AN INSURANCE BROKER'S DUTY: ADOPTING CALIFORNIA'S APPROACH

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I. INTRODUCTION

Towards the end of a long and successful career in business, a wealthy individual built an expensive yacht, which he planned to use to sail around the world.[1] Before he could sail the yacht, he had to take one crucial step: obtain insurance. He went to a brokerage firm, who he hired to find an insurance plan for the vessel.[2] The brokerage firm found a plan, and the owner went on his dream sailing trip. He embarked off the Eastern Seaboard, headed south and west through the Panama Canal, before eventually making his way up towards the Californian coast.[3] Within a nautical mile of the dock in Southern California, the yacht scraped a bed of rocks underwater, damaging the vessel's underside.[4] The businessman knew that his insurance would not cover the full price of the yacht, but assumed that his plan would cover the full amount of any damages.[5] Without consulting his broker or the insurer, he had the yacht revamped by a repair shop right near the dock.[6]

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1 *Certain Interested Underwriters at Lloyd's v. Bear LLC*, No. 15cv630 BTM (BLM), 2016 U.S. Dist. LEXIS 58247, at *3 (S.D. Cal. Apr. 29, 2016).

2 *Certain Interested Underwriters at Lloyd's v. Bear, LLC*, 259 F. Supp. 3d 1050, 1054 (S.D. Cal. 2017).

3 *Id.*

4 *Id.*

5 *Certain Interested Underwriters at Lloyd's*, 2016 U.S. Dist. LEXIS 58247, at *3.

6 *Id.*

Contrary to the owner's beliefs, the yacht's damage was slightly more severe than he originally thought, since the steel frame of the yacht was also damaged and would cost hundreds of thousands of dollars to fully repair.[7] The repair shop informed the owner that welding was required to fix the damage to the steel frame.[8] During the welding process, the entire yacht caught fire and destroyed it beyond repair.[9] Horrified, the owner sought consolation and contacted his insurance company, only to learn that his unintentional violation of the insurance agreement prevented a payout of his policy.[10] Under the terms of his agreement, the businessman owner was required to notify the insurance company prior to any repairs payable by the policy, which he failed to do when he sought to repair the yacht's frame.[11] In an attempt to recoup his losses, the man turned to the court for justice, but summary judgment was granted for the insurer, since the businessman had clearly violated the policy's notification requirement.[12] Unable to recoup his losses from the insurance company, the businessman took action against the insurance brokerage who procured the policy on his behalf.[13]

In his case against the insurance broker, the complainant-businessman argued for, among other things, breach of contract, breach of fiduciary duty, and negligence.[14] Although the court granted the broker's motions for summary judgment on the businessman's claims for breach of contract, breach of fiduciary duty and negligence claims, the court allowed his claims for heightened fiduciary and common law claims to continue.[15] The heightened duties claim is a factual determination which requires it proceed to trial for a jury to decide.[16]

This note will analyze the heightened duties of insurance brokers and when those heightened standards apply. Part I will address the role of insurance brokers and distinguish their relationship with the insurer from the insured clients. Part II will set out the nationally-recognized common law duties of brokers and provide brief examples of conduct that breaches those obligations. Part III will analyze the heightened duty standards in Florida, New York, and California to establish what circumstances have led courts to hold brokers to a heightened standard. Part IV will compare the Florida, New

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7 *Certain Interested Underwriters at Lloyd's*, 259 F. Supp. 3d at 1054.

8 *Id.* at 1055.

9 *Id.*

10 *Id.*

11 *Id.* at 1054.

12 *Id.* at 1063.

13 *See generally Certain Interested Underwriters at Lloyd's*, 259 F. Supp. 3d at 1054.

14 *See generally Bear, LLC v. Marsh USA, Inc.,* No. 15-cv-00630-BTM-BLM, 2018 U.S. Dist. LEXIS 68115, at *15 (S.D. Cal. Apr. 20, 2018).

15 *Id*. at 29.

16 *Id.*

York, and California's standards, discussing the policy considerations that each state evaluates when examining the standard. Part IV will then propose a standard for when heightened duties should be imposed, suggesting that states adopt a standard similar to the heightened duties enforced in California.

II. BACKGROUND

Insurance brokers play an important role in the insurance industry. Brokers function as intermediaries, connecting commercial and wealthy individual clients with insurance companies.[17] Insurance brokers are not insurance agents. Insurance agents are paid employees of the insurer, whereas brokers are not employees of either the insurer or insured.[18] This note will focus on the role and duties of insurance brokers.

Insurance brokers are often regarded as agents of the insured party in an agency context, but this is not always the case.[19] The agency relationship stems from the insured client-principal requests for the broker-agent to find specific insurance coverage, which the broker-agent obtains on the client's behalf.[20] This principal-agent relationship is automatically created when the insured client requests the services of the broker.[21] Unlike typical principal-agent relationships, insurance brokers can have a "dual-agency" role.[22] In this role, insurance brokers can be agents for both the insured client as well as the insurer-client.[23] Under normal circumstances, this would create a conflict of interest. However, in the insurance broker context, the insured and insurer-clients' respective interests are not in conflict.[24]

Principal-agent relationships provide the principal with a level of control over the agent in certain matters.[25] When insurance brokers are agents of the insured, the latter "controls the broker in placing coverage with insurer."[26] On the other hand, when insurance brokers are agents of an

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17 Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 TORT & INS. L.J. 1, 6–7 (2004).

18 ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 254 (3d ed. 2002).

19 *See* DANIEL S. KLEINBERGER, AGENCY AND PARTNERSHIP: EXAMPLES AND EXPLANATIONS 126 (1995) (stating that absent contrary agreement, "an agent may not act for anyone whose interests might conflict with the interests of the principal," and describing this as a "duty of undivided loyalty"); HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 127 (2d ed. 1990) ("It is the duty of an agent to act solely and completely for the benefit of his principal.").

20 Jerry, II, *supra* note 18.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

26 Richmond, supra note 17, at 6–7 (citing Jerry, II, *supra* note 18).

insurer, the insurer controls the broker "in collecting premiums."[27] These two aspects of an agent's duties do not conflict.[28] It is important to note that the insured client can expressly or impliedly permit the broker to be a dual-agent for the insurer. but only with express, contractual agreement from the insurer.[29] The insurer-client's relationship to the broker is not automatically a principal-agent relationship.[30] This is because the insured party should know that the broker is responsible for collecting premiums, since it pays its premiums to the broker rather than directly to the insurer.[31] However, the insurer should know the extent of the broker's relationship with secured clients and the possibility that the broker will be representing the insured-client's interests beyond simply procuring coverage before authorizing a dual-agency.[32]

In the *Polar Bear* case, the owner of the yacht had the boat appraised by marine surveyors independent of the broker.[33] Subsequently, the owner hired the insurance brokerage firm to obtain insurance coverage.[34] Hiring the brokerage firm formed the principal-agent relationship between the two parties, and the insurance broker sought out coverage from various insurers and presented its findings to the principal.[35] In this case, though irrelevant, none of the parties engaged in dual-agency. The broker, now the agent for the insured client-principal, had duties and responsibilities that he owed to the client under the agency relationship between the two parties.

III. AN INSURANCE BROKER'S COMMON LAW DUTIES

Insurance brokers owe common law duties to the insured client through the contractual and agency relationships between the two parties.[36] There are generally four claims that an insured client can bring against an insurance broker in violation of these duties: (1) negligence (in tort), (2) breach of contract, (3) breach of fiduciary duty, and (4) breach of heightened duties.[37] This section will cover the first three claims, and how insured clients bring

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27 *Id.*

28 *Id.*

29 See Kleinberger, *supra* note 19 (stating that absent contrary agreement, "an agent may not act for anyone whose interests might conflict with the interests of the principal," and describing this as a "duty of undivided loyalty"); Reuschlein & Gregory, *supra* note 19 ("It is the duty of an agent to act solely and completely for the benefit of his principal.").

30 *See* Kleinberger, *supra* note 19.

31 *Id.*

32 *Id.*

33 Certain Interested Underwriters at Lloyd's v. Bear, LLC, 259 F. Supp. 3d 1050, 1054 (S.D. Cal. 2017).

34 *Id.*

35 *Id.*

36 Richmond, *supra* note 17, at 1.

37 *Id.*

such claims against insurance brokers who fail to live up to their duties.

Negligence is the most common tort claim against insurance brokers.[38] To establish negligence, an insured client must establish that: (1) the broker owed a duty to the insured client; (2) said duty was breached by the broker; (3) the broker's breach of duty was the proximate to the insured client's damages; and (4) the insured client was harmed as a result of the broker's breach.[39] These are the typical common law elements of negligence that can serve as a basis for a claim, regardless of a contractual relationship between the broker and the client.[40]

However, in the insurance broker context, the common law claim of negligence in tort arises from a contractual duty between the broker and the insured client.[41] To prove breach of contract, the insured client must show that: (1) a contract, either oral or written, existed between the parties; (2) the insurance broker materially breached the contract; and (3) the insured client was damaged as a result of the insurance broker's breach.[42] Insurance brokers are found negligent "[w]here an insurance agent or broker undertakes to obtain insurance coverage for another person and fails to do so" and "may be held liable for resulting damages to that person for breach of contract or negligence."[43] In other words, if a broker contracts with a client to obtain the requested insurance coverage and fails to do so, he will be found negligent and in breach of contract.[44] Negligence and breach of contract are two separate claims; however, many claimants argue to prove these claims overlap.

To meet the duties owed to their clients, insurance brokers must "act with reasonable care, skill, and diligence."[45] This standard is recognized universally, requiring the broker to "exercise reasonable care under the circumstances," or, as articulated by Wyoming courts, "general duty to act reasonably towards the insured."[46] This means that "insurance agents 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."[47] Whether a broker has advised a client in a reasonable amount

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38 *Id.*

39 *Id.*

40 Wachovia Ins. Servs. v. Toomey, 994 So. 2d 980, 990 (Fla. 2008).

41 Romo v. Amedex Ins. Co., 930 So. 2d 643, 654 (Fla. Dist. Ct. App. 2006).

42 *Id.*

43 *Id.* (citing Klonis v. Armstrong, 436 So. 2d 213, 216 (Fla. Dist. Ct. App. 1983)).

44 Bennett v. Berk, 400 So. 2d. 484, 485 (Fla. Dist. Ct. App. 1981).

45 *See e.g.*, Desai v. Farmers Ins. Exch., 55 Cal. Rptr. 2d 276, 281 (Ct. App. 1996).

46 Bichelmeyer Meats v. Atl. Ins. Co., 42 P.3d 1191, 1196 (Kan. Ct. App. 2001); Gordon v. Spectrum, Inc., 981 P.2d 488, 492 (Wyo. 1999).

47 Am. Bldg. Supply Corp. v. Petrocelli Group, Inc., 19 N.Y.3d 730, 735 (2012).

of time is a fact-sensitive inquiry, and must be examined in light relevant industry standards.[48] If a broker is unable to secure coverage for his client, that broker must inform the client in reasonable amount of time to allow the insured client to seek coverage elsewhere.[49] Additionally, brokers have a duty of good faith and fair dealing that require them to secure policies that are not "materially deficient" and to accurately represent their clients.[50]

Insured clients have a duty to request specific coverage and read the policy provided to them by the insurance broker.[51] Central to the common law duties of brokers is the broker's responsibility to procure a policy that covers everything that the insured client has explicitly requested.[52] On the other side, the insured client must request *specific* coverage, since "a general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage."[53] Without knowing the client's specific coverage needs, a broker will not be held liable for inadequate coverage: "a request for 'full coverage,' 'the best policy,' or similar expressions does not place an insurance [broker] under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase."[54] The reason for specific coverage requests is rooted in the idea that:

> [I]nsureds 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, 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.[55]

Generally, a broker's duties to an insured client end when the broker delivers the policy.[56] Because a broker has no duty to advise an insured client on the adequacy of his or her coverage, it is necessary for insured clients to read and understand the policies prior to delivery.[57] Thus, "the relationship between broker and insured . . . is an ordinary commercial one."[58] "Various

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48 *Id.*

49 *Id.*

50 Desai v. Farmers Ins. Exch., 55 Cal. Rptr. 2d 276, 280 (Ct. App. 1996) (imposing liability on agent who failed to procure level of coverage demanded by insured before insured agreed to purchase policy).

51 *Am. Bldg*, 19 N.Y.3d at 736.

52 *Id.*

53 *Id.*

54 Trotter v. State Farm Mut. Auto. Ins. Co., 377 S.E.2d 343, 347 (S.C. Ct. App. 1988).

55 Murphy v. Kuhn, 90 N.Y.2d 266, 273 (N.Y. 1997).

56 *See generally* Faulkner v. Gilmore, 251 Ill. App. 3d 34, 39 (1993).

57 *Id.* at 36.

58 Am. Bldg. Supply Corp. v. Petrocelli Group, Inc., 19 N.Y.3d 730, 737 (2012) (Pigott, J., dissenting).

appellate courts have held that once an insured has received his or her policy, he or she is presumed to have read and understood it and cannot rely on the broker's word that the policy covers what is requested."[59] This reasoning goes to the basic principle of contract law; barring any coercion, misrepresentations, or any other violations of equitable principles, parties are free to contract with whomever they wish, regardless of their relationship to the other.[60] Once the insured receives his or her coverage, the broker's only remaining duty is to give timely notice of the policy's end date, insuring the client avoids any gap in coverage.[61] The broker is under no implied duty to renew the policy on behalf of the client unless the broker and client agreed to it in the contract.[62]

The common law duties in tort and contract law require the broker do his job professionally.[63] In the insurance broker context, some courts have found breach of contract and negligence to be separate claims, with the duty element for negligence arising out of the contractual agreement between broker and client.[64] Other courts recognize breach of contract and negligence as separate claims, with the duty element for negligence arising out of an "extra-contractual duty."[65] In either case, negligence and breach of contract are interrelated claims; it is unlikely that any court would find a broker negligent without also finding that the broker breached the respective contract.[66] It is unlikely that any court would find a broker negligent without also finding the broker breached the respective contract, since the contract between the insurance broker and the insured client is meant to procure the specific insurance requested.[67] If the broker breaches his duties, by failing to either obtain proper insurance for the client, inform the client of inability to obtain coverage, or by procuring the wrong type or level of coverage, the insurance broker has both breached his contract with the insured and acted

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59 *Id.* at 736.

60 *Id.* at 737 (Piggott, J., dissenting).

61 *See generally Faulkner*, 251 Ill. App. 3d 34, 38–39 (holding what duties a broker owes a client within a Mastery Surety Agreement).

62 *Id.*

63 *Id.*

64 *See, e.g.,* Wachovia Ins. Servs. v. Toomey, 994 So. 2nd 980, 1000 (Fla. 2008) (Lewis, J., dissenting in part).

65 SMI Owen Steel Co. v. Marsh USA, Inc., 520 F.3d 432, 443 (5th Cir. 2008) ("The Nevada Supreme Court stated that insurance brokers are 'not obligated to assume the duty of procuring . . . insurance, but when they [do] so *the law impose[s] upon them* the duty of performance in the exercise of ordinary care for the rights and interests of the [intended purchasers].").

66 Certain Interested Underwriters at Lloyd's v. Bear, LLC, 260 F. Supp. 3d 1271, 1277–81 (C.D. Cal. 2017) (relying on its determination of the breach of contract claim when deciding the negligence claim).

67 *Id.*

negligently.[68] If the broker successfully obtains the specific coverage, he is in compliance compliant with his contractual obligations and the insured party has no claim of negligence unless the parties have contracted beyond just procuring a policy and acted with care.[69] The *Polar Bear* case is illustrative of this point, since the court relies on factual determinations made in consideration of the breach of contract claim against the broker to determine the negligence claim.[70]

IV. A STATE PRESCRIBED FIDUCIARY DUTY

In some states, insurance brokers owe a fiduciary duty to their insured clients as a result of the principal/agent relationship between the parties.[71] This section will focus on the California, New York and Florida approaches in determining whether or not insurance brokers owe a fiduciary duty and the courts' reasoning under each approach.

A fiduciary duty, also referred to as the duty of loyalty, is central to a principal/agent relationship. However, insurance brokers have unique circumstances that have put the nature of the fiduciary duty, and its very existence, into question.[72] Fiduciary duties in the insurance broker context do not always exist. Courts that recognize a fiduciary duty do so as a matter of law, whereas courts that do not find a fiduciary duty look for a heightened duty based on specific circumstances.[73]

Insurance brokers pose unique challenges for courts because of the potential dual-agency relationship between insured and insurer, and the policy considerations of assigning heightened duties to brokers.[74] Typically, agents have a fiduciary obligation to their principal and, "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency ."[75] To prove a breach of fiduciary duty by a broker, the insured client must show: (1) a

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68 *Id.*

69 *Id.*

70 *Id.* at 1278. ("As already discussed above, the undisputed facts demonstrate that Marsh obtained the requested coverage for $17 million, and adequately informed and explained to Bear the terms and conditions of the policy. Therefore, as a matter of law, it did not breach its duty of reasonable care . . .") (holding the broker not negligent but in breach of contract when the broker and client contracted for more than just procuring policy, such as automatic renewal, expert opinions, etc.).

71 *Id.* (*"*Under Florida law, an insurance broker has a fiduciary relationship with the insured that requires the broker to inform and explain the coverage it has secured at the client's directions.").

72 *Certain Interested Underwriters at Lloyd's*, 259 F. Supp. 3d at 1278.

73 *Id. at 1281.*

74 *See generally* Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82 (Mo. Ct. App. 1994); *see also* Murphy v. Kuhn, 90 N.Y.2d 266 (N.Y. 1997).

75 RESTATEMENT (SECOND) OF AGENCY § 387 (2010).

fiduciary duty exists between the broker and the client, (2) the broker breached his fiduciary duty, and (3) the broker's breach of his fiduciary duty was the proximate cause of the insured client's harm.[76] The first element, whether a fiduciary duty exists, depends upon the relationship of the parties. Certain relationships give rise to fiduciary duties.[77] The principal/agent relationship is a type of relationship where, as a matter of law, the agent owes its principal a fiduciary duty.[78] Courts' methodologies in determining whether the insurance broker's relationship to his client is an agency relationship is determinative of the duties owed by brokers.[79] The analysis rests on whether the court considers the insurance broker/client relationship to be a principal/agent relationship.

California, New York, and Florida courts vary on their classification of the insurance broker's relationship, and duties he or she owes, to insured clients beyond those in tort and contract. For this analysis, the following definition of agency is important: "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[80]

In *Wachovia v. Toomey*, the Florida Supreme Court, articulated that an insurance broker owes its clients a fiduciary duty by operation of law.[81] Thus, courts in Florida recognize the agency relationship between broker and insured client and assert that, "failing to adequately explain to [the client that the] insurance policy," "failing to obtain proper approval from [the client to make changes]," and "failing to advise [the client] about the impact of the proposed [changes]" would be a breach of the fiduciary duty.[82] In the *Polar Bear* case, also decided under Florida law, the court granted summary judgment in favor of the broker because he was able to show he had fulfilled his fiduciary duty by explaining a particular clause to the client multiple times.[83] Therefore, the duty of a broker to advise the insured as a fiduciary agent does not suggest advising on the merits of the insurance policy; but instead, the duty to advise requires the broker to explain the provisions in a way that allows the client can make an informed decision on whether or not to accept the policy.[84]

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76 *See Certain Interested Underwriters at Lloyd's*, 259 F. Supp. 3d at 1276–78.

77 Rash v. J.V. Intermediate, Ltd., 498 F. 3d 1201, 1207 (10th Cir. 2007).

78 *Id.* (citing Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002)).

79 *Id.*

80 RESTATEMENT (SECOND) OF AGENCY § 387 (2010).

81 *Wachovia* Ins. Servs. v. Toomey, 994 So. 2d 980, 984 (Fla. 2008).

82 *Id.*

83 Certain Interested Underwriters at Lloyd's v. Bear, LLC, 260 F. Supp. 3d 1271, 1280 (S.D. Cal. 2017).

84 *Id.* ("Ordinarily, an insurance broker has no duty to advise an insured as to the insured's coverage needs.").

In *Tiara Condominium v. Marsh*, the United States District Court for the Southern District of Florida recognized a duty more extensive than the fiduciary duty of "advis[ing] and recommend[ing]" the client when a special relationship is formed.[85] This court used several factors to determine when the duty to advise and recommend is triggered, specifically listing:

> (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.[86]

A lawyer can be sued for malpractice if the lawyer does not explain the law adequately, but he can not be found guilty if he explained the law sufficiently to a client who ultimately made a poor determination. Similarly, a broker will breach his fiduciary duty if he fails to explain the policies he procures, but he will not be in breach if he explains the policies properly and the client makes an unsatisfactory decision. Thus, Florida has imposed three levels of duties that insurance brokers owe their insured-clients: (1) a common law duty, (2) a fiduciary duty and, (3) a heightened duty.[87]

In *Cathy Daniels v. Weingast*, the Appellate Division of New York stated that "in the absence of a special relationship, a claim against an insurance broker for breach of fiduciary duty does not lie . . . Here, the [allegations in the] complaint do not establish anything more than a typical insurance [broker]-customer relationship."[88] The *Bruckmann* case further solidifies this point, asserting "the law is reasonably settled . . . that insurance agents 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."[89] Under New York case law, there are three factual circumstances that can give rise to a special relationship between insurance broker and insured client:

> (1) the agent receives compensation for consultation apart from

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[85] *Id.* (citing Tiara Condo. Ass'n. v. Marsh, USA Inc., 991 F. Supp. 2d 1271, 1280 (S.D. Fla. 2014)).

[86] *Id.* at 1280–81 (citing *Tiara*, 991 F. Supp. 2d at 1280).

[87] *Id.* at 1280.

[88] Cathy Daniels, Ltd. v Weingast, 91 A.D.3d 431, 433 (N.Y. App. Div. 2012) (citing Bruckmann, Rosser, Sherrill & Co. v. Marsh USA, 65 A.D.3d 865, 867 (N.Y. App. Div. 2008); People v. Liberty Mut. Ins. Co., 52 A.D.3d 378, 380 (N.Y. App. Div. 2008)); *See generally Bruckmann*, 65 A.D.3d at 865.

[89] *Bruckmann*, 65 A.D.3d at 867 (quoting *Murphy* v. Kuhn, 90 N.Y.2d 266, 270 (N.Y. 1997)).

> 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 specially relied on.[90]

Unlike those in Florida, New York courts do not prescribe a fiduciary duty from an insurance broker to its insured clients as a matter of law.[91] Instead, the existence of any heightened duty beyond common law tort and contract law is a factual determination, requiring insured clients to show a special relationship existed, establishing more extensive duties.[92] New York, therefore, only has two levels of duties: (1) a common law duty and (2) a fiduciary duty.[93]

California's rulings on this issue have been more akin to those passed down by New York courts, with California's courts showing a similar hesitatation to assign heightened duties to insurance brokers. In *Kotlar v. Hartford*, a California appellate court ruled that "the duty of a broker, by and large, is to use reasonable care, diligence and judgment in procuring the insurance requested by its client."[94] The court went on to further describe the relationship between broker and client as "wide of the mark" when compared to the attorney-client relationship.[95] The role of lawyers to act as zealous advocates for their clients within the bounds of the law contrasts with a broker's need to only use "reasonable care to represent his client."[96] In addition, the analogy is even weaker when the dual-agency nature of an insurance broker is taken into account, since it would not be acceptable for a lawyer to serve as a dual-agent to both parties in a transaction.[97] California's approach adheres strongly to the concept that a broker's duty to its client normally ends once the policy is procured.[98]

However, like in New York, California courts recognize certain factual circumstances that could lead to duties beyond reasonable care.[99] For example, when "there is a request or inquiry by the insured for a particular type or extent of coverage, or the [broker] assumes an additional duty by

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90 Voss v. Neth. Ins. Co., 8 N.E.3d 823, 828 (N.Y. 2014) (citing *Murphy*, 90 N.Y.2d at 266).

91 *Id.*

92 *Id.*

93 *Id.*

94 Kotlar v. Hartford Fire Ins. Co., 100 Cal. Rptr. 2d 246, 250 (Ct. App. 2000).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* at 250 (finding no reason to impose a duty on the broker to inform the insured that his policy was terminating due to non-payment of premiums).

99 *Kotlar*, 100 Cal. Rptr. 2d at 250.

either express agreement or by 'holding himself out' as having expertise in a given field of insurance being sought by the insured."[100] California, like New York, has only two levels of duties: (1) a common law duty and (2) a heightened fiduciary duty.[101]

By holding the broker-client relationship to be an agency relationship, and thereby imposing an inherent fiduciary duty as a matter of law, Florida courts have made policy considerations in favor of policyholders.[102] Florida courts go even further, however, establishing a duty beyond fiduciary that allows the insured client to demonstrate there is a special relationship between broker and client requiring brokers to advise and recommend.[103] On the other hand, California and New York courts have not imposed this inherent fiduciary duty and require a fact-sensitive inquiry considering whether a special relationship exists, thereby taking a "pro-insurance broker" stance.[104]

V. COMPARING CALIFORNIA, NEW YORK AND FLORIDA STANDARDS FOR FORMING A SPECIAL RELATIONSHIP OR FIDUCIARY DUTY

Courts have an extremely difficult task in determining how high to set the bar for establishing a special relationship and holding brokers to heightened duties. This section will compare the thresholds set by each court, the policy considerations involved, and their relative strengths and weaknesses. As noted, courts in California, New York, and Florida all recognize certain factual circumstances that create duties beyond those proscribed in common law.

California only considers an insurance broker to have breached his duty of care in obtaining an insurance policy for the insured in three instances: where (1) the broker misrepresented the nature, extent, or scope of the coverage that is being either offered or provided; (2) the insured client has asked for a "particular type or extent of coverage; or (3) the broker has taken on an additional duty either by express agreement or by presenting himself as an expert in the specific area of insurance being requested.[105] Although the court in *Pacific Rim* distinctly considered the factors separately, they can be examined interdependently.[106] If a prospective insured client asks a broker for "a particular type or extent of coverage," it is likely because "the broker

100 Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. West, Inc., 138 Cal. Rptr. 3d 294, 297–98 (Ct. App. 2012), (citing Fitzpatrick v. Hayes, 67 Cal. Rptr. 2d 445, 452 (Ct. App. 1997)).

101 *Id.* at 298.

102 *Id.*

103 *Id.* at 298–300.

104 *See generally id.*

105 *Id.* at 297–99.

106 *Pac. Rim.*, 138 Cal. Rptr. 3d at 297-99.

is holding himself out" as an expert in the related field.[107] Where the broker is not "holding himself out" as an expert and a prospective client assumes the broker to be an expert without specifically inquiring, the client is taking a gamble.[108] Objectors to this interpretation argue that a broker may "hold himself out," to be an expert, where in reality he is not.[109] However, this scenario is hard to imagine without an express statement, oral or written, of expertise. If the broker misleads the insured about his expertise, he assumes the additional duty and the court will find him liable for any breach of this duty.[110] This is to say that none of the factors test dispositive; with courts instead considering the totality of circumstances.

The contract theory of reliance is embedded in this test.[111] The insured client must show he relied on the broker when he signed the insurance policy, and he had valid reason to rely on the broker. The test is only used to show a heightened duty exists; whether the broker breached this duty is an entirely separate question. Thus, finding an insurance broker in breach of his heightened fiduciary duty is an uphill battle for the insured client in California.

New York courts' prior decisions pose similar difficulties for insured clients. New York courts considers three circumstances that create a special fiduciary relationship between insurance broker and insured client.[112] The first situation occurs when the broker was paid an additional amount on top of the premium he or she received for their consultation.[113] The analysis of this factor requires an understanding between the broker and insured client that the broker is going beyond his ordinary duties and thus should be compensated accordingly.[114]

The second instance occurs when there has been an interaction between the broker and client in which the client inquired about coverage and relied on the broker's expertise.[115] The second occurrence is not met when the insured simply shows that he or she asked a question and relied on the

107 *Id.* at 297.

108 *Id.*

109 Id.

110 *Id.* at 297–203; *see also* Century Sur. Co. v. Crosby Ins., Inc., 21 Cal. Rptr. 3d 115, 119 (Ct. App. 2004) (holding that an insurance broker is not immune from fraud, regardless of other duties and the respective claims that arise from them. "The following elements must be pleaded to state a cause of action for fraud: (1) a misrepresentation of a material fact; (2) knowledge of falsity; (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damages.").

111 *Pac. Rim.*, 138 Cal. Rptr. 3d at 297–203.

112 Voss v. Netherlands Ins. Co., 8 N.E.3d 823, 828 (N.Y. 2014) (citing Murphy v. Kuhn, 90 N.Y.2d 266, 272–93 (N.Y. 1997).

113 *Id.*

114 *Id.* at 829.

115 *Id.*

answer.[116] The broker's manner and substance of his response are also relevant to this inquiry, with the court asserting that "the casual response, given informally, [will] not elevate an ordinary commercial relationship to one that would impose a duty to determine value and ensure full coverage."[117] This means that the broker must offer expert advice to the insured client, and the insured client must rely on said expert advice.[118] If the insured does not heed the alleged expert advice, no fiduciary duty will be imposed.[119]

The third occurrence considers whether a reasonable broker in the normal course of dealing would know that the insured client is relying on his advice.[120] This third instance alone has several considerations; it must show: (1) a course of dealing, (2) over a long period of time, (3) events that would put the broker on notice that the insured client views him as an expert, (4) either through an express agreement or reliance on the broker's expertise, and (5) that the insured client relief on the broker's expertise in signing the policy.[121] If an insured client is relying on the third instance to impose a fiduciary duty on the broker, proving a course of dealing over an extended period of time will be the simplest element to prove.[122] However, the reasonableness standard implicit in the third situation is more difficult to establish. The standard requires the insured client to demonstrate multiple occasions in which he or she requested expert advice from the broker, and multiple times where the client relied enough on this advice, giving notice to the broker that the insured client is relying on the broker's expertise.[123] All three circumstances have difficult burdens for the insured client to meet; in the words of the *Voss* court, "special relationships in the insurance brokerage context are the exception, not the norm."[124]

Though Florida courts have employed a fact-sensitive special relationship standard, it is nonetheless different from New York and California's standards, emphasizing a pro-policyholder, anti-insurance broker stance.[125] For example, Florida has six factors, many of which are not considered by California or New York courts.[126] This makes it easier to establish a heightened duty. There are common factors, as well; however,

116 *Id.*
117 W. Joseph McPhillips, Inc. v. Ellis, 8 A.D.3d 782, 784 (N.Y. App. Div. 2004).
118 *Id.*
119 *Id.*
120 *Voss*, 8 N.E.3d at 829–30 (citing Murphy v. Kuhn, 90 N.Y.2d 266 (N.Y. 1997)).
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 830.
125 *Id.*
126 *Voss*, 8 N.E.3d at 829–30.

Florida recognizes the broker-client relationship as inherently that of principal-agent with a fiduciary duty to explain the procured policies.[127]

Florida courts use the three factors in their analyses that are used by California and New York courts, as well as an additional three factors:

> (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.[128]

California's three factors are (1) whether the broker misrepresented the nature, extent, or scope of the coverage; (2) whether the client asked for a particular type or extent of coverage; and (3) whether the broker has expressly or impliedly taken on a heightened duty.[129] New York's three-factor test considers whether the client has paid the broker an additional sum to the premium, whether the client requested the broker's expertise, and whether the broker had reason to know that the client had relied on his expertise as a result of the length and breadth of his relationship with the client.[130] Accordingly, Florida's additional factors consider the brokers' involvement in the client's decision-making, the information volunteered by the broker, and the representations by the broker about the breadth of coverage obtained.[131] These additional factors allow the insured clients to bring claims against insurance brokers in a wider set of circumstances.

VI. ANALYSIS

Florida's three additional factors deviate from the deep-seeded policy position that the insured is in the best position to evaluate risk for his business. There are two main policy considerations that have prompted courts and state legislators to impose a high threshold on finding that insurance brokers owe a heightened duty to their clients.[132] First, "[i]mposing on intermediaries a general duty to advise insured about the adequacy and appropriateness of coverage insulates insureds from the burden of evaluating and caring for their own financial needs."[133] Second, creating a general duty

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127 *Id.*

128 Tiara Condo. Ass'n v. Marsh, USA, Inc., 991 F. Supp. 2d 1271, 1281 (S.D. Fla. 2014).

129 Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. West, Inc*,* 138 Cal. Rptr. 3d 294, 297–98 (Ct. App. 2012).

130 *Voss,* 8 N.E.3d at 829–30.

131 *Tiara*, 991 F. Supp. 2d 1271, 1281.

132 ROBERT H JERRY & DOUGLAS R RICHMOND, UNDERSTANDING INSURANCE LAW 225 (5th ed. 2012).

133 *Id.*

to advise allows insured parties to fill gaps in their policy after an uncovered loss has occurred and blame the broker for the lack of coverage.[134] Placing such a duty on brokers "turns the entire theory of insurance on its ear as individuals, in theory, take an 'intellectual gamble' when purchasing insurance as they weigh the expense of insurance versus the amount of coverage that they purchase. Allowing insureds to seek coverage, post-occurrence, allows them to completely circumvent this risk."[135]

In this section, the note will evaluate California's, New York's, and Florida's standards against the backdrop of these overarching policy considerations. Specifically, it will argue in favor of California's standards for brokers over both Florida and New York.

California's test, which only finds a heightened duty if the broker misleads, the insured makes a specific request for a particular extent of coverage, or if broker has expressly or impliedly held himself out to be an expert, should be adopted by every state's judiciary. These requirements are consistent with the policy objectives because it keeps the task of risk assessment with the insured unless the broker agrees to serve as risk expert and advise the insured client.[136] In this way, the broker is taking on a separate role not just as a broker, but also as a risk advisor.[137]

Though California courts, under the right circumstances, have held brokers to have taken on this additional advisory role, they have only done so in very specific cases.[138] For example, in *Greenfield v. Insurance Inc.*, the California Court of Appeals found that when the insured client asked his broker for an "all-risk business interruption policy," he or she made a specific request for particular coverage.[139] However, the broker procured a policy that did not cover mechanical defects.[140] Thus, the court held that the broker was liable based on negligence.[141] In contrast, in *Fitzpatrick v. Hayes,* the insured asked whether the procured policy adequately covered his automobile.[142] There, the court held that a general inquiry to the adequacy of the policy did not rise to the level of a specific request for particular coverage.[143] Thus, the broker was not liable for the insured's uncovered

134 *Id.*

135 Farmers Ins. Co. v. McCarthy, 871 S.W.2d 82, 86 (Mo. Ct. App. 1994).

136 David Martin, Christopher Hossellman & Seymour Everett, *Broker, Advisor, or Both? When an Expanded Duty Will Be Imposed*, 57 ORANGE COUNTY LAWYER 22 (2015).

137 *Id.*

138 *Id.* at 24.

139 Greenfield v. Ins., Inc., 97 Cal. Rptr. 164, 167 (Ct. App. 1971).

140 *Id.*

141 *Id.* at 168.

142 Fitzpatrick v. Hayes, 67 Cal. Rptr. 2d 445, 447(Ct. App. 1997).

143 *Id.* at 453.

losses.[144] These two cases highlight the high threshold California has for insureds to prove they made a specific request for particular coverage.

California's inquiry into whether the broker has expressly agreed to take on a risk advisory role or held himself out to be an expert, has focused on the latter.[145] There is no sound argument against holding a broker liable if he has expressly agreed to be a risk advisor to the insured's detriment.[146] However, when the broker has not expressly taken on this role, California courts have only found a broker to have "held himself out" to be an expert in very specific circumstances.[147] For example, in *Williams v. Hilb*, when an insured party requested a meeting to discuss the type of coverage he needed for his business, the broker responded "[I am] the go-to person to take care of the insurance needs for Rhino Linings dealerships," and "[I am] the expert on the product necessary to satisfy [Rhino SFS's] insurance needs."[148] Here, the court ruled that the broker had assumed the advisory role as an expert to the insured's detriment and was therefore liable.[149] On the other hand, California courts have not held "conclusory allegations regarding alleged expertise are insufficient" to impose a heightened duty on the broker.[150] Specifically, the court held "[t]he mere allegation in a complaint, as in this case, that an insured has purchased insurance from an insurance [broker] for several years and followed his advice on certain insurance matters is insufficient to imply the existence of a greater duty."[151] The court in *Jones* rejected the idea that the length of the insured's professional relationship with the broker was a relevant or decisive factor in finding a heightened duty.[152] In this case, the broker had general financial information regarding the insured's business, but the court held that the broker could not have reasonably known how much the insured was willing to pay for the premium or whether the financial information the broker had was the full extent of the insured's assets.[153] In concluding that the broker was not liable here, the court heavily relied on the abovementioned policy considerations.[154] Similarly, in *Wallman v. Suddock*, the court found that mere allegations, or the subjective belief of the insured, that the broker held himself out to be an expert, were

144 *Id.* at 454.

145 Martin et al., *supra* note 136.

146 *Id.*

147 *Id.*

148 Williams v. Hilb, Rogal & Hobbs Ins. Servs. of Cal., Inc., 98 Cal. Rptr. 3d 910, 913 (Ct. App. 2009).

149 *Id.* at 923.

150 Martin et al., *supra* note 136 at 24.

151 Jones v. Grewe, 234 Cal. Rptr. 717, 721 (Ct. App. 1987).

152 *Id.*

153 *Id.*

154 *Id.* at 721–22.

insufficient to find a heightened duty.[155] Without an express agreement, California courts have been hesitant and strict in assigning a heightened duty for insurance brokers because the insured is in the best position to assess his risks and request the appropriate coverage.

New York courts have taken a similar approach to California, except for the fact that they have an additional factor. New York's first and second factors are identical to California's first two factors.[156] New York's factor regarding an additional payment on top of the premium made to the broker is akin to California's requirement of an express agreement to be an expert advisor. New York's second factor which focuses on the insured asking a specific question and the broker in response providing expert advice is akin to California's "holding himself out as an expert" factor.[157]

New York courts, however, also consider the course of dealing and length of relationship to hold the broker to a heightened duty.[158] It is important to note that New York has never found a broker liable under a heightened duty.[159] New York courts thus far have only acknowledged that this circumstance has been considered by other jurisdictions and has merit.[160] New York courts rely on *Trotter v. State Farm*, wherein the South Carolina Court of Appeals held that doing business with the same company for eight years was insufficient to establish a heighted duty, barring any evidence that showed the broker should have known about the reliance.[161] The insured's reliance alone is not enough; the broker should be aware of the fact that the insured is relying on his expertise.[162] Even though New York courts have recognized this avenue to hold the broker to a greater duty, the fact that the court has never found a heightened duty in this situation demonstrates the court's reluctance to impose it.[163] Regardless, New York courts should no longer recognize this third circumstance and adhere to the two analyses in common with that of California. The California approach is the most appropriate because as the New York Court of Appeals has upheld, "[i]nsurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status," unless they have assumed such

155 Wallman v. Suddock, 134 Cal. Rptr. 3d 566, 585 (Ct. App. 2011).

156 *Compare* Voss v. Neth. Ins. Co., 8 N.E.3d 823, 828 (N.Y. 2014), *with* Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. West, Inc., 138 Cal. Rptr. 3d 294, 297–98 (Ct. App. 2012).

157 *Compare Voss*, 8 N.E.3d at 828, *with* Pac. Rim, 138 Cal. Rptr. 3d at 297–98.

158 *See e.g.*, *Voss*, 8 N.E.3d at 828.

159 Murphy v. Kuhn, 90 N.Y.2d 266, 269–71 (1997).

160 *Id.* at 975 (citing Trotter V. State Farm Mut. Auto. Ins. Co. 377 S.E.2d 343 (S.C. Ct. App. 1988)).

161 *Trotter*, 377 S.E.2d at 343.

162 *Id.*

163 *See e.g.*, 5 Awnings Plus, Inc. v. Moses Ins. Grp., Inc., 108 A.D.3d 1198 (N.Y. App. Div. 2013); *Murphy*, 90 N.Y.2d at 273.

responsibility expressly.[164]

The three additional factors in Florida shift the risk assessment from the insured to the broker in more circumstances than is appropriate, which is contrary to the overarching policy objectives regarding the role and duty of insurance brokers. It is important to note that in Florida, finding a special relationship is a question of fact for the jury to decide.[165] Thus, factors that the jury can consider should be limited. Florida's additional factors, when considered by a jury, allow the insured the opportunity to escape his responsibility of risk and opens the door for claims against brokers that are unjustified.

First, as an independent factor, the extent of the broker's involvement in the client's decision-making puts the broker between a rock and a hard place. Indeed, brokers should not be so clinical so that the insured simply asks for coverage and the broker procures it. Brokers should be build relationships with their insured clients, which naturally involves the broker in the client's decision-making. However, without the broker's express acquiescence to serve in an expert or advisory role, the client should be fully aware that he is in the best position to assess his own needs and make the final decision on the type of coverage he prefers. If the broker misrepresents or does not procure the coverage requested, he will be found liable under common law.[166]

Second, the broker's representations regarding the breadth of coverage should be more than casual remarks. Again, this factor is considered by a jury. Casual remarks such as "this policy is good" or "that is the best policy we could find," could be taken as an expert opinion when in fact, they are not. Again, the client should know whether the policy is adequate to cover his risks. If the broker provides extremely specific and expert-like opinions on the breadth of coverage, the insured should inquire whether this is intended to be expert advice. In general, a client seeking insurance should be clear about the type of coverage he needs in addition to the type of relationship he has with the broker.

Finally, information volunteered by the broker assumes the broker is an expert. If a broker volunteers information, the insured client may probe and inquire further, which may trigger a heightened duty. Volunteering information, without any follow up or further questioning by the insured, does not put the broker on notice that the client is relying on him as an expert, and allows the insured to substitute his own judgment and responsibility.

Ultimately, the three additional factors used by Florida courts are broad

164 *Murphy*, 90 N.Y.2d at 273.

165 Tiara Condo. Ass'n v. Marsh, USA, Inc., 991 F. Supp. 2d 1271, 1282 (S.D. Fla. 2014).

166 Id. at 1280.

and unqualified. Florida's approach provides the jury with broad discretion to find brokers liable, and causes the jury to assume the risk assessment role involuntarily. California and New York courts have fewer and more specific factors, which strictly adhere to leaving the financial and risk decision making with the insured, which is where it belongs.

VII. CONCLUSION

It is apparent through recent case law across the country that California's approach is the emerging trend.[167] For example, Louisiana, a state that is traditionally hostile towards applying a narrow broker duty, recently held that an insurance broker owes no fiduciary duty to his clients.[168] Assigning broad duties to insurance brokers opens the floodgates for insureds to sue their brokers after a loss has occurred.[169] Essentially, broad duties allow insureds to scapegoat their failures in assessing their own risks at the time they request coverage, either because they are not business-savvy or are trying to avoid paying high premiums for unlikely risks. When these risks manifest, assigning blame to a broker should not be an easy fix or a go-to alternative for requesting adequate insurance to begin with. Insureds are in the best position to assess their risks and request the appropriate coverage. Therefore, the national trend should continue towards the Californian approach, with courts across the nation rejecting Florida's overly broad factors.

167 Martin et al., *supra* note 139 at 24.

168 Isidore Newman Sch. v. J. Everett Eaves, Inc., 42 So. 3d 352; (La. 2013); *see also* Barreca v. Weiser, 53 So. 3d 481 (La. Ct. App. 2010).

169 *Isidore Newman Sch.*, 42 So. 3d at 357–58.