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Insurance Brokers/Agents and Their Customers: Not the Relationship You Might Have Expected

Do insurance brokers owe fiduciary duties to their clients? Under California law, until recently, this was an open question. Most attorneys, especially those representing policyholders, included a breach of fiduciary duty cause of action when suing an insurance broker/agent in actions that involve broker/agent malpractice. And, some include these claims when suing a broker/agent and an insurance company for insurance bad faith. California law has now been clarified with the California Court of Appeals for the Second Appellate District's decision in *Workmen's Auto Insurance Company v. Guy Carpenter & Company, Inc.*, __ Cal. App. 4th __, Cal. App. LEXIS 533 (May 4, 2011), that held insurance brokers do not owe fiduciary duties to their clients.

Guy Carpenter & Co. ("Carpenter") is a reinsurance intermediary providing insurance companies with reinsurance coverage. Carpenter placed reinsurance for Workmen's Auto Insurance Co. ("the company") with PMA Capital Insurance Company of Philadelphia, Pennsylvania ("PMA"). The company sued Carpenter, alleging causes of action for negligence, breach of fiduciary duty and breach of contract. Regarding the breach of fiduciary duty claim, the company asserted that Carpenter breached its duty by failing to secure timely payments from PMA, failing to secure the best available terms of reinsurance, and acting with the intent to injure the company by incurring inflated commissions.

The trial court dismissed the breach of fiduciary duty claim but the other claims were tried before a jury. The jury found in Carpenter's favor on both the negligence and breach of contract claim. The company appealed this decision dismissing the breach of fiduciary duty claim.

The court first addressed an insurance broker's potential liability for failure to exercise reasonable care as follows:

> [A]n insurance [broker] will be liable to his client in tort where his intentional acts or failure to exercise reasonable care with regard to the obtaining or maintenance of insurance results in damage to the client. [Citation.]‖ (Saunders v. Cariss (1990) 224 Cal.App.3d 905, 909.) For example, a —broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence.‖ (Nowlon v. Koram Ins. Center, Inc. (1991) 1 Cal.App.4th 1437, 1447; Desai v. Farmers Ins. Exchange (1996) 47 Cal.App.4th 1110, 1120.) But as a general proposition, a broker does not have a duty of care to advise a client on insurance matters unless —(a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided . . . , (b) there is a request or inquiry by the insured for a particular type or extent of coverage . . . , or (c) the agent assumes an additional duty by either express agreement or by _holding himself out' as having expertise in a given field of insurance being sought by the insured.‖ (Fitzpatrick v. Hayes (1997) 57 Cal.App.4th 916, 927; Jones v. Grewe

> (1987) 189 Cal.App.3d 950, 954 (Jones) [an insurance agent does not have a duty of care —to advise the insured on specific insurance matters‖ absent an express agreement or holding out as an expert]; Free v. Republic Ins. Co. (1992) 8 Cal.App.4th 1726, 1730 [no general duty of care to advise regarding the sufficiency of insurance].)

The court explained that in a typical agency relationship, there is the principal, and the agent looking out for the interests of the principal. The relationship between the agent and the principal, outside of the insurance industry, has been a fiduciary relationship, wherein the agent owes the principal a fiduciary duty. The company argued that insurance case law should not be applied to the reinsurance intermediary-broker relationship due to the "far more complex and comprehensive relationships with their clients." Therefore it argued, Carpenter did not just owe a duty to exercise reasonable and due care, but owed a higher level duty, those duties owed by a fiduciary.

The Court of Appeals looked at "whether Carpenter was the company's agent and, if so, whether that agency imposed a fiduciary duty on Carpenter as a matter of law such that Carpenter can be held civilly liable for breaching those duties." A reinsurance-intermediary broker, as defined in the Insurance Code Section 1781.2(g) is

> any person, other than an officer or employee of the ceding insurer, firm association, or corporation that solicits, negotiates, or places reinsurance cessions or retrocessions on behalf of a ceding insurer without the authority or power to find reinsurance on behalf of that insurer.

Under the statute, the reinsurance intermediary-broker can be characterized as a dual agent. Such a broker acts on the behalf of the interests of two parties, not a single party. The Court held that Carpenter, as a reinsurance intermediary-broker was an agent of the company. However, the Court was hard-pressed to find a fiduciary duty anywhere in insurance law. The Court stated: "we are unaware of even a single California precedent permitting a client to sue an insurance broker for breach of fiduciary duty." Therefore, the Court did not want to open this door as a matter of public policy. The Court held that "decades of cases have drawn a policy line between what brokers must do and need not do. Because that line has been drawn, we decline to revisit the issue."

The court went on to review a number of California cases discussing the duties of an insurance broker, including *Kotlar v. Hartford Fire Ins. Co* (2000), 83 Cal. App. 4th 1116, 1123. In *Kotlar*, the court held that "a broker only needs to use reasonable care to represent his or her client", and "a broker's duties are defined by negligence law, not fiduciary law." The court then further explained its holding that a broker owes no fiduciary duties under insurance law:

> Given the foregoing, and given that a broker is an agent, there is an inherent conflict between insurance law and agency law. Agency law establishes that —[t]he relations of principal and agent, like those of beneficiary and trustee, are fiduciary in character. . .. [¶] . An agent must disclose to his principal every fact known to him bearing upon the [subject matter of the agency], the concealment of which would lead to the injury of the principal [citation].‖ (*Kinert v. Wright* (1947) 81 Cal.App.2d 919, 925 (*Kinert*); *Chodur v. Edmonds* (1985) 174 Cal.App.3d 565, 571 (Chodur) [—[a]n agent is a fiduciary‖].) Further, an agent has an obligation of —diligent and faithful service the same as that of a trustee. [Citations.]‖ (Ibid.) As explained by *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 (Wolf), a fiduciary is bound to act with utmost good faith for the benefit of the other party. If applied in the insurance context, *Kinert, Chodur* and *Wolf* would require brokers to disclose all material knowledge and advise client's on specific

> insurance matters even if the broker is not required to do so by the duty of care. Indeed, —the duty of undivided loyalty the fiduciary owes to its beneficiary . . . [is] far more stringentll than the duty of care. (Wolf, supra, at p. 30.) —_Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.' [Citation.]ll (*Ibid*.) Thus, it is impossible for us to reconcile insurance law and agency law.

So, unless there are other courts of appeal that disagree or if the California Supreme Court addresses the issue, it appears the level of care an insurance broker owes to its client is measured, not by a fiduciary duty, but by a reasonable standard of care.

By: Robert J. McKennon
Partner
McKennon|Schindler LLP
20321 SW Birch St, Suite 200
Newport Beach, California 92660
877-MSLAW20
(877) 675-2920