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Ruling helps define scope of insurance brokers' duties

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California courts have been struggling for years on the breadth of fiduciary duties owed by an insurance broker to insureds. The 3rd District Court of Appeal's recent decision of *Mark Tanner Construction Inc. v. HUB International Insurance Services Inc.*, 2014 DJDAR 2873 (March 10, 2014), will further limit the duties owed by insurance brokers.

At issue in *Hub International* is a failed self-insured workers compensation program for contractors, Contractors Access Program of California (CAP). Compensation Risk Managers of California LLC (CRM) administered CAP, and Diversified Risk Insurance

Brokers, later acquired by defendant and respondent HUB International Insurance Services Inc. (HUB), marketed and sold CAP to plaintiffs and appellants Mark Tanner Construction Inc. and Mt. Lincoln Construction Inc.

When CAP failed, the plaintiffs were exposed to considerable liability, and they subsequently brought suit against HUB for professional negligence and fraud. HUB filed for summary judgment, and while the motion was pending, the plaintiffs obtained in the course of discovery a written marketing agreement between CRM and Diversified.

The plaintiffs thereafter sought leave to file a second amended complaint, and a continuance of the hearing on the motion for summary judgment. They argued that the marketing agreement showed that Diversified (and therefore HUB) was actually in a joint venture with CRM, and that Diversified was acting as a broker for CAP instead of plaintiffs. The trial court denied both motions, and granted summary judgment for HUB. The Court of Appeal affirmed.

The most interesting of the appellate court's rulings were: (1) HUB owed no general duty to ascertain the financial condition of CAP, a self-insured program, just as insurance brokers owe no general duty to insureds to investigate the financial condition of insurers, and (2) "other than when handling an insured's money, a [insurance] broker's duty - whether or not phrased as a fiduciary duty - is no greater than the duty to use reasonable care and diligence in procuring insurance."

HUB International arguably provides a much clearer rule as to whether insurance brokers owe fiduciary duties to insureds, limiting the fiduciary duty only to the handling of

insureds' monies.

The court admitted that "it is unclear whether a fiduciary relationship exists between an insurance broker and an insured" (citing to *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates Inc.*, 115 Cal. App. 4th 1145, 1156 (2004), a 2nd District Court of Appeal decision). However, the court also highlighted the *Hydro-Mill* court's reasoning that since "an insurer is not a fiduciary, then arguably, neither is a broker."

Notably, other courts that have acknowledged this general sentiment amongst California courts - that insurance brokers are typically not fiduciaries to insureds - have kept their holdings ambiguous on this point. See, e.g., *Motorist Commercial Mutual Ins. Co. v. Soltis*, 2013 WL 6887968, p. 4 (E.D. Cal. Dec. 31, 2013) (noting that "this Court joins numerous others in refusing to expand the doctrine of fiduciary duty to include insurance brokers," but "[w]hether a fiduciary relationship exists is a question of fact ... [i]n the instant case, the Complaint is devoid of facts that would support the formation of a fiduciary relationship.").

Even secondary authorities recognize this uncertainty. See, e.g., Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2012), at Section 11:166. Thus, claimants still routinely allege that insurance brokers owe them fiduciary duties and plead facts that they contend create the requisite fiduciary relationship.

In contrast, *HUB International* arguably provides a much clearer rule as to whether insurance brokers owe fiduciary duties to insureds, limiting the fiduciary duty only to the handling of insureds' monies. The decision further applies this rule to the insurance broker's handling of self-insured programs, not just insurance policies sold by insurance carriers.

HUB International will likely be a landmark case for the defense bar favoring insurance brokers. Not only does *HUB International* set forth a bright-line rule for the scope of duties owed by insurance brokers, it also expands the rule to apply to self-insured programs, which are becoming increasingly popular.

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