NEW JERSEY INSURANCE PRODUCER LIABILITY: ATTEMPTING TO DEFINE THE "SPECIAL RELATIONSHIP" THEORY OF LIABILITY

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INTRODUCTION

The general concepts underlying the special relationship theory of insurance producer[1] liability are relatively familiar in that they flow from common tort principles. The issue, however, is that the special relationship theory, while sharing common themes with general tort law, has proven difficult to define and even more difficult to apply. In large part, this difficulty stems from the fact that the special relationship theory requires a fact-specific analysis of the producer-client relationship,[2] but little is known as to which facts or occurrences will trigger liability. Adding to the confusion is New Jersey's lack of established precedent on the topic.

Several other courts throughout the county have, on the other hand, provided working definitions that aid us along. For instance, the New York Court of Appeals provided that liability may arise under a special relationship theory in "exceptional and particularized situations . . . in which insurance [producers], through their conduct or by express or implied contract with customers and clients, . . . assume or acquire duties in addition to those fixed at common law."[3] Similarly, the Third Circuit Court of Appeals has opined that liability will be imposed in situations where insurance producers undertake to provide certain

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1. The term *insurance producer* will, for the purposes of this Commentary, include insurance brokers and insurance agents.

2. Sobotor v. Prudential Prop. & Cas. Ins. Co., 491 A.2d 737, 739 (N.J. Super. Ct. App. Div. 1984) ("Whether or not an additional duty is assumed will depend upon the particular relationship between the parties. Each case must be decided on its own peculiar facts." (citing Hardt v. Brink, 192 F. Supp. 879, 881 (W.D. Wash. 1961))), *superseded on other grounds by statute*, N.J. STAT. ANN. § 17:28-1.9 (West 1993), *as recognized in* Pizzullo v. New Jersey Mfrs. Ins. Co., 952 A.2d 1077 (N.J. 2008).

3. Murphy v. Kuhn, 682 N.E.2d 972, 975 (N.Y. 1997).

extraordinary services or tasks for a client, courtesies which the producer is not required to provide; the client claims reliance on the producer to perform these extraordinary tasks; and the client is ultimately unsatisfied with or harmed by the producer's action or inaction as to the services provided.[4]

Based on those general principles and a review of the case law, it appears that a finding of liability under a special relationship theory requires: (1) some form of agreement, express or implied, between a producer and a client creating a professional relationship;[5] (2) the producer must agree, either expressly or impliedly, to provide the client with some extraordinary service; and (3) the producer's action or inaction of the extraordinary service must harm the client.[6] While New Jersey courts have not officially approved this analysis, these requirements appear to be the general requirements of any viable special relationship claim. With this working definition as the platform, this Commentary will explore how New Jersey is likely to apply this concept and how, based upon the limited precedent available, New Jersey will differentiate between services classified as either standard or "exceptional," the latter exposing a producer to liability.

As this Commentary will discuss, New Jersey has not articulated what types of services will be deemed exceptional, but it has provided insight as to which services it deems required by common law; in other words, we can, at the very least, begin to outline the boundaries of how New Jersey will likely apply the special relationship concept. As will be discussed more fully below, under the current body of jurisprudence, it appears that *any* service provided, above those required at common law, may be deemed exceptional, and a subsequent failure to adequately perform those exceptional tasks could expose the producer to liability,

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4. *See e.g.*, Glezerman v. Columbian Mut. Life Ins. Co., 944 F.2d 146, 150 (3d Cir. 1991).

5. This Commentary will not explore the first prong in great detail, simply due to the narrow scope of the topic discussed. Readers should be aware, however, that courts have yet to explore whether a potential client may present a viable special relationship claim against a producer. Based upon the test proposed, it would appear unlikely that such a claim would be entertained, but a certain factual presentation—specifically, where it is unclear whether an actual producer-client relationship has been formed; the potential client relies on some pre-relationship statement or action of the producer; and the producer fails to act in accord with the potential-clients expectations—may raise interesting issues for a court to decide.

6. This point deserves some additional qualification. At least one New Jersey Appellate Division case appears to directly stand for the proposition that liability will not be imposed under a special relationship theory where the broker acted exactly as instructed by the client. Duffy v. Certain Underwriters at Lloyd's of London, No. A-5797-11T4, 2014 WL 3557861, at *9 (N.J. Super. Ct. App. Div. July 21, 2014). As such, *Duffy* appears to support this assertion that some amount of deviation or other harm-causing act is required to find liability under a special relationship theory.

and until it becomes more clear how the courts will apply the concept, litigants—both producers and clients—should be aware of the concept's existence and proceed cautiously.

I. SPECIAL RELATIONSHIPS AND INSURANCE PRODUCER LIABILITY IN NEW JERSEY: BASELINE OBLIGATIONS VERSUS EXTRAORDINARY UNDERTAKINGS

New Jersey case law has not provided a working list of what types of services will be deemed extraordinary. Therefore, to understand how New Jersey will likely apply the special relationship theory's extraordinary undertaking versus baseline obligations distinction, it is important to understand the case law discussing the common law or baseline duties an insurance producer owes to a client. By establishing the baseline requirements, we can better identify where the line between required actions and "special" or extraordinary services should be drawn; it is at this line where special relationship jurisprudence begins.

A. The Baseline Obligations Producers Owe Clients

In New Jersey, it has long been held that producers must act competently and in good faith in carrying out their professional duties. More specifically, in *Bates v. Gambino,* the New Jersey Supreme Court concluded that insurance brokers must:

1. Have the degree of skill and knowledge requisite to competently complete the job;

2. Exercise good faith and reasonable skill, care and diligence in the execution of employment responsibilities;

3. Possess reasonable knowledge of available policies and terms of coverage in the area in which the insured seeks protection; and

4. Either procure the coverage necessary for the client's exposures or advise the client of his inability to do so.[7]

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7. Bates v. Gambino, 370 A.2d 10, 13–14 (N.J. 1977) (citing Rider v. Lynch, 201 A.2d 561, 566–67 (N.J. 1964)); *see* Brill v. Guardian Life Ins. Co. of Am., 666 A.2d 146, 157 (N.J. 1995) (requiring a broker to use reasonable skill and diligence in performing his professional obligations); *see also* Christopher P. Leise, *Understanding an Insurance Brokers Duty of Care*, WHITE & WILLIAMS LLP (January 10, 2012), http://www.whiteandwilliams.com/resources-alerts-Understanding-an-Insurance-Brokers-Duty-of-Care.html (citing *Rider*, 201 A.2d at 566–67).

The requirements provided in *Bates*, although articulate and clear, are difficult to reflexively apply; they require a factual analysis of the broker's actions in determining compliance. What is clear, however, is that a producer will be found liable to a client if they fail to comply with the enumerated factors. Such non-compliance has been found where the producer: 1. failed to procure the policy promised; 2. assured that there is coverage when there was not; or 3. procured a deficient policy.[8] That list is not exhaustive; broker liability may be established under other circumstances, the specifics of which remain factually dependent and will likely be decided on a case-by-case basis.[9]

B. Special Relationship: Something More

The first glimpse of the special relationship theory in New Jersey appears not in New Jersey state jurisprudence, but in an interpretation of New Jersey law by the Third Circuit in *Glezerman v. Columbian Mutual Life Insurance Co.*[10] In *Glezerman*, the Third Circuit focused first on the baseline obligations articulated in *Bates*, reiterating the rule that producers who undertake efforts on behalf of clients will be held liable for failing to act properly in discharging those obligations.[11] Having established the baseline, the *Glezerman* court next focused on whether the broker actually undertook or agreed to undertake extraordinary obligations on the client's behalf.[12] In conducting this analysis, the Third Circuit focused in part on the history of the parties' relationship, including the length and substance of the relationship and their prior conduct.[13] Specifically, the court indicated, "[t]he prior conduct of and length of relationship between the parties can create or negate the existence and scope of the duty owed to the insured."[14] As the Third Circuit articulated in *Glezerman*, in order to sufficiently plead a special relationship claim, the client must show that the producer undertook extraordinary obligations.[15] Put differently, "the client must establish 'something more' than a [normal producer]-client relationship in order to impose a heightened standard of care on a broker."[16] The

8. Glezerman v. Columbian Mut. Life Ins. Co., 944 F.2d 146, 150 (3d Cir. 1991); Aden v. Fortsh, 776 A.2d 792, 801 (N.J. 2001) (holding that "an insurance broker who agrees to procure a specific insurance policy for another but fails to do so may be liable for damages resulting from such negligence").

9. *Glezerman*, 944 F.2d at 150 (citing *Bates*, 370 A.2d at 14 n.2).

10. *Id.* at 150–51.

11. *Id.* at 150.

12. *See id.*

13. *See id.*

14. *Id.*

15. *Id.* at 151.

16. *Id.* (citing Avery v. Arthur E. Armitage Agency, 576 A.2d 907, 910–11 (N.J. App.

New Jersey Appellate Division weighed in on the subject, albeit briefly, in *Triarsi v. BSC Group Services, LLC*,[17] articulating that the root of a special relationship claim is more reliant on proof that additional, extraordinary obligations were undertaken rather than on whether the broker breached a duty of carrying out those obligations. Specifically, the Appellate Division determined:

> the basis of the claim is that the insurance [producer] 'assume[d] duties in addition to those normally associated with the [producer]-insured relationship' by conduct that invited plaintiff's detrimental reliance. This claim does 'not require proof of a deviation from a professional standard of care,' but instead depends on proof of the parties' conduct.[18]

Based on *Triarsi* and *Glezerman*, it appears that the crux of a special relationship claim is proof that extraordinary obligations were undertaken; this analysis, as guided by the concerns of both the Appellate Division and the Third Circuit, must focus then on the conduct of the parties—a fact based inquiry.[19]

C. Determining the Existence of Something More: What Facts are Important?

With an understanding that the heart of the inquiry is whether the producer undertook, or agreed to undertake, extraordinary obligations, and with the further understanding that this must be a fact-based, relationship-specific inquiry, we must next determine the specific facts that courts are likely to deem important in determining whether extraordinary duties were assumed. The first step returns us to *Bates* and the baseline requirements of the normal producer-insured relationship; all obligations required to comply with the basic requirements are likely to be considered just that, basic, and not special or extraordinary. For the purposes of the special relationship analysis, this is our floor.[20] Next, we turn to the limited body of case law

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Div. 1990), *superseded on other grounds by statute*, N.J. STAT. ANN. § 17:28-1.9 (West 1993), *as recognized in* Pizzullo v. New Jersey Mfrs. Ins. Co., 952 A.2d 1077 (N.J. 2008)).

17. 27 A.3d 202 (N.J. Super. Ct. App. Div. 2011).

18. *Id.* at 209–210 (citations omitted).

19. Sobotor v. Prudential Prop. & Cas. Ins. Co., 491 A.2d 737, 739 (N.J. App. Div. 1984) ("Whether or not an additional duty is assumed will depend upon the particular relationship between the parties. Each case must be decided on its own peculiar facts." (citing Hardt v. Brink, 192 F.Supp. 879, 881 (W.D. Wash.1961))) *superseded on other grounds by statute*, N.J. STAT. ANN. § 17:28-1.9 (West 1993) *as recognized in* Pizzullo v. New Jersey Mfrs. Ins. Co., 952 A.2d 1077 (N.J. 2008).

20. This point must be qualified however. In a 2014 unpublished Appellate Division

discussing special relationships within New Jersey. The few courts that have addressed the issue focus, at least in part, on the following facts surrounding the producer-client relationship:

1. The length of the broker-client relationship;[21]
2. The prior conduct of the parties;[22] and
3. The existence of any contractual agreement—either express or implied—expanding or limiting the scope of the relationship.[23]

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case, the court briefly discussed special relationships and found the existence of a special relationship when: a client requested the producer procure a surety bond; the producer agreed to locate said product or locate an individual who could procure it; and the client ended up disappointed in the product procured. Harrington v. Hartan Brokerage, Inc., No. A-5546-11T2, 2014 WL 2957756, at *2–4 (N.J. Super. Ct. App. Div. July 2, 2014) (citations omitted). While the court used the term special relationship in rendering decision, a review of the case indicates that the court's use of the appears general in nature, and not an invocation of the special relationship theory of insurance producer liability. The court did not address the special relationship theory in any detail. The court appeared to find general liability arising out of the relationship between the parties in a situation where the broker violated the baseline obligations owed under *Bates* and *Rider*. The Appellate Division's entire discussion of the issue clarifies this point:

> A plaintiff can establish a prima facie case of negligence against a broker if: (1) the broker neglects to procure the insurance; (2) the broker secures a policy that is either void or materially deficient; or (3) the policy does not provide the coverage the broker undertook to supply.
>
> Generally, "a duty arises when there is a special relationship between the insurance agent and the client which indicates reliance by the client on the agent." In *Sobotor*, the court found that by asking for the "best available" insurance, the insured put the agent on notice that he was relying on the agent's expertise to obtain the desired coverage. Here, as in *Sobotor*, the duty arose based on the "special relationship" between plaintiff and defendant, namely the Sikora defendants' agreement to undertake the duty of finding a company to issue the surety bond, and Harrington's reliance on the Sikora defendants' expertise to do so.

Id. at *7–8 (quoting Sobotor v. Prudential Prop. & Cas. Ins. Co., 491 A.2d 737, 741, 738–40 (N.J. App. Div. 1984)) (citing President v. Jenkins, 853 A.2d 247, 257–58; (NJ 2004); Rider v. Lynch 201 A.2d 561, 566–67, 569–70 (NJ 1964) (stating "duty encompasses claims alleging that the agent or broker obtained insurance that failed to meet the insured's needs")).

To find a special relationship for simply failing to procure the requested coverage appears unnecessary, as *Bates*, *Brill*, and *Rider* have long held this to be a baseline requirement. Therefore, notwithstanding the Appellate Division's invocation of the term special relationship, the author respectfully suggests that special relationship liability must begin where the baseline obligations end in order to avoid unnecessary overlap in jurisprudence.

21. *Glezerman*, 944 F.2d at 150.

22. *Id.*; Bruni v. Prudential Ins. Co. of Am., 241 A.2d 449 (N.J. 1968) (citing *id.* at 457–62 (Carton, J., dissenting)).

As may be apparent, these factors also require a fact-based inquiry, and little guidance is provided on how these factors are to be analyzed. However, it appears that this list should be viewed as a non-exhaustive set of inquires that courts will use in order to glean a clearer understanding of the general producer-client relationship. To explore this concept further, we must return to the case law, where we find a set of common threads that appear to tie all successful special relationship claims together.

i. Acceptance, Either Express or Implicit, of Extraordinary Responsibilities Likely Suffices to Prove the Existence of Special Relationship Obligations

The collective body of case law indicates that where a producer offers to undertake extraordinary action on a client's behalf, a special relationship is created. An example of conduct found to create a special relationship may be found in *Glezerman*, where, as part of the producer-client relationship, the producer informed the client when annual premiums were due.[24] Additionally, in some instances, the premiums were paid directly to the producer for remittance to the insurer.[25] In other instances, the producer would instruct the client on which financial accounts to use to pay the premium.[26] The producer and insured also established a procedure whereby the producer would alert the client when the grace period drew near so that the insured could pay the premium at the very last moment—presumably so that investments with the money allotted for premium payment would be as prosperous as possible.[27] The Third Circuit concluded that the producer's course of conduct—specifically, agreeing to and voluntarily informing the client of premium due dates and advising on payment methods and subsequently failing to execute those duties—presented enough evidence of a special relationship to submit the question to the jury.[28] In bringing suit against the broker, the insured in *Glezerman* alleged that the producer failed to inform her that the policy had lapsed, thus preventing the insured from making a special late-payment that would have resulted in reinstatement of the policy.[29] In reversing a district court's grant of summary judgment in favor of the producer, the Third Circuit held that the facts presented, if true,

23. *Sobotor*, 491 A.2d at 739–40.
24. *Glezerman*, 944 F.2d at 147.
25. *Id.* at 148.
26. *Id.*
27. *Id.*
28. *Id.* at 155.
29. *Id.* at 149.

established the "something more" necessary to trigger the special relationship theory.[30] More specifically, the court held that because

> [t]he district court erred when it concluded that "based on public policy considerations, we find that even [if the producer] had developed a custom or practice of reminding plaintiff that the grace period was about to expire, he had no legal duty to provide such notice." Indeed, it is just such a custom or practice that would give rise to a legal duty to provide notice of the end of the grace period.[31]

Glezerman, therefore, puts producers on notice that advisory-type actions could be considered extraordinary, thereby exposing them to potential liability. For producers, this is a problem, as many implicitly (if not explicitly) advise clients on coverage limits, policy scope, suggested coverages, and other coverage-related matters. Under current precedent, it remains unclear whether such activity—if unsatisfactorily performed—creates a potential for special relationship liability.

ii. Lack of Agreement or Voluntary Undertaking of Extraordinary Tasks Likely Indicates No Special Relationship Exists

In distinguishing *Glezerman*, the U.S. District Court for the District of New Jersey in *Guardian Life Insurance Co. of America v. Goduti-Moore*, concluded that no special relationship existed where the defendant "paid the premiums directly to [the insurance company] and did not rely on [the producer] to tell him when to make the payments."[32] Additionally, the court found important the fact that the producer in *Glezerman* informed clients about the pending expiration of a grace period for a premium due on an annual basis, while in contrast, the defendant in *Guardian* paid his premiums on a monthly basis through automatic withdrawal.[33] Ultimately, the court concluded that "it would be unduly onerous for brokers to warn every client who misses a monthly premium due date that the client must pay the amount by the end of the grace period or face forfeiture."[34] Likewise, in *Wang v. Allstate Insurance Co.*, the New Jersey Supreme Court found no evidence of a special relationship where "the policies had been routinely renewed, probably without any contact between the parties other than

30. *Id.* at 150.
31. *Id.* at 155.
32. 36 F. Supp. 2d 657, 665-66 (D.N.J. 1999), *rev'd on other grounds*, 229 F.3d 212 (3d Cir. 2000).
33. *Id.*
34. *Id.* at 665.

the issuance and receipt of the new policy and the issuance and payment of an invoice."[35]

CONCLUSION

Based on *Glezerman* and *Harrington*, it appears clear that when a producer undertakes extraordinary obligations and subsequently fails to adequately execute, special relationship liability may be imposed. Alternatively, where the producer does not affirmatively undertake extraordinary obligations, as was the case in *Guardian Life Insurance* and *Wang*, it appears that insureds will have difficulty proving the existence of a special relationship. Ultimately, the existence of an affirmative, extraordinary undertaking appears to be the heart of establishing a viable special relationship claim. What remains unclear is what facts will lead New Jersey courts to conclude that a special relationship exists. While *Glezerman* and *Harrington* provide examples of special relationship-type behavior, producers regularly provide clients with courtesies superior to those required by *Bates* as part of their normal business practice. Ultimately, producers are in the business of selling insurance. As part of marketing their business, producers often advise clients of renewal dates, provide updates regarding newly available products, present viable options for coverage, and market available services. For larger clients specifically, it is common practice for producers to market alternative policies and coverage packages; under the current posture of New Jersey special relationship jurisprudence, it appears that all of these routine business-type actions could be viewed by courts as establishing a special relationship. Due to the lack of clarity regarding what acts will prompt a court to impose liability under the special relationship theory, insurance producers must be mindful of the services they provide to clients. Where a producer provides extraordinary services, even if in an attempt to retain or acquire business, they would be wise to act in good faith and with the utmost diligence.

35. 592 A.2d 527, 534–35 (N.J. 1991).