Perspectives on the Special Relationship: *Wakefern, Tiara* and *Voss*

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Policyholders aggrieved by an error or omission on the part of their insurance agent[1] that causes an out of pocket loss will most likely make a claim against their agent or end up suing their agent. In some cases brought against the agent the special relationship is alleged based on the notion that it can strengthen the policyholder's case. The customary definition of standard of care is what the objectively reasonable agent would have done in the same or similar circumstances. Absent a special relationship, that standard of care does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage and does not heighten the agent's duty.[2] However, if the special relationship is successfully established, the standard of care is elevated, heightened to a level above how the non-special relationship agent would have performed. To be successful, the policyholder must establish that its relationship with the agent is beyond the ordinary or standard agent-insured relationship.

[1]Many states have chosen to use the term "producer" to identify agents and brokers dealing with the public. The use of the term "agent" is meant to include the insurance professional and/or agency.

[2]*See:* 3 Steven Plitt et al., *Couch on Insurance § 46:38* (3d ed. 2011) *See also: Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 482-83, 486 (Alaska 2001); *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me. 1991); *Sadler v. Loomis*, 139 Md. Ct. App. 374, 776 A.2d 25, 46 (2001); *Robinson v. Charles A. Flynn Ins. Agency*, 39 Mass. Ct. App. 902, 653 N.E.2d 207, 207-08 (1995); *Harts v. Farmers Ins. Exch.*, 461 Mich. 1, 597 N.W.2d 47, 48 (1999); *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997); *Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 344 (1990).

Procedurally, in most cases, to maintain the special relationship, the policyholder's attorney must navigate at least three steps after discovery: (1) survive a motion for summary judgment or a pretrial motion *in limine* brought by the agent's attorney; (2) convince the finder of fact—either the judge in a nonjury jury trial, or the jury—that there is a special relationship between the agent and the insured; and (3) determine what effect, if any, the heightened duty has on the agent's performance. The determination of whether a special relationship exists is a question of fact.[3] The application of the added legal duty of providing advice is one for the court.[4]

The agent's primary legal duty is to follow the client's instructions, act in good faith, and obtain the best insurance at the most commercially reasonable price and terms using reasonable skill and ordinary diligence. The special relationship adds an additional legal duty to provide unsolicited advice as to coverage. The special relationship generally does not apply to the selection of limits with some exceptions such as that found in the *Voss* case discussed below. Many agents submit proposals to prospective clients or existing clients prior to policy renewals to present information relative to their in force policies as well as providing options for additional coverages such, as employment practices liability (EPL), directors and officers (D&O) liability, crime, etc. as well as higher limits. A proposal, in and of itself, is not a basis for a special relationship.

One facet of the special relationship applies to coverages that might better serve the interests of the policyholder either in the form of a different policy with broader coverage or by endorsement to an existing policy. However, even in situations where a special relationship is ultimately found to ex-

[3] *Buelow v. Madlock,* 206 S.W.3d 880, 893, citing *Hardt v. Brink*, 192 F. Supp. 879 (W.D. Wash. 1961).

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[4] *Fitzpatrick v. Hayes*, 67 Cal. Rptr. 2d 445, 448 (Cal. App. 1997); *Harts v. Farmers Ins. Exch.*, 597 N.W.2d 47, 49 (Mich. 1999) "Whether a duty exists is a question of law that is solely for the court to decide." (Citations omitted); "In a negligence action, whether or not a duty exists is generally an initial question of law for the court." (Citation omitted). However, if the existence of a duty depends upon factual determinations, the facts must be resolved by the trier of fact." *Rawlings v. Fruhwirth*, 455 N.W.2d 574, 577 (N.D. 1990).

ist, the scope of unsolicited advice may require the use of an expert witness. As an example, Bill Wilson,[5] in a recent Insurance Commentary.com article, states that:

> ISO has over 1,800 active Commercial Property policy forms and endorsements countrywide, with any state having up to 200 in effect. Each form has a multitude of coverage options. With respect to ISO's BOP, there are over 2,300 BOP policy forms and endorsements countrywide with up to 220 being in effect in any one state. This does not include the literally thousands of non-ISO proprietary or enhancement forms.

An analysis of whether a form, endorsement, or policy exists which is more appropriate for a policyholder's risks should take into consideration several factors: (1) the history of the relationship between the agent and policyholder; (2) whether the agent should have been aware of those policy forms or endorsement that might have provided broader and/or more comprehensive protection; and (3) the increase in the premium for the coverage to be substituted. However, in some instances the agent's responsibilities to provide advice within the framework of the special relationship go beyond a review of applicable, yet purportedly, broader coverages. As will be discussed in *Wakefern*, the duty to advise applies to proffered as well as in force policies.

The criteria for discerning whether a special relationship exists varies by state, but may include one or more of the following:[6]

- Counseling the insured concerning specialized insurance coverage;
- Holding oneself out as a highly skilled insurance expert, coupled with the insured's reasonable reliance on that expertise;
- Receiving compensation above the customary premium paid for expert advice provided;
- Misrepresenting the nature, extent or scope of the coverage being offered or provided;
- A request or inquiry by the insured for a particular type or extent of coverage;
- Assuming an additional duty by either express agreement or by a holding out as having expertise in a given field of insurance being sought by the insured;

[5] William C. Wilson, Jr., CPCU, ARM, AIM, AAM, is the founder of InsuranceCommentary.com. He retired from the Independent Insurance Agents & Brokers of America in December 2016 where he served as Assoc. VP of Education and Research and was the founder and director of the Big "I" Virtual University for over 17 years. He is the former Director of Education & Technical Affairs for the Insurers of Tennessee and, prior to that time, he was employed by Insurance Services Office, Inc. (ISO).

[6] *See:* Lipshultz, *When a Special Agent-Insured Relationship Imposes a Heightened Legal Duty*, *The Risk Report*, Vol. XXXVII, No. 8, April 2015, at 16. The criteria supporting a special relationship vary by state.

- Interaction between the producer and the insured regarding a question of coverage and the insured's reasonable reliance on the expertise of the agent;

- The nature of the relationship, consisting of more than just the number of years of association or a course of dealing over an extended period of time, which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on;

- An inquiry made by the insured that may require advice and the agent's provision of advice, although not obligated to do so, that is found to be inaccurate;

- A long-established relationship of entrustment in which the agent clearly appreciates the duty of giving advice;

- Failing to respond appropriately to a request or inquiry for or about a particular type or extent of coverage; and

- Failing to clarify an ambiguous request by the insured before providing coverage.

In *Tiara Condo. Assn., Inc. v. Marsh USA, Inc.,* 991 F. Supp. 2d 1271 (S.D. Fla. 2014)' the court was called upon to determine whether a special relationship existed between Marsh and Tiara and the effect such a special relationship would have on the broker's duty.[7] Initially Tiara asserted claims for breach of contract, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, negligence and breach of fiduciary duty. Before the court was Marsh's Motion for summary judgment on the issues of negligence and breach of fiduciary duty.[8] As part of its negligence allegations Tiara included an allegation of special relationship.

Tiara Condominium Association, Inc., was managed by an elected volunteer Board of Governors consisting of residents of the Association. An Insurance Committee had been created prior to the claimed losses and the retention of Marsh. Tiara maintained a *Guidelines and Instructions Manual* that detailed the Insurance Committee's function as follows:

> The committee works with the Manager on insurance claims and other insurance issues including preparation of the insurance request for proposal (RFP). The committee's assistance

[7]The court stated that it was being called upon to address an issue novel to Florida law. The question of when an insurance broker shares a special relationship with an insured is the broker subject to extra-contractual enhanced duty of care requiring the broker to advise about the amount of limits prudently needed to meet complete insurance needs? *Id.* 1273.

[8]The Eleventh Circuit upheld the dismissal of all other claims, including breach of contract and negligent misrepresentation, *Tiara Condo. Ass'n v. Marsh & McLennan Cos., Inc.,* 607 F.3d 742 (11th Cir. 2010).

> should include appraisals, limits and deductibles and obtaining competitive bids. The bids for insurance must be adequate for the protection of condominium owners and the Association against casualty, liabilities and other claims as required by law.

The Insurance Committee's "duties" included a number of tasks, one of which was reviewing policies for content of coverage needed.

Pursuant to a request for proposal, in early 2002, the Insurance Committee interviewed three brokers and ultimately selected Marsh because of its size, experience, and level of service. To memorialize its agreement with Tiara, Marsh sent an engagement of services letter to the condominium which was accepted. In 2004, the Engagement of Services letter identified twenty five services that Marsh would provide and additional services that Marsh was able to provide for additional compensation. The engagement of services letter described an essential part of Marsh's responsibility:

> Assist with documentation and other steps to obtain commitments for and implement your insurance program upon your instructions, it being understood that Marsh will not independently verify or authenticate information provided by you necessary to prepare underwriting submissions and other documents relied upon by insurers, and you will be solely responsible for the accuracy and completeness of such information and other documents furnished to Marsh and/or insurers and will sign any application for insurance. You understand that the failure to provide all necessary information to an insurer, whether intentional or by error, could result in the impairment or voiding of coverage.

Tiara traditionally relied on a professional appraisal company to inspect the condominium property and provide a construction cost appraisal. Tiara opted not to secure an updated appraisal for the 2004/2005 policy period, and instead, relied upon a 2002 appraisal. However, Tiara had been advised by an appraisal company that the replacement value of the building would probably have increased between 7 and 9 percent. Tiara previously had not requested Marsh to suggest appropriate limits for replacement value.

In September 2004 Tiara suffered substantial losses as a result of back to back hurricanes Francene and Jeanne. After concluding repairs, Tiara alleged it suffered a substantial shortfall because its property was underinsured. Tiara brought suit against Marsh, alleging the existence of a special relationship with Marsh such that it would have been responsible for suggesting appropriate property limits. Tiara further alleged that Marsh failed to recommend or advise Tiara to obtain a new appraisal for the 2004 – 2005 policy period and further failed to warn that the insurable value based on a 2-year old appraisal might

lead to considerably lower limits than reasonably prudent. Marsh disputed these allegations, arguing that it had no extracontractual duty to advise on full coverage needs, no duty to recommend that Tiara obtain an updated appraisal, no duty to warn of the possible effects of being underinsured and no duty to provide recommendations on reasonable, prudent limits.

The court referred to the general proposition that an insurance agent has no duty to advise an insured as to the insured's coverage needs. Although the court could not find any Florida case on point, it referred to other cases throughout the United States that established an exception to the general "no duty to advise" rule when a special relationship is proved, creating an enhanced duty of care to advise a client about the amount of coverage prudently needed to meet its complete insurance needs.[9]

The court then opined that the reviewed cases as well as others:

> suggest that the trier of fact may engage in a multiple factor analysis to determine whether a broker shared a "special relationship" with its client. Considerations may include (1) representations by the broker about its expertise; (2) representations by the broker about the breadth of coverage obtained; (3) the length and depth of the relationship; (4) the extent of the broker's involvement in the client's decision making about its insurance needs; (5) information volunteered by the broker about the client's insurance needs; and (6) payment of additional compensation for advisory services.[10]

The court concluded that whether the broker had a special relationship with its client was a question of fact for the jury, and as there were disputed facts, the matter was remanded to the trial court for a determination.[11]

Upon remand, after a 2-week trial, the jury found in favor of Marsh, determining that no special relationship existed. During the trial, Marsh established that: it received no additional compensation other than that outlined in the engagement of services letter, including no payment for advice; there was no long-term course of dealing between Marsh and Tiara; neither Marsh in general nor any of its personnel held themselves out as an expert; Marsh's obligations to Tiara were clearly described in an annual engagement of services letter; Tiara did not seek Marsh's advice as to the adequacy of its policy limits, nor was there any request by Tiara for a particular type or extent of coverage; Marsh did not misrepresent in any of

[9] *Id.,* p. 1281. The court referred to a number of cases that supported the finding of a special relationship, including: *Fitzpatrick v. Hayes,* 57 Cal. App.4th 916 (1997), *Peter v. Schumacher Enter., Inc.,* 22 P.3d 481 (Alaska 2001), *Harts v. Farmers Ins. Exchange*, 597 N.W.2d 47 (Mich. 1999).

[10] *Id.*

[11] The lower court trial record can be found at *Tiara Condominium Association, Inc. v. Marsh & McLennan Companies Inc., Marsh Inc., Marsh USA, Inc.,* United States District Court, Southern District of Florida, Case No. 08-80254- CIV-Hurley/Hopkins.

its proposals or orally, at any time, the nature of the coverage being offered; Marsh did not promise or assume the responsibility to select the "appropriate" insurance policies for Tiara; all decisions were made in concert by Tiara and Marsh; and, Tiara's insurance decisions were ultimately made by its Insurance Committee, a group made up of sophisticated insurance buyers.

Because the federal court had no Florida legal precedent to rely upon for guidance regarding the special relationship, it structured the six point "multiple factor analysis" described above to determine if a special relationship might exist, further suggesting that a court "may engage" in the test for the fact finder to follow. More importantly, this test places a greater burden on the agent to defend against the special relationship allegations, as the policyholder has its choice of the laundry list of criteria necessary to prove the special relationship. Further, the use of the word "may" leaves the selection as well as the relative weight of each criteria to the policyholder. In *Tiara*, even using the appellate court's multiple factor analysis test, there did not appear to be any facts provable on Tiara's part that would have supported a special relationship conclusion or that should have required a jury to consider the special relationship issue.

In *Wakefern Food Corp., et al. v. BWD Grp. LLC,* Superior Court of New Jersey, Appellate Division, Docket No. A-1662-18T1, April 2020,[12] the special relationship was created by two separate but similar agreements between Wakefern and its two brokers, BWD Group and The Associated Agencies.[13] Wakefern is a retailer-owned cooperative in which members individually own and operate over 250 supermarkets under the ShopRite banner, and over 50 supermarkets under the PriceRite banner in New Jersey, New York, Connecticut, Pennsylvania, Delaware, Maryland Rhode Island, and Massachusetts.

BWD had a 50-year client-broker-consultant relationship with Wakefern. During this period, BWD had procured property policies for Wakefern from various insurers as well as a broad range of other coverages including general liability, umbrella liability, property, and D&O. The Associated Agencies' relationship with Wakefern was approximately 30 years. During this period, The Associated Agencies had written general liability, auto, workers compensation and property, and had exclusive access to Affiliated FM having placed Affiliated policies prior to the October 1, 2012, property renewal.

The BWD and Associated multi-page Client Service Agreement for Insurance Broker and Risk Management Services

[12]The author was Wakefern's expert witness. Some of the material in the recitation of the facts are sourced from the underlying record.

[13]The existence of the special relationship was not challenged by BWD in the appeal, instead arguing that Wakefern had not proved that BWD proximately caused Wakefern's losses. Nevertheless, the special relationship played an important role in the underlying case.

contained, inter alia, the following pertinent language:

> The [broker]will provide professional technical assistance with interpretation of and, where necessary and commercially possible, modification to policy terms and conditions to best protect the interests of WAKEFERN and Wakefern members. This also includes service with respect to complex insurance issues involving leases, contracts and other documents that set forth insurance issues involving WAKEFERN and/or Wakefern members.
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> [the broker] will provide those advisory services in accordance with the highest standards customarily prevailing in the insurance industry including but not limited to: 1) pricing; 2) terms and conditions; 3) significant changes in coverage availability; … 5) availability projections; and 6) general insurance market developments.

Both brokers were paid an annual fee; BWD received $537,500 annually, and Associated received $250,000 annually for their services. and all policies were issued net of commissions.

Wakefern had a Retail Insurance Committee (RIC), made up of business-oriented owners to review Wakefern's various insurance programs and oversee the purchase of insurance policies. Decisions were dependent on recommendations made by the brokers who were to provide subject matter guidance. Due to several large losses suffered by Wakefern during the 2011/2012 policy period, a substantial premium increase of the in-force Affiliated policy was anticipated. In the spring of 2012 BWD suggested that the Wakefern account be marketed. Wakefern agreed, based on the brokers' recommendations.

At the September 24, 2011, RIC meeting immediately prior to the October 1, 2012/2013 renewal, two proposals, selected by the brokers, were presented, one from Affiliated and the other from Lexington Insurance Company.[14] The Affiliated premium was approximately $1 million higher than Lexington's premium.[15] The Lexington policy contained a named storm deductible (NSD) which was Wakefern's first exposure to a policy that included a named storm deductible.

At this RIC meeting the two proposals were presented by Wakefern's insurance department in a slide deck prepared by the brokers. Other than what the brokers had previously relayed to Wakefern's staff,

[14]There were several other proposals from other insurers that were rejected by the brokers and not discussed with Wakefern. Several of the proposals included a self-insured retention which the brokers deemed unacceptable to Wakefern. Wakefern was not provided with the opportunity to evaluate these proposals in light of the overall coverages and pricing of the Affiliated and Lexington proposals.

[15]The premiums included amounts attributable to Wakefern's captive insurer, Insure-Rite, to lower the per location deductible to $10,000.

there was no attempt by either of the two brokers' representatives in attendance during the presentation to explain, or at least call the RIC's attention to the named storm deductible and how it operated. The brokers remained silent during the meeting and made no attempt to explain the effects that the NSD would have on potential catastrophic losses. Based on previous discussions with the brokers, Wakefern's staff believed the NSD applied only to property damage. In fact, the NSD applied to the total insurance value (TIV) of each location. The Affiliated policy did not have an NSD and losses were considered business interruption losses. The Lexington policy maintained a $250,000 wind/hail deductible, but in the event of a named storm, the deductible was 2% of TIV. The Lexington policy also included language that if multiple deductibles applied to a loss, the largest deductible would apply.

Superstorm Sandy made landfall on October 29, 2012, in New Jersey. Of the 150 stores affected, only a few suffered building/structure damage, but many stores sustained considerable damage to their contents. A claim for $55.4 million was submitted to Lexington, which, after applying the NSD, paid Wakefern $27 million. As a result of an approximate difference of $24 million, Wakefern brought suit against the brokers for breach of contract, negligence, professional negligence, and breach of fiduciary duties.

The jury trial lasted 5 weeks. Associated settled with Wakefern prior to the verdict. The jury returned a unanimous verdict in favor of Wakefern for breach of contract, breach of fiduciary duty and professional negligence, determining that BWD was the proximate cause of Wakefern's loss. On appeal, the New Jersey Superior Court, Appellate Division, affirmed the trial court's ruling of its denial of BWD's motions.[16] In response to BWD's argument that Wakefern did not establish how BWD caused Wakefern's damages, the court referred to the proof offered through Wakefern's expert that:

> BWD's contract required it to provide professional assistance and interpretation of policy terms; BWD did not meet the standard of care; when BWD procured insurance in 2012, it focused almost entirely on price and ignored other factors; BWD should have given a full explanation of the NSD; the missing information represented a deviation from the broker's standard of care; BWD did not explain the differences between the expiring Affiliated policy and the Lexington policy; up until 2012, Wakefern did not have an insurance policy with an NSD so BWD was required to explain this deductible; and BWD failed to follow up with other insurance carriers who provided an initial quote.

* * *

[16]BWD appealed from the trial court's denial of its motions for a new trial and JNOV. *Wakefern Food Corp. v. BWD Grp.*, Opinion, at 3.

> Accordingly, we are satisfied the jury could reasonably find from [plaintiff's expert] BWD's failure to provide critical information to Wakefern's representatives deprived them of the ability to make a prudent decision and that BWD's failure constituted a deviation from the standard of care.

Wakefern Food Corp. v. BWD Grp., Opinion, at 17-18.

This case demonstrates the broad effect of the heightened duty created by the special relationship, especially one created by agreement. In a no duty to advise scenario, the broker could have argued that they had no duty to provide advice with respect to policy terms and conditions, including the named storm deductible nor did they have any responsibility to present what they considered to be nonconforming proposals. Whether Wakefern was deprived of its ability to make an informed decision with respect to which policy to accept would have been a standard of care question without the heightened duty imposed by the special relationship.

In *Voss v. Netherlands Ins. Co., et al.,* 22 N.Y.3d 728, 8 N.E. 3d 823, 985 N.Y.S.2d 448 (2014), the court was asked to determine whether a special relationship existed between the insured and their broker. Ordinarily the special relationship doctrine does not apply to the selection of or advice concerning limits. The general rule in New York with respect to the selection of limits was set out in *Murphy v. Kuhn,* 660 N.Y.S.2d 371, 90 N.Y.2d 266, 682 N.E.2d 972 (1997):

> Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status. Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act. Furthermore, permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation. Notably, in a different context, but with resonant relevance, it has been observed that "[u]nlike a recipient of the services of a doctor, attorney or architect * * * the recipient of the services of an insurance broker is not at a substantial disadvantage to question the actions of the provider of services" (*Video Corp. of Am. v. Frederick Flatto Assocs.*, 85 A.D.2d 448, 456, 448 N.Y.S.2d 498, *mod.* 58 N.Y.2d 1026, 462 N.Y.S.2d 439, 448 N.E.2d 1350*).* (Some citations omitted).

Voss appears to turn this rule on its head.

Deborah Voss appealed from an order granting summary judgment and dismissal of claims against her broker, CHI Insurance Brokerage Services Co., alleging that CHI had secured inadequate levels of business interruption insurance for three sepa-

rate losses. The court reversed the order of the appellate division [*Voss v. Netherlands Ins. Co.,* 947 N.Y.S.2d 253 (N.Y. App. 2012)], finding that the "broker failed to meet its burden justifying summary judgment and dismissal of the complaint [was] not warranted."

Voss owned and controlled three separate business enterprises housed in a building in Liverpool, New York. Voss met with Joe Convertino Jr. of CHI, and they were retained as her broker in 2004, three years before the first loss. At that time, Voss owned two modeling agencies located on Henry Clay Boulevard in Liverpool. Convertino met with Voss at her business location, at which time they discussed various insurance coverages. One of the items considered was business interruption insurance. Voss was asked to provide sales figures to allow Convertino to calculate business interruption limits. Convertino also promised Voss that, as her business grew, CHI would review her insurance program.

During a subsequent meeting, Convertino recommended a policy with The Netherlands Insurance Company with a business interruption limit of $75,000. Convertino "allegedly assured [Voss] that it would suffice based on the condition of the building as well as the size of her businesses." 8 N.E.2d at 826. Voss also alleged that Convertino had calculated the appropriate business interruption limit and, further, that each year CHI would review the limit as her business evolved. Voss accepted Convertino's recommendations.

In April 2006, Voss, through her PropCo company, purchased the First Street building. Voss advised Convertino that she intended to move Shiver Model to the new building and planned to open two new businesses at the location—a café and a separate catering business. CHI obtained a Netherlands Insurance policy with the same business interruption limits of $75,000. By early 2007, all of Voss's businesses were in operation at the First Street location.

The first loss occurred in March 2007 as a result of water damage from multiple roof leaks.[17] In the spring of 2007, Voss met with another CHI representative, Carrie Allen, to discuss renewal of the Netherlands policy. The proposal from CHI suggested reducing business interruption limits to $30,000. Voss questioned this limit, and Allen indicated she would "take a look at it." 8 N.E.2d at 826.

The policy was issued with a $30,000 per occurrence limit for business interruption. In February 2008, the roof failed for a third time, damaging the building, and causing additional business interruption losses. Voss initiated suit against CHI, Netherlands, and the roofing contractor. Specifically as to CHI, Voss alleged "that a special relationship existed with CHI and that CHI had negligently secured inadequate levels of business interruption insurance for all three losses." *Id.* at 827. (Voss's

[17]Voss hired a roofing contractor to replace the roof, but within a month the new roof failed causing even more extensive damage and forcing Voss to close her three businesses for periods of time.

claims against the roofer and Netherlands were not considered in this appeal.)

CHI made three arguments to support its request for a dismissal:

> (1) that no special relationship was created and without a specific request by the insured for coverage, CHI could not be responsible for not recommending or obtaining higher limits; (2) the negligence claim was not viable based on Voss's admission that she received the policies and was aware of the limits for business interruption; and (3) assuming a special relationship existed, the proximate cause of Voss's injuries was Netherland's failure to make timely payments pursuant to the policy.

CHI argued that the relationship between it and Voss was an ordinary broker-client relationship and that no special relationship was created.

The court first cited the general principle that insurance brokers "have a common law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide, or direct a client to obtain additional coverage." (Citations omitted). The court applied this rule and stated that, in an ordinary negligence action, the insured can prevail only if she made a particular request for coverage to the broker that was not procured. Voss did not make these allegations but rather proceeded on the theory of the existence of the special relationship. "If a special relationship can be demonstrated, a broker can be liable even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage." *Id.*, citing *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.,* 7 N.Y.3d 152 (2006).

The court then referred to *Murphy v. Kuhn* for the rule that an agent, by its conduct or by express or implied contract with the insured, may "assume or acquire duties" beyond those imposed by common law. Noting that a determination of whether a special relationship exists is determined on a case-by-case basis, the court then mentioned the "three exceptional circumstances" that might create a special relationship.[18]

Relying principally on Voss's deposition testimony, the court concluded that there was some interaction with respect to the business interruption coverage limits and that Voss relied on the expertise of the agent. For example, when Convertino suggested the $75,000 business interruption limit, Voss questioned him as to its adequacy. Convertino "assured her that it was adequate based on his review of her business finances as well as the layout of the building."

[18](1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and relied on. *Murphy* 660 N.Y.2d at 374-375. All citations omitted.

Voss also testified that she had been promised that CHI would annually review coverage and recommend appropriate adjustments. The court also stated that special relationships in an insurance brokerage context are the exception, not the norm. The court did not find that the special relationship existed in this matter, only that a determination would have to be made at trial. The trial court's order granting CHI's motion for summary judgment was reversed.

At first blush this seems to be a standard of care or a breach of contract question. Did the agent promise to select the initial appropriate business interruption limits, and did the agent promise an annual review to affirm the adequacy of the limits? Did the insured reasonably rely on those representations to her detriment? However, *Voss* rests on the proposition that an agent can accept a voluntary duty to give advice as to the sufficiency of limits: "No doubt, … although a person may not owe a duty to another, a duty can arise when that person volunteers to act on behalf of another." *Palomar Ins. Corp. v. Guthrie,* 583 So.2d 1304, 1306 (Ala. 1991) (citations omitted).

Because the issue in *Voss* was the *sufficiency* of the business interruption limits, the policyholder, in order to succeed, had to prove that a special relationship existed. Otherwise the general rule as discussed in *Murphy* would apply.

The standard of care from CHI's perspective would suggest that after the first year of Voss' policy, she would be expected to review her financial status and determine, on her own, bodily injury (BI) limits with which she was comfortable. The standard of care could require the agent to provide Voss with a BI worksheet to allow the agent and underwriter to assist the insured in selecting limits without actually setting them. Because the issue here involved the selection of policy limits, a finding of a special relationship becomes necessary in order to overcome the standard of care without a heightened duty and the general rule of selecting limits. In *Voss*, the agent had selected the BI limits which Voss accepted, relying on the agent's suggestion. The seminal issue is whether this preliminary advice of limits for the first year of the policy translated into a continuing duty on an annual basis.

Conclusion

The contract language found in the *Wakefern* and *Tiara* cases are at opposite ends of the special relationship spectrum. Based on the facts developed in the *Wakefern* case, BWD's agreement language "[the broker] will provide those advisory services in accordance with the highest standards customarily prevailing in the insurance industry including but not limited to: … terms and conditions; … significant changes in coverage availability … and general insurance market developments" could trigger several of the special relationship criteria listed above, such as:

- Misrepresenting the nature, extent or scope of the coverage being offered or provided;

- Assuming an additional duty by either express agreement or by a holding out as having expertise in a given field of insurance being sought by the insured;

- Interaction between the producer and the insured regarding a question of coverage and the insured's reasonable reliance on the expertise of the agent;

- The nature of the relationship, consisting of more than just the number of years of association or a course of dealing over an extended period of time, which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on;

- An inquiry made by the insured that may require advice and the agent's provision of advice, although not obligated to do so, that is found to be inaccurate;

- A long-established relationship of entrustment in which the agent clearly appreciates the duty of giving advice; and

- Failing to respond appropriately to a request or inquiry for or about a particular type or extent of coverage.

Agreeing to the "highest standards" leaves little room to maneuver when it comes to the special relationship. On the other hand, Marsh's engagement of services letter sets forth clear limits of its responsibilities. Marsh's letter encapsulates an industry custom and practice that an agent or broker is expected to rely on the information provided by an insured, that the insured's information is accurate, and that the agent or broker is not required to validate the information provided.

The only avenue open to Tiara's success against Marsh was to establish that a special relationship existed (in order to be successful) to support an extra-contractual claim that Marsh was required to provide advice to Tiara even though Marsh had been Tiara's broker for only 3 years, had not previously been called upon to provide advice regarding limits during the period it had served as Tiara's broker, and there was no language in the engagement of services letter that would have compelled Marsh to provide any unsolicited advice, including advice with respect to valuation of the building. The better rule is cited in *Murphy:* **Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers**, **unless the latter are informed and asked to advise and act**.

That the concept of the special relationship is recognized by a court does not translate into ease of proof. There is an irony in the body of caselaw that shape the criteria necessary to establish a special relationship, which is that most claims against the agent are made because of an issue not with coverage concerns but rather with policy lim-

its.[19] And, the majority of the caselaw decisions where the special relationship has been alleged fail because of the inability of the policyholder to meet threshold requirements.

Voss falls in between *Wakefern* and *Marsh.* The customary rule seems to be, as set forth above in *Murphy,* that the agent or broker does not have any responsibility to advise as to limits, even in situations where the special relationship exists. However, the *Voss* court decided that there were sufficient facts to support a special relationship between the policyholder and the agent, specifically with respect to the selection of limits that the issue had to be decided by the fact finder. And, further, that if a special relationship is found to exist, that the duty to provide continuing advice concerning limits would apply to CHI.

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[19] *Parker v. State Farm,* 630 N.E.2d 567 (Ind. Ct. App. 1994)[failure to advise as to the availability and desirability of underinsured motorist coverage], *Fitzpatrick v. Hayes,* 67 Cal. Rptr.2d 445 (Cal. App. 1997) [failure to advise of the availability of a personal umbrella policy], *Kaercher v. Sater,* 155 P.3d 437 (Colo. App. 2006) [failure to recommend higher uninsured/underinsured limits to match liability limits], *Indiana Restorative Dentistry. P.C. v. Laven insurance Agency,* 27 N.E.3d 268 (Ind. 2015) [failure to procure "full coverage",i.e. higher limits for business personal property], *Bruner v. League Insurance Company,* 164 Mich. App. 28, 416 N.W.2d 318 (1987) [failure to advise insured to purchase uninsured motorist coverage], *Rawlings v. Fruhwith,* 455 N.W.2d 574 (N.D., 1990) [failure to advise insured to purchase higher auto policy limits to meet umbrella threshold where two different agencies provided each policy], *Trupiano v. Cincinnati Insurance Company,* 654 N.E.2d 886 (Ind. App. 1995) [duty to advise about underinsured motorist coverage and to provide a policy with adequate limits], *Murphy v. Kuhn,* 660 N.Y.S. 2d 371, 90 N.Y.2d 266, 682 N.E.2d 972 (1997) [failure to recommend purchase of higher auto liability limits], *Harts v. Farmers Ins. Exchange,* 461 Mich.1, 597 N.W.2d 47(1999)[failure to advise about adequacy and availability of uninsured motorist coverage], *Peter v. Schumacher Enterprises, Inc.,* 2001 Alaska 160 (2001) [failure to recommend higher uninsured/underinsured limits], *Sadler vs. The Loomis Company,* 139 Md.App. 374, 776 A.2d 25, 1 (2001) [failure to advise as to availability and selection of higher auto and homeowners limits], *Sintros v. Hamon,* 810 A.2d 553 (N.H., 2002) [failure to recommend adequate and sufficient insurance limits], *Zaremba Equip. v. Harco National Insurance Company,* 280 Mich. App.16, 761 N.W.2d 151, (2008) [failure to procure higher limits on building], *McClammy v. Cole,* 243 P.3d 392, 158 Wash.App.769 (Wash.App 2010) [adequacy of homeowner building limits].