

Client Alert

December 2012

New York Court of Appeals Permits Failure-to-Procure Claim Against Broker Despite Policyholder's Failure to Read the Policy

In *American Building Supply Corp. v. Petrocelli Group, Inc.*, No. 188, 2012 N.Y. LEXIS 3476 (N.Y. Nov. 19, 2012), New York's highest court, the New York Court of Appeals, held that an insurance broker could be held liable for a failure to procure adequate insurance coverage even though the policyholder failed to read the policy to confirm that the coverage sought had been properly procured. By permitting such a claim to proceed, the Court substantially expanded the potential for broker liability in New York due to negligent policy procurement.

BACKGROUND

American Building Supply Corporation ("ABS"), a supplier of building materials based in the Bronx, New York, rented a commercial building for its business operations under a sublease agreement with a company called DRK, LLC ("DRK"). ABS and DRK are both managed and owned by the same person.

DRK had rented the Bronx property from the New York City Industrial Development Agency ("NYCIDA"). DRK's lease required that DRK maintain at least \$5 million of general liability insurance from an insurer licensed to do business in New York.

In October 2004, DRK hired Petrocelli Group, Inc. ("Petrocelli"), to be its insurance broker and requested that Petrocelli procure the insurance required under DRK's lease with NYCIDA. As DRK alleged, it "specifically requested general liability coverage for its employees in case of injury, as required by the lease agreements." DRK also alleged that it informed Petrocelli that only employees, never customers, entered the premises. In addition, according to DRK, Petrocelli agreed to reinstate and correct a prior policy and even visited the leased premises to ensure that any deficiencies in the prior coverage were addressed and corrected. But Petrocelli failed to do as it promised and, instead, procured a policy that was essentially the same as the prior coverage. Neither DRK nor Petrocelli read the new policy.

In October 2005, an ABS employee was injured at the Bronx location. ABS sought coverage from its insurer, who denied coverage based on a cross-liability exclusion contained in its policy. DRK filed suit seeking a declaration that coverage applied for the claim, but the court eventually ruled that the exclusion applied.

ABS then filed suit against the broker, Petrocelli, for negligence and breach of contract alleging that Petrocelli failed to procure the correct coverage. Petrocelli moved for summary judgment. The trial court found that whether certain coverage had been requested was a question of fact. The Appellate Division reversed granting summary judgment to the broker and holding that ABS/DRK's "failure to read and understand the policy precluded recovery" as a matter of law. The Court of Appeals accepted review.

APPEAL & HOLDING

On appeal, the Court of Appeals observed that insurance agents “have a common-law duty to obtain requested coverage for their clients” and explained that brokers can be liable in negligence and contract law for failure to obtain coverage specifically requested.

The Court acknowledged, however, that New York law was unclear as to whether a policyholder could maintain an action against its broker where the policyholder had itself not read the policy. The Court observed that “it is certainly the better practice for [a policyholder] to read its policy,” but held that a policyholder should nevertheless be able to rely on the expertise of its broker. A policyholder’s failure to read its policy might therefore at most give rise to a defense of comparative negligence, but it should not altogether bar an action against the broker. Consequently, the Court reversed the Appellate Division and remanded the matter for further proceedings.

PRACTICAL IMPLICATIONS

The New York high court’s decision in *Petrocelli* clarifies uncertainties that may have existed under New York law concerning a broker’s duties to its clients and when a policyholder may hold its broker accountable for a failure to procure requested coverage. The decision recognizes that policyholders place a high degree of trust in their brokers. A breach of that trust may subject the broker to liability.

Further, by finding that brokers may be accountable regardless of whether their clients have read their insurance policies, *Petrocelli* clarifies that professional insurance brokers cannot avoid liability on the ground that a lay policyholder did not read the policy to check on the broker’s work.

Finally, *Petrocelli* is particularly timely in the wake of Superstorm Sandy, as many policyholders in and around New York are only now learning that the coverage they may have requested or expected was, in fact, never obtained. In such cases, policyholders may have a claim against their broker for failing to procure the correct scope of coverage in the first instance.

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