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Professional Negligence vs. Breach of Fiduciary Duty in Insurance Broker Malpractice Actions

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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.


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"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 agent authorized, in writing, by any insurance company to act as its agent to solicit, negotiate or sell insurance contracts on its behalf or to collect insurance premiums and who may be authorized to countersign insurance policies on its behalf.

While an "insurance broker" 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.

N.J.A.C. 11:17B-1.3. An insurance agent owes a duty to the insurance company for which it is authorized to act, while an insurance broker owes its duty to an insured or prospective insured. *Weinisch v. Sawyer*, 123 N.J. 333, 340 (N.J. 1991). In New Jersey, both insurance agents and brokers are "insurance producers" governed by the Act per the rules and regulations promulgated by the Commissioner of Banking and Insurance pursuant to N.J.S.A. §17:22A-48. The most relevant rules and regulations are found in Title 11, Chapter 17, concerning producer licensing, and Chapters 17A through 17D, setting forth insurance producer standards of conduct for marketing, commissions and fees, management of funds, and administrative procedures and penalties.

Buried in the regulations addressing insurance producer marketing, is N.J.A.C. 11:17A-4.10, which is titled "Miscellaneous Marketing and Related Requirements." This provision simply states: "An insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business." There is no specific definition of "fiduciary capacity" or "fiduciary duty" in this regulation, or for that matter, in the Act. As a result, while the rules and regulations promulgating the Act proclaim that an insurance producer acts in a fiduciary capacity, i.e., has a fiduciary duty, "in the conduct of his or her insurance business," the administrative code provisions fail to provide any guidance as to when a breach of fiduciary duty standard should be applied to an insurance producer's conduct.

The "fiduciary capacity" provision, nonetheless, generally has been cited by various New Jersey courts. However, the concept of a "fiduciary duty" has more often been included in case law discussing an insurance producer's general obligations and alleged negligence where the producer acts as an insurance broker. This treatment of two distinct causes of action has the potential to cause practitioners and jurists alike to conflate the two causes of action to unfairly impose a heightened standard of care on New Jersey insurance producers.

While the administrative code seeks to blanket every New Jersey insurance producer with a fiduciary duty, like attorneys, we submit that not every case against an insurance producer for professional negligence sounds in or should sound in breach of fiduciary duty. For example, when an insurance broker is alleged to have failed to procure requested available coverage for an insured or potential insured, the broker could be charged with professional negligence. A claim for professional negligence asserts an alleged deviation from an accepted standard of care which proximately causes damage. *Rider v. Lynch*, 42 N.J. 465, 476-77 (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"); *see also Carter Lincoln-Mercury v. Emar Group*, 135 N.J. 182, 188-189 (1994).

When an insurance broker is alleged to have misappropriated or diverted insurance premiums, for instance, then an insurance broker may be charged with a breach of fiduciary duty, i.e., an alleged deviation from the duty of loyalty and/or confidence with which he or she was entrusted. *See F.G. v. MacDonell*, 150 N.J. 550 (1997) ("The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship.") (Internal citations omitted.); *McKelvey v. Pierce*, 173 N.J. 26, 57 (2002). In short, breach of fiduciary duty is a more serious allegation than professional negligence, because not every mistake rises to the level of an act of disloyalty.

Case Law Referencing an Insurance Producer's Fiduciary Duty

The causes of action for professional negligence and breach of fiduciary duty are often conflated in cases only concerning alleged deviations from the accepted standard of care and not involving allegations of a breach of the duty of loyalty. For example, in *Walker v. Atl. Chrysler Plymouth*, 216 N.J. Super. 255, 260 (App. Div. 1987), a failure to procure insurance coverage case, the Appellate Division stated that insurance intermediaries in New Jersey must act in a fiduciary capacity to the client "[b]ecause of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies." (Internal quotations omitted.) In *Weinisch v. Sawyer*, 123 N.J. 333, 340 (1991), a failure to inform of available higher limits case, the court stated that the fiduciary relationship gives rise to a duty owed by the broker to the client "to exercise good faith and reasonable skill in advising insureds."

In *Aden v. Fortsh*, 169 N.J. 64, 78 (2001), a deficient policy case, the court pronounced that insurance brokers in New Jersey "must act in a fiduciary capacity to the client because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies." (Internal quotations and citations omitted). That pronouncement has been carried into subsequent cases solely concerning allegations of professional negligence and not breach of the duty of loyalty. *See Harbor Commuter Service v. Frenkel & Co.*, 401 N.J. Super. 354, 367 (App. Div. 2008) (a duty to advise and procure case) ("Insurance brokers stand in a fiduciary capacity with their clients, to whom they owe a duty to exercise reasonable skill and good faith.") (citation omitted); *Lancos v. Silverman*, 400 N.J. Super. 258, 267-68 (App. Div. 2008) (failure to procure).

The Fair Use of "Fiduciary Duty"

From the perspective of a defense attorney, these cases unintentionally conflate the causes of action for professional negligence and breach of fiduciary duty, which could be misinterpreted as expanding the umbrella of enhanced responsibility on insurance producers without the caveat of a fact-specific guardrail. *Aden, supra*, finds, as a matter of public policy, that there is a fiduciary relationship in the context of the placement of insurance because of "the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies." *Id*. at 78-79.

The court also commented "that an insured in this State is entitled to assume that a broker has performed his or her fiduciary duty," 169 N.J. at 80, thereby suggesting a de facto fiduciary duty on producers in all circumstances. The court "reaffirmed New Jersey's long-standing tradition of holding professionals to high standards of care." *Id*. at 87. Undoubtedly, interpreting public policy is within the province of the Supreme Court. However, without awareness to nuance, the existing case law may be misinterpreted as suggesting, wholesale, fiduciary duty-related issues when, factually, the conduct at issue does not rise above simple negligence. When compared to other professionals, who also interact with the public in no less impactful ways, it would not be fair, or legally correct, to interpret public policy to automatically enhance liability claims against insurance producers to sound not only in professional negligence but also in fiduciary breach.

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