

# BROKER, ADVISOR, OR BOTH? WHEN AN EXPANDED DUTY WILL BE IMPOSED

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In California, an insurance broker's duty is limited in nature. Generally, the broker need only procure the coverage requested by the client. However, this rule is subject to several exceptions, which may require the broker to assume the additional role of insurance advisor. This creates the potential for liability if the coverage recommended is inadequate. Understanding the extent of a broker's duty is essential to successfully prosecuting or defending against professional liability claims.

## An Insurance Broker's Duty

Under California law, the duty of an insurance broker is generally limited to using "reasonable care, diligence, and judgment in procuring the insurance requested by an insured." *Mark Tanner Constr., Inc. v. Hub Int'l Ins. Servs., Inc.*, 224 Cal. App. 4th 574, 584 (2014). California courts have expressly restricted a broker's duty by stating that it "does not include responsibility for ensuring the insured has adequate coverage to protect against all eventualities." *Paper Savers, Inc. v. Nacsa*, 51 Cal. App. 4th 1090, 1095 (1996). Rather, the insured must inform the broker about the insurance he requires. This is true even when the insured has been purchasing insurance from his broker for several years, and followed the broker's advice on insurance matters. See *Wallman v. Suddock*, 200 Cal. App. 4th 1288, 1312 (2011).

The reasons for a broker's limited duty are manifest. It is the insured, not the broker,

who is in the best position to know exactly what his coverage needs are, and the amount of risk he is willing to bear. See *Jones v. Grewe*, 189 Cal. App. 3d 950, 956 (1987). Brokers often handle a large number of clients each year, and, typically, are not provided with detailed information about each client's finances or business operations.

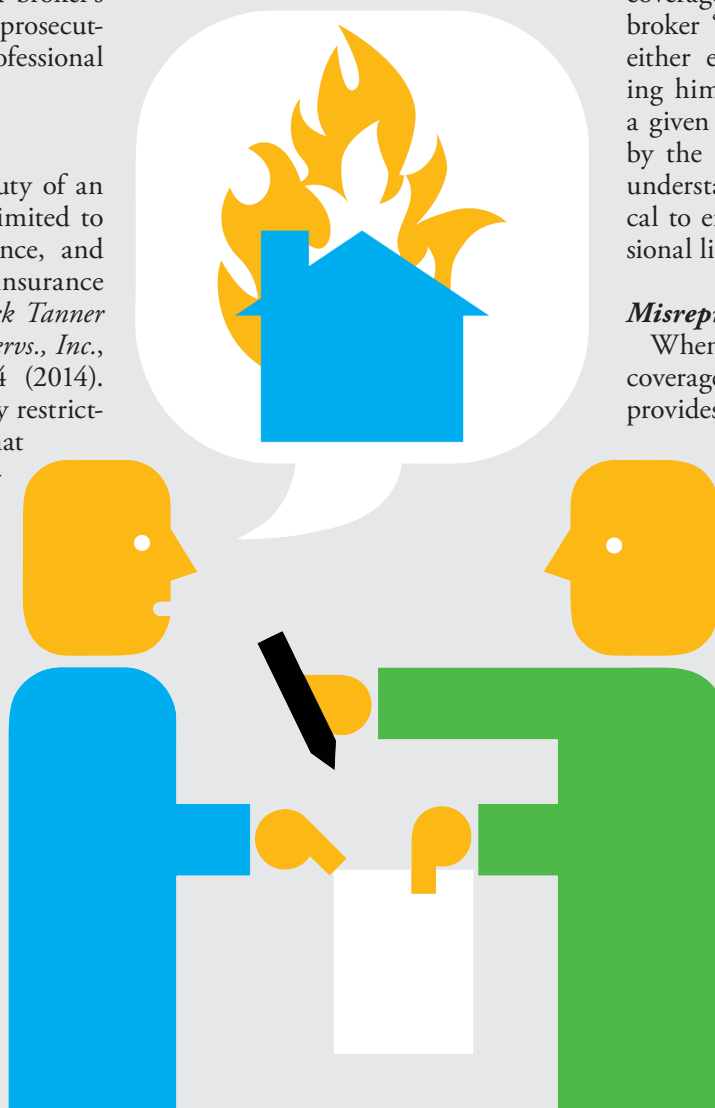
## Exceptions to the Limited Duty of Care

There are three scenarios in which a broker's duty of care will be expanded. *Fitzpatrick v. Hayes*, 57 Cal. App. 4th 916, 927 (1997). The first occurs when a broker "misrepresents the nature, extent or scope of the coverage being offered or provided." *Id.* The second happens when "there is a request or inquiry by the insured for a particular type or extent of coverage." *Id.* The third occurs when a broker "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." *Id.* Having a detailed understanding of each exception is critical to effective representation in professional liability cases.

## Misrepresenting Coverage

When a broker misrepresents the coverage obtained, or voluntarily provides information that is not accurate, the duty of care may be expanded. In *Free v. Republic Ins. Co.*, 8 Cal. App. 4th 1726 (1992), an insured sought coverage sufficient to rebuild his home in the event of a total loss. Over the course of ten years, the broker repeatedly assured the client that the policy limits were sufficient. When a fire destroyed his home, the insured discovered that property values had substantially increased, and the policy limits he originally obtained were no longer adequate to replace his home.

The court imposed an expanded duty upon the broker because he "assured plaintiff his coverage was



sufficient. Under the circumstances, defendants must be deemed to have assumed additional duties, which, if breached, could subject them to liability.” *Id.* at 1730.

The *Free* court distinguished itself from *Jones v. Grewe*, where it was held that the insured was in the best position to determine his coverage needs and goals. The *Free* court observed, “[t]his case does not involve the same sorts of uncertainties. Here plaintiff sought to be protected against a very specific eventuality—the destruction of his home.” *Id.* Contrast such specificity with an insured who requests only basic coverage, even though a more robust policy would better suit his needs. In such an instance, a broker is generally under no duty to inform her client of more suitable options.

The *Free* court observed that the brokers could have avoided liability by declining to offer an opinion on the matter. By voluntarily providing inaccurate information, the brokers became advisors, and exposed themselves to liability.

#### ***Request or Inquiry for Particular Coverage***

When an insured inquires about a particular type of coverage, the broker has a duty to advise her client and provide a recommendation. In the seminal decision of *Fitzpatrick v. Hayes*, the court considered the type of request or inquiry necessary to trigger additional broker duties. The plaintiff in *Fitzpatrick* only alleged that he relied on his broker to advise him regarding adequate coverage, and the broker led him to believe that his coverage was indeed sufficient. The court observed, “[n]otably lacking from this conclusory statement is any allegation concerning any sort of specific inquiry from [the insured] to Hayes much less specific advice in the opposite direction.” *Fitzpatrick*, 57 Cal. App. 4th at 928. Had the *Fitzpatrick* client specifically inquired into a particular type of coverage, or asked what policy would be necessary to adequately protect his interests, it may have triggered the broker’s duty to advise regarding such issues.

Similarly, in *Wallman v. Suddock*, the court found an overly general inquiry did nothing to broaden the broker’s duty. In *Wallman*, the client asked its broker to

ensure that it was covered for any possible lawsuits that could happen in the future. The court noted that there were no specific discussions regarding the terms of coverage or the property that was protected. Such general inquiries are insufficient to trigger a greater duty. “Under these circumstances, Suddock could not reasonably have known that plaintiffs wanted excess insurance for past years or for properties they no longer owned.” *Wallman*, 200 Cal. App. 4th at 1311.

By contrast, a client’s specific request for coverage will implicate an expanded duty for a broker. In *Greenfield v. Ins. Inc.*, 19 Cal. App. 3d 803 (1971), the insured purchased an expensive shredder for use in his business. He discussed procuring insurance coverage for this new item with his broker, specifically requesting business interruption insur-

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ance covering a breakdown of the shredder. When he obtained the policy, the broker assured his client that everything would be covered. However, the policy expressly excluded losses caused by mechanical breakdown, a fact that only became apparent to the insured after the shredder malfunctioned. The court found that the broker breached his duty by both failing to obtain the insurance requested, and “by failing to notify Greenfield that the policy, as issued . . . excluded such coverage.” *Id.* at 810. The court acknowledged the broker’s newly acquired duty to advise its client, and held the broker accountable for its failure to do so.

An expanded duty to advise a client may arise from a specific request for a particular type of coverage. It is insufficient for the client to make broad proclamations that they want to be protected from every eventuality. However, there is no bright line as to what constitutes

sufficient specificity. A broker and her attorney should be certain to examine any requests made of the broker carefully to determine if any new duties have arisen.

#### ***Express Agreement and Expertise***

It should come as no surprise that if a broker expressly agrees to undertake a certain action, such as advising an insured and recommending coverage, the broker will be held accountable for failing to fulfill her contractual obligation. In contrast, the issue of whether a broker held herself out as an expert, and must thereby comply with a higher standard of care, is more difficult to determine. Whether the broker’s conduct constituted a “holding out” is typically the lynchpin for evaluating liability.

In *Williams v. Hilb, Rogal & Hobbs Ins. Servs. of California*, 177 Cal. App. 4th 624 (2009), the insured owned a business called Rhino Linings of Santa Fe Springs, which installed spray-on linings onto the beds of pickup trucks. When the client called his broker to arrange a meeting to discuss potential policies, she told him that “a meeting would not be necessary, because she was very familiar with Rhino Linings dealerships and programs, and was the expert on the product necessary to satisfy Rhino SFS’s insurance needs.” *Id.* at 628. When the broker failed to advise her client that worker’s compensation insurance was mandatory in California, she breached the heightened duty she assumed by holding herself out as an expert.

California courts have held that conclusory allegations regarding alleged expertise are insufficient to establish the existence of a duty to recommend additional coverage. In *Jones v. Grewe*, the complaint alleged that the brokers “held themselves out as insurance consultants and experts . . . [and] had taken care of appellants’ insurance needs for ten years, during which time [the insureds] relied on [the brokers’] expertise.” *Jones*, 189 Cal. App. 3d at 953. The court held that these factually devoid allegations were not enough to impose any additional duties on the brokers.

The *Wallman* case involved similar allegations on appeal from a motion for summary judgment. The insureds argued that there were triable issues as to whether the broker held himself out as an

apartment building insurance expert. In support of this contention, they relied on declarations in which they testified that the broker “held himself out to us as an expert in insurance matters, and specifically, for the type of risks our family business encountered . . . .” *Wallman* 200 Cal. App. 4th at 1312. Relying on the *Jones* decision, the *Wallman* court determined that these allegations were simply too conclusory to raise a triable issue of fact.

### Broker, Advisor, and Fiduciary?

To many, insurance brokers may appear to be acting in a fiduciary role. They assist their clients in obtaining policies that can be critical to their financial well-being. However, California courts have been reluctant to recognize a separate and distinct fiduciary duty apart from the general duty to procure the coverage requested.

Earlier decisions relating to this issue demonstrate a judicial reluctance to definitively state whether a fiduciary duty existed. “It is not clear in what respect the ‘fiduciary duty’ owed by an independent insurance agent differs from the duty of due (reasonable) care. As used in respect to an independent agent, ‘fiduciary duty’ may refer merely to avoidance of conflict of interest, self-dealing, excessive compensation, etc.” *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc.*, 115 Cal. App. 4th 1145, 1158 (2004). While the *Hydro-Mill* court limited the potential impact of any fiduciary duties, it, arguably, left the door open to liability beyond the general duty of care.

A decision earlier this year by the California Court of Appeal for the Third District appears to close this door. It held that “[t]here is no authority . . . that any fiduciary duty owed by an insurance broker would extend to areas beyond the recognized duty to use reasonable care and diligence in the procuring of insurance at the insured’s request.” *Mark Tanner Constr.*, 224 Cal. App. 4th at 588. This statement is bolstered by other courts that have distinguished the broker-insured relationship from the fiduciary attorney-client relationship.

See *Kotlar v. Hartford Fire Ins. Co.*, 83 Cal. App. 4th 1116, 1123 (2000) (distinguishing a broker-client relationship from an attorney-client relationship by observing that the latter is fiduciary in nature); *Pacific Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. West, Inc.*, 203 Cal. App. 4th 1278, 1284 (2012) (same).

While the issue may be subject to further review, the California courts of appeal are leaning toward not imposing a fiduciary duty that expands beyond the broker’s typical duty to use reasonable care and diligence in procuring the insurance coverage requested.

### The National Trend

Recent appellate court decisions in several states indicate a general judicial reluctance to expand the duty of an insurance broker. This places the national trend in step with California’s approach to limiting broker duties.

In 2013, a New York appellate court observed that, absent a specific request for coverage not already in a client’s policy, or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide, or direct a client to obtain additional coverage. 5 *Awnings Plus, Inc. v. Moses Ins. Group, Inc.*, 108 A.D. 3d 1198, 1200 (N.Y. App. Div. 2013).

In 2012, the Ohio Court of Appeal found that an insurance broker did not have a fiduciary relationship with the insured or a duty to advise of the amount of coverage necessary to cover potential damages to the insured’s off-site electronic data. *Tornado Tech., Inc. v. Quality Control Inspection, Inc.*, 977 N.E. 2d 122, 127 (Ohio Ct. App. 2012).

In Pennsylvania, an appellate court held that an insurance agency, in its capacity as an insurance broker, owed no duty to the insureds to inspect their property before advising them about their insurance needs, and thus the insurance agency was not negligent in failing to inspect the insured’s property or to recommend flood insurance. *Wisniski v. Brown & Brown Ins. Co. of Pa.*, 906 A. 2d 571, 581 (Pa. Super. Ct. 2006).

The Supreme Court of Louisiana recently held that an insurance broker has no duty to recommend coverage amounts or to determine whether the client is underinsured. *Isidore Newman School v. J. Everett Eaves, Inc.*, 42 So. 3d 352, 353 (La. 2010). This is notable, since Louisiana has historically been hostile to the idea of a limited broker duty. See, e.g., *Succession of Barreca v. Weiser*, 53 So. 3d 481, 485 n.3 (La. Ct. App. 2010) (“an insurance broker or agent owes a fiduciary duty to his customers, which includes a duty to prudently advise one’s clients regarding recommended coverage”).

### Conclusion

Given that the national trend is in line with California’s recent appellate decisions, there is little indication that the scope of a broker’s duty in this state will change anytime soon. Even states that have traditionally been hostile to a narrow broker duty are beginning to follow the majority approach.



#### ON TOPIC

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