

Professional Negligence vs. Breach of Fiduciary Duty in Insurance Broker Malpractice Actions, *New Jersey Law Journal*

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New Jersey insurance producers—colloquially referred to as “brokers”—are heavily regulated and held to a high professional standard. In many respects, New Jersey courts hold insurance producers to the same professional level of care as attorneys and doctors. See Rider v. Lynch, 42 N.J. 465, 476 (1964) (if an insurance broker “neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby.”). This treatment of an insurance producer contrasts, for example, with the manner insurance producers are treated in New York, where the sale of insurance is generally viewed as a commercial transaction, only imposing heightened obligations on an insurance producer under certain circumstances. See Murphy v. Kuhn, 90 N.Y.2d 266, 270 (1997); Chase Scientific Research v. NIA Group, 96 N.Y.2d 20, 28-31 (2001).

It is not surprising then that, as occurs in the legal malpractice context, claims of breach of fiduciary duty are often inappropriately asserted alongside claims for professional negligence in actions against insurance brokers and agents. This article discusses the conflation that often occurs in the case law between the two causes of action in insurance producer malpractice actions, and urges a greater sense of clarity in their use by practitioners and fairness in their application by our courts.

The Insurance Producer’s Fiduciary Duty

An “insurance producer” is defined under the New Jersey Insurance Producer Licensing Act (the “Act”) as “a person required to be licensed under the laws of this State to sell, solicit or negotiate insurance.” N.J.S.A. §17:22A-28. To “negotiate” insurance under the Act means:

the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract or policy of insurance concerning any of the substantive benefits, terms or conditions of the contract or policy, provided that the person engaged in that act either: sells insurance or obtains insurance from insurers for purchasers.

“Insurance agent” and “insurance broker” are defined under the regulations promulgated to implement the Act. Specifically, an “insurance agent” is defined as:

an insurance producer acting as an insurance broker who, for a commission, brokerage fee, or other consideration, acts or aids in any manner concerning negotiation, solicitation or sale of insurance contracts as the representative of an insured or prospective insured; or a person who places insurance in an insurance company that he does not represent as an agent.