably under the circumstances.

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