*New York County Clerk's Index No. 601562/08*

# Court of Appeals

STATE OF NEW YORK

AMERICAN BUILDING SUPPLY CORP.,

*Plaintiff-Appellant,*

*against*

PETROCELLI GROUP, INC.,

*Defendant-Respondent,*

*against*

POLLAK ASSOCIATES,

*Defendant.*

## BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*


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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

PAGE(S)

CASES

## CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

## PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

The purposes of the Defense Association of New York, Inc. are to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated cases and whose representation in such cases is primarily for the defense and also those whose practice consists in representing insurance companies, self-insured firms and corporate defendants; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings related to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standard of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools and

emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just personal injury claim and to present effective resistance to every non-meritorious or inflated claim; to advance the equitable and expeditious handling of disputes arising under all forms of insurance and surety contracts; to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This is an action to recover damages based on the purported negligence of an insurance broker to procure adequate and/or proper insurance coverage for an insured. Here, the broker was defendant-respondent Petrocelli Group, Inc. (hereinafter "Petrocelli"). It is alleged that Petrocelli failed to procure the appropriate coverage for plaintiff-appellant American Building Supply (hereinafter "American Building"). However, it is undisputed that American Building received the policy at issue, had an opportunity to review it, and, nonetheless

requested no changes to the policy. American Building's failure to read the policy it received is a complete bar to any claim for negligent procurement against its provider.

Moreover, the record is devoid of evidence of fraud or other wrongful conduct. Thus, the presumption that the policy holder, here American Building, read and understood the policy, precludes its recovery in this action.

There are alternate ground for affirmance in this case: there is no evidence that the broker was a fiduciary and it cannot be said that American Building's alleged request that it needed "general liability for the employees . . . if anybody was to trip and fall and get injured in any way" was a specific request for coverage. American Building's failure to read the policy it received is a complete bar to any claim for negligent procurement against its provider. The order appealed from should be affirmed.

## STATEMENT OF FACTS

### a. Nature Of Action

Plaintiff American Building Supply Corp. (hereinafter "American Building") is in the business of selling and furnishing construction building materials to general contractors (R 67)[1]. Defendants, Petrocelli Group, Inc. ("Petrocelli") and Pollak Associates ("Pollak") are insurance brokers (R 97, 127). American Building alleges that Petrocelli and Pollak were negligent and breached a contract because they failed to procure insurance coverage specifically requested by American Building (R 36, 60, 61)[2].

### b. American Building Did Not Specifically Request General Liability Insurance Which Would Cover Claims Against It By Its Employees For Injuries Sustained By Them During Employment

During 2002 to 2007, American Building was located at 150 Bruckner Boulevard, Bronx, New York. It sub-leased the building from non-party DRK, LLC (R 113, 394). Pursuant to the sub-lease, American Building was required to maintain certain types of insurance (R 69, 352-353).

From 2003 to 2004, Pollak was the insurance broker for American Building (R 98-99). For the policy period of June 14, 2004 to June 14, 2005, Pollak procured a general liability policy

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1 Numbers in parenthesis following "R" refer to pages of the Record on Appeal.

2 The action and all cross-claims against Pollak were discontinued with prejudice (R 110).

for American Building with Burlington Insurance Company ("Burlington") (R 103).

In 2004, Peter Lech ("Lech"), General Manager of American Building, assumed responsibility for procuring insurance for American Building. Howard Khan ("Khan"), the President of American Building, was previously responsible for procuring insurance for the company (R 69, 120). According to Lech, because Pollak was unable to secure the insurance coverage required by the sub-lease for the building at 150 Bruckner Boulevard, Bronx, New York, Lech contacted Richard Longueria, Vice President of Petrocelli, and made Petrocelli American Building's "broker of record" (R 70).

Longueria spoke with Lech in October 2004 (R 128). Lech told Longueria that American Building was having some problems with their present insurance and insurance broker (R 129, 132). Lech asked Longueria for Petrocelli to become American Building's insurance broker. According to Longueria, Lech never explained to Longueria precisely what was needed for American Building, nor did American Building specifically request any particular insurance terms or conditions (R 129, 131). American Building asked for a general liability policy covering the location and operations of a building materials dealer (R 143).

After Petrocelli became American Building's broker, Lech informed Petrocelli of the type of operations performed at the

building and that American Building needed certain limits of liability and required general liability for its own employees and customers (R 71, 73). Lech did not recall whether he made any requests to change or modify the terms of the Burlington policy in effect when Petrocelli became American Building's broker (R 75). Lech testified at his deposition as follows:

> Q. Other than sending him the Burlington policy and the lease requirements, did you send him anything else?
>
> A. I don't believe so.
>
> Q. At that time, did you have any conversations with Mr. Longueira or anyone at Petrocelli with regards to the type of insurance that you wanted for DRK or American Building Supply?
>
> A. I told them what type of operations were at the locations. The Bronx specifically, we had basically only workers in there, as far as there was no customers as such. Wherein, the Manhattan location, there was, you know, more retail. The Bronx location only had drivers, warehouse men and laborers.

(R 71).

> Q. What, if anything, was discussed with regards to insurance for American Building Supply and/or DRK at that meeting?
>
> A. What we needed for insurance and what the operations were at each location.
>
> Q. Specifically, what did you say you needed for insurance?
>
> A. Certain limits of liability for the IDA, they needed general liability for the employees and for the, you know, customers

in Manhattan if anybody was to trip and fall or get injured in any way?

Q. Anything else that was discussed?

A. Not that I recall.

(R 72-73).

Q. In your initial meeting with Mr. Longueria, was there any requests by either you or Mr. Khan that any of the insurance that had been procured through Pollack Associates be changed or modified in any way?

A. I don't recall.

(R 75).

When the Burlington policy procured by Pollak was to expire in June of 2005, Lech asked Petrocelli to see if he could procure another policy with lower premiums and direct billing (R 77-78). Lech did not ask Petrocelli to make any changes to the terms and conditions when procuring the renewal policy (R 79). Lech testified at his deposition as follows:

Q. When the first Burlington policy was up for renewal in approximately June of 2005, did you have any discussions with Mr. Longueira about the renewal policy?

A. Yes. I stated before that I asked him to see if he could remark it and get it on the direct bill.

Q. Was he able to get it on direct bill?

A. I don't recall. I don't believe so.

Q. Did you ask him to change any of the terms or conditions that were in the Burlington policy for 2004 to 2005 for the next

upcoming policy year?

A. I wasn't sure of any conditions in the policy. I rely on the broker to, you know, issue me a policy that is appropriate for my operations.

Q. Did you ask him to make any changes in the policy, the 2004 to 2005 policy, for the next policy period?

A. Not that I'm aware of.

(R 79).

Q Did you have any discussions with Mr. Longueira about the application at the time you faxed it to him?

A. No. I just, you know, I explained my operations to him again, and I wanted to make sure that I was covered for, you know, whatever went on. I mean, it says, you know, "building materials dealer, both locations, owner or occupant of location number one," which is Bruckner Boulevard, so that would be DRK. He knew what my operations here. When I was looking through the other pages, you know, I'm a building materials dealer.

(R 79).

After Petrocelli became American Building's broker, American Building's President Khan attended a meeting between Longueria and Lech. At the meeting, Khan informed Longueria that American Building needed liability and umbrella insurance coverage and requested that Petrocelli ". . . make sure everyone's covered" (R 122). He testified at his deposition as follows:

Q. When you say you made it clear you needed coverage, what specifically did you say?

A. I don't recall the exact words. I basically said I need liability, umbrella, make sure everybody's covered, things you expect your broker to do.

(R 122).

**c. American Building Did Not Read The Burlington Renewal Insurance Policy**

Petrocelli encountered difficulty procuring an insurance policy for American Building because of American Building's adverse claim history, payment problems, and percentage of lumber in their overall sales. Burlington was the only insurance carrier willing to insure American Building (R 135). Therefore, Petrocelli renewed the Burlington policy for the period of June 14, 2005 through June 14, 2006. The 2005-2006 policy contained the same terms and conditions as the 2004-2005 Burlington insurance policy obtained by Pollack (R 21, 175-284, 303-309).

After procuring the Burlington renewal policy, Longueira sent a copy of the policy along with a cover letter to American Building, advising American Building to read the policy carefully because any future loss would be subject to the terms, conditions, exclusions and limitations contained within the policy (R 138-139, 302). After sending the policy to American Building, Longueira did not have any discussions with anyone at American Building about its contents and American Building never

requested that Petrocelli amend the insurance policy (R 141, 144).

Lech acknowledged receiving a copy of the renewal policy. However, he did not read the policy. He also never contacted Petrocelli to request that anything be changed in the renewal policy and did not have any conversations with Petrocelli regarding the terms, conditions, and limits of the renewal policy (R 81-82).

Khan also acknowledged that American Building received a copy of the renewal policy. He did not contact Petrocelli to discuss any of the terms or conditions of the policy (R 122).

**d. Burlington's Disclaimer Of Coverage**

On October 18, 2005, Gregorio Lucero ("Lucero"), an American Building employee, was injured at the building located at 150 Bruckner Boulevard, Bronx, New York, while in the course of his employment (R 311, 484, 485). Lucero instituted a bodily injury action against, among others, American Building in the Supreme Court, Bronx County of Bronx ("Lucero action") (R 433). Burlington disclaimed insurance coverage as to American Building in connection with the Lucero action based upon a cross-liability exclusion contained in the insurance policy (R 285-301). The exclusion reads, in pertinent part, as follows:

> [t]his insurance does not apply to any actual or alleged "bodily injury", "property damage", personal injury" or advertising injury" to:

3. A present, former, future, or prospective partner, officer, director, stockholder or employee of any insured

(R 221).

**e. Petrocelli's Motion For Summary Judgment**

Petrocelli moved for summary judgment, contending that the complaint should be dismissed on the following grounds:

1. Petrocelli fulfilled its limited duty to procure the insurance coverage requested by American Building;

2. American Building is bound by the express terms and conditions of the Burlington insurance policy; and

3. the action is premature, not ripe for judicial adjudication, and failed to state a viable cause of action (R 14-31).

Petrocelli argued that the evidence demonstrated that American Building did not make a specific request for insurance coverage that would provide coverage for claims such as the Lucero claim. Further, it contended that Petrocelli sent American Building a copy of the policy, American Building had a duty to read the policy, and American Building is bound by the policy's terms and conditions (R 28, 29).

American Building opposed the motion for summary judgment on several grounds. The principal ground was that American Building made a specific request to Petrocelli for general liability insurance which would cover American Building for claims by employees such as Lucero's claim (R 310-326).

The Supreme Court, New York County (Rakower, J.), denied Petrocelli's motion for summary judgment (R 7-12). The trial court found that Lech's testimony that he informed Petrocelli that American Building needed, among other things, "general liability for the employees . . . if anyone was to trip and fall and get injured in any way," created an issue of fact concerning whether American Building made a specific request for coverage in the event of bodily injury to an American Building employee in the course of their employment. Further, the trial court held that American Building's failure to review the Burlington insurance policy did not alter its conclusion (R 12).

**f. The Appellate Division's Order**

The Appellate Division, First Department, reversed the trial court's order and granted Petrocelli summary judgment. The Appellate Division found that issues of fact exist with respect to whether the information provided by plaintiff--a description of its business operations, a copy of the existing policy and its lease, and an apparent specific request for general liability coverage for its employees--should have alerted Petrocelli that the general liability policy obtained may not have provided the coverage requested by American Building. However, the court held that the presumption that a policy holder read and understood a policy of insurance duly issued to them precludes recovery in the action. It reasoned that although the presumption may be overcome

if there is wrongful conduct on the part of the broker, such as when the broker affirmatively misrepresents or fails to correct a misimpression regarding coverage, there is no evidence of such an affirmative misrepresentation here.

## POINT I

**IN THE ABSENCE OF FRAUD OR OTHER WRONGFUL CONDUCT, AN INSURED'S FAILURE TO READ THE POLICY IT RECEIVES IS A COMPLETE BAR TO ANY CLAIM FOR NEGLIGENT PROCUREMENT AGAINST ITS INSURANCE PRODUCER**

American Building's case rests upon a basic premise: it should be permitted to avoid the adverse consequences of applying the subject policy's terms because it failed to read the policy. However, in the absence of evidence of fraud or wrongful conduct on the part of the producer procuring the policy, the insured is presumed to know the contents of the policy and to have assented to those terms. Since the principle that an insured's failure to read the terms of its insurance policy does not vitiate the terms of the policy is well-settled in New York, the foundation of American Building's case is flawed. Thus, since American Building conceded that it failed to read the policy at issue, and the record is devoid of evidence of fraud or other wrongful conduct the Appellate Division's decision should be affirmed.

New York courts have long concluded that a party cannot seek to avoid the application of a contract's terms by arguing that it had not read the contract. Blitman Const. Corp. v. Insurance Co. of North America, 66 N.Y.2d 820, 823, 498 N.Y.S.2d 349, 350 (1985); In re: Level Exp. Corp., 305 N.Y. 82, 87-88 (1953); see also Florence v. Merchants Cent. Alarm Co., 51 N.Y.2d 793, 795,

433 N.Y.S.2d 91, 92 (1980) (holding that "the law's teaching since Pimpinello v. Swift & Co., (253 N.Y. 159) has been that if they could read it, the fact that they did not is immaterial, absent evidence of fraud.")(emphasis added). That the contract is an insurance policy does not alter that analysis. Metzger v. Aetna Ins. Co., 227 N.Y. 411, 416 (1920). As this Court held in Metzger, "[i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them, and there can be no evidence for the jury as to his understanding of its terms." Id. at 416.

The lower courts have been nearly unanimous in application of this principle. Motor Parkway Enter., Inc. v. Loyd Keith Freidlander Partners, Ltd., 89 A.D.3d 1069, 1070, 933 N.Y.S.2d 586, 586 (2d Dep't 2011) (affirming dismissal of a claim for negligent procurement of an insurance policy); Portnoy v. Allstate Indemn. Co., 82 A.D.3d 1196, 1198, 921 N.Y.S.2d 98 (2d Dep't 2011); (affirming dismissal of a claim for negligent procurement of coverage "even though the coverage was not

entirely in accord with what the plaintiff had requested"); Maple House Inc. v. Alfred F. Cypes & Co., Inc., 80 A.D.3d 672, 914 N.Y.S.2d 912 (2d Dep't 2011) (holding the motion court properly dismissed a claim for negligent procurement of an insurance policy); Stone v. Rullo Agency, Inc., 40 A.D.3d 1185, 1186, 834 N.Y.S.588 (3d Dep't 2007) (affirming dismissal of a claim for negligent procurement of an insurance policy that failed to cover plaintiff's artwork "even if, as the Supreme Court found, defendant may have had reason to know that plaintiff's possessions included such items."); Madhvani v. Sheehan, 234 AD2d 652, 654-655, 650 N.Y.S.2d 490 (3d Dep't 1996) (affirming dismissal of a claim for negligent procurement where the policy issued did not provide sufficient coverage for one of the plaintiff's vehicles); L.C.E.L. Collectibles, Inc. v. American Ins. Co., 228 AD2d 196, 197, 643 N.Y.S.2d (1st Dep't 2006) (affirming dismissal of a claim for failure to procure coverage insuring against flood damage). See, also Chase's Cigar Store, Inc. v. Stam Agency, 281 A.D.2d 911, 722 N.Y.S.2d 320 (4th Dep't 2001).

For example, in Madhvani, the plaintiff had previously insured two vehicles for actual cash values of no more than $25,000. 234 A.D.2d at 653. He later purchased a vehicle having a value of more than $47,000, and sought coverage for that vehicle as well. Id. Although the bill of sale for the new

vehicle was provided to the producer, the limits of coverage were never increased above $25,000. Id. The vehicle was stolen several months later and after learning that he did not have coverage for the full value of the vehicle, the plaintiff sued. Id. In holding that that plaintiff had no claim against the producer for negligent procurement of insurance, the Third Department noted that the plaintiff had the declarations page and policy limits information in his possession for several months prior to the loss and could have reviewed them and requested additional limits. Id. at 655. Because he did not do so, the Third Department held plaintiff's claim against his broker was unsustainable. Id.

Additionally, in L.C.E.L. Collectibles, Inc., supra the insured sought to recover against, inter alia, its producer when it suffered a flood loss was that was not covered by a policy. 228 A.D.2d at 196. The First Department held that insured's failure to read the policy, which expressly excluded losses occasioned by flood, was one reason why its claim was untenable. Id.

Similarly, in Catskill Mountain Mechanical, Inc. v. Marshall and Sterling Upstate, Inc., 51 A.D.3d 1182, 857 N.Y.S.2d 353 (3rd Dep't 2008), the Third Department reversed the Supreme Court's decision denying the producer's motion for summary judgment where the policy it procured failed to provide coverage for one of the

insured's job responsibilities. The insured initially obtained insurance for its sheet metal operations. Id. at 1183. After approximately five years, it added "cleaning out" of ships, a process involving vacuuming out cement from ships, to its services. Id. The insured claimed it advised the producer and was assured coverage existed; the producer denied having any knowledge of the new operations. Id. The policy was amended, however, to include coverage for workers' compensation for operations near water. Id. The insured admitted having failed to read the endorsement. Id. at 1184.

Sometime thereafter, a worker involving in the cleaning out process was injured. Id. When coverage was denied, the insured sued, alleging that the broker negligently failed to procure the proper insurance coverage. Id. In holding that the supreme court had incorrectly denied the producer's motion for summary judgment, the Appellate Division relied upon the well-settled principle that an insured is conclusively presumed to know the contents of the policy it received, regardless of whether it had actually read the policy. Id. at 1184. In light of that precedent, the plaintiff's case, the court held, should have been dismissed. Id.

Likewise, in Sea Trade Maritime Corporation v. Hellenic Mutual War Risks Association (Bermuda), Ltd., 7 A.D.3d 289, 776 N.Y.S.2d 255 (1st Dep't 2004) the insured sought to avoid

application of an arbitration clause in its war risks policy that applied to not only the carrier but also the producers. In upholding a stay imposed by the motion court, the First Department held that the insured's failure to read the policy, which had been renewed five times, did not provide grounds to avoid compliance with its terms. Id.

In the matter at bar, American Building concedes that it received the policy at issue and failed to read it. Having failed to read the policy, any opportunity to request the coverage it now argues should have existed was foregone. American Building, as the First Department correctly recognized, cannot seek to recover from its producer when it failed to read the policy provided to it well before the date of loss.

Moreover, American Building's reliance on the First Department's decision Baseball Office of the Commissioner v. Marsh & McLennan, Inc., 295 A.D.2d 73, 742 N.Y.S.2d 40 (1st Dep't 2002) is misplaced. Baseball Office of the Commissioner is more akin to those cases in which a producer has affirmatively misled an insured as to the coverage provided, and the Appellate Division herein aptly distinguished that case on the grounds. In Baseball, at issue was coverage for personal injury liability, which would include coverage for claims of defamation. Such coverage was in place for years before the incident in question. However, shortly before the occurrence, the insurer notified the

producer that it was deleting such coverage. Nevertheless, the producer never advised the insured of the deletion and, in fact, stated that "[w]e have checked the policies for accuracy and found everything to be in order." 295 A.D.2d at 75. No such circumstances exist in the cast at bar.

Similarly, in Arthur Glick Truck Sales, Inv. v. Spadaccia Ryan Haas, Inc., 290 A.D.2d 780, 782, 736 N.Y.S.2d 491, (3rd Dep't 2002) the Appellate Division held that a producer's potentially misleading conduct as to the policy limits removed the matter from one covered by the general rule that receipt of an insurance policy constitutes "'conclusive, presumptive knowledge" of the terms of the policy. The producer knew that an inaccurate binder had been issued and that the policy was ultimately issued with limits different from those set forth in the binder. Id. at 781. Under those circumstances, the court held that order denying the producer's motion for summary judgment had been properly decided. Id. at 782. c.f. Brownstein v. Travelers Cos., 235 A.D.2d 811, 814, 652 N.Y.S.2d 812 (3d Dep't 2007) (noting that an exception to the general bar exists where there is evidence of fraud on the part of the producer). Importantly, in this action, there is no evidence of any fraud or other wrongful conduct on the part of the producer. Therefore, no exception to the general rule should be found to exist.

In the matter at bar, American Building concedes that it failed to review the policy issued by Burlington. Under well-established precedent, that concession renders its claim against Petrocelli unsustainable. Moreover, the Burlington policy contains the same cross-liability exclusion as the preceding year's policy. Like the insureds in Sea Trade Maritime Corporation and Portnoy, the failure to read the policy is fatal to American Building Supply's claims.

The dismissal of this action comports with longstanding contract law principles set forth by this Court, discussed above, as well as the case law cited above from all four departments of the Appellate Division.

Moreover, as will now be shown, there were no special relationship between American Building and Petrocelli requiring Petrocelli to do anything more than it did in this case. As stated in Chase's Cigar Store, Inc. v. Stam Agency, supra, "[t]he find decision maker in a risk management situation is ultimately the insured who has the option to forego or obtain additional insurance coverage. . ." 281 A.D.2d at 910, quoting Madhvani v. Sheehan, supra See, also, Murphy v. Kuhn, 90 N.Y.2d 766, 660 N.Y.S.2d 371 (1997) dismissal of this action should be affirmed.

## POINT II

**INSURANCE BROKERS ARE GENERALLY NOT FIDUCIARIES AND CAN ONLY BE HELD LIABLE UNDER THE COMMON LAW. THE FACTS OF THIS CASE DO NOT WARRANT A FINDING OF A SPECIAL RELATIONSHIP, WHEREBY THE BROKER WOULD BE EXPOSED TO LIABILITY FOR BREACH OF CONTRACT**

The main issue on appeal concerns whether a plaintiff who sues its insurance broker can be barred from recovery because it received and had an opportunity to read the policy, but requested no changes to it. An underlying issue is the duty owed by a broker to its customer. According to the facts of this case, Petrocelli was not a fiduciary. Contrary to the ruling of the Appellate Division, American Building's alleged request that it needed "general liability for the employees . . . if anybody was to trip and fall and get injured in any way" was not a specific request for coverage. Nor was there a "special relationship" between the parties. American Building was an experienced and sophisticated business entity. It did not delegate its insurance responsibilities to Petrocelli. Just as with any broker-customer relationship, American Building told Petrocelli what insurance it wanted; it did not ask Petrocelli what that insurance should be. Petrocelli procured the policy and sent it to American Building, which apparently did nothing to determine if the requested coverage was sufficient for its needs.

In a commercial relationship, the duty to speak with care exists when "the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information". International Prods. Co. v. Erie R.R. Co., 244 N.Y. 331, 338 (1927). This reliance must be justifiable because a "casual response given informally does not stand on the same legal footing as a deliberate representation for purposes of determining whether an action in negligence has been established." Heard v. City of New York, 82 N.Y.2d 66, 74-5, 603 N.Y.S.2d 414 (1993).

This Court has noted that these "casual" statements and contacts make up the "vast majority of commercial transactions". Kimmell v. Schaefer, 89 N.Y.2d 257, 263, 652 N.Y.S.2d 715 (1996). Therefore, not all representations made by a seller of goods or provider of services will give rise to the duty to speak with care. Id. The only parties that can be held liable for negligent misrepresentation are ones who "possess unique or specialized expertise, or are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." Id. This Court has held that professionals such as lawyers, engineers, and accountants may have a special relationship with their clients and can be exposed

to liability for negligent misrepresentation. Id., 89 N.Y.2d at 263-64.

In Murphy v. Kuhn, 90 N.Y.2d 266, 660 N.Y.S.2d 371 (1997), this Court considered the alleged failure of an insurance agent to advise the plaintiff as to possible additional insurance coverage needs. The parties had a relationship since 1973, covering business and personal insurance needs. The same automobile policy limits had been in place from 1984 through the date of the accident in 1991. The plaintiff never asked for higher coverage for personal and family auto-insurance needs.

This Court ruled, in general, that insurance agents owed a common-law duty to obtain requested coverage for customers within a reasonable time, or inform the customer of the inability to do so. Id., 90 N.Y.2d at 270. But this Court held that the agent had no continuing duty to advise, guide, or direct a customer to obtain additional coverage. Id.

In deciding whether a "special relationship" existed, this Court echoed its ruling in Kimmell, supra, and decided that the party exposed to liability for negligent misrepresentation must possess "unique or specialized expertise" or have a special relationship that would warrant justifiable reliance. Id. This Court continued that "there must be some identifiable source of a special duty of care in order to impose tort liability." Id.

This Court assumed that the special-relationship theory could exist between a customer and agent in an auto-insurance setting and ruled that the relationship was insufficient to defeat summary judgment because "this record does not rise to the high level required to recognize the special relationship threshold that might superimpose on defendants the initiatory advisement duty, beyond the ordinary placement of requested insurance responsibilities." Id., at 271. While the parties' relationship was extensive, this Court decided that it represented a standard customer-agent relationship and did not support plaintiffs' effort to shift to the insurance agent the customer's personal responsibility for initiating, seeking, and obtaining appropriate coverage. Id. This Court did not foreclose the possibility of an agent being held liable for negligent misrepresentation, but it held that there had to be "exceptional and particularized situations" where an insurance agent, through its "conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law." Id., at 272.

The facts in this case do not warrant such a finding. While American Building trumpets the lengthy relationship of the individuals involved, it compares with that in Murphy. This Court also noted in Murphy that uniqueness of customary and ordinary insurance relationships and transactions was manifested

in the "absence of obligations arising" out of the agent's professional status with respect to the procurement of additional coverage. Id., at 273. Importantly, this Court reiterated the holding that agents "have no continuing duty to advise, guide, or direct a client to obtain additional coverage". (citation omitted) Id.

This Court reasoned that insurance agents and brokers were "not financial counselors and risk managers". Id. Insureds such as American Building were "in a much 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". Id. This Court presciently foretold of this type of litigation when it advised that allowing such litigation may open the floodgates to new and unwanted litigation:

> 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". (citation omitted)

Id.

American Building is a sophisticated entity. It knew its insurance needs better than any agent or broker. Yet it now seeks

to impose tort liability against Petrocelli based upon its failure to read its policy to determine if it provided the necessary coverage for its business. This Court rejected such a claim in Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 N.Y.3d 152, 818 N.Y.S.2d 798 (2006).

In Hoffend & Sons, the plaintiff did design and construction work for theater stages. Rose & Kiernan ("R&K") was plaintiff's insurance broker and Mark Nickel's employer. On December 11, 1998, R&K gave plaintiff a written proposal for insurance coverage that included a builders' risk policy – provided by Travelers Indemnity Co. of Illinois – to cover property damage to domestic construction projects generally and a "Foreign Liability Exporters' Package Policy—provided by Great Northern—to cover general liability, non-owned automobile coverage and workers' compensation for foreign projects. The Great Northern policy did not cover property damage incurred during construction abroad. R&K advised the plaintiff that Travelers' policy would only cover domestic projects and that foreign projects had to be discussed on a project-by-project basis.

The loss at issue occurred in Argentina. The plaintiff's principal – Donald Hoffend – claimed that he spoke with Nickel about the project and at a meeting made it clear to Nickel that it was to be "covered". The plaintiff's contract for the Argentina project required it to procure insurance for labor-

related accidents, which was covered by Great Northern's policy. But it made no mention of insurance for property damage.

In December 1999, R&K gave the plaintiff a written proposal for coverage that was essentially the same as the previous year, but it did not state that foreign coverage under the Travelers would have to be negotiated on a project-by-project basis. Hoffend read the policy, but did not contact R&K with any questions or changes.

The underlying accident occurred on October 5, 2000. Travelers disclaimed coverage, and as a result, the property damage in Argentina was not covered by either policy. The plaintiff sued Nickel and R&K and asserted that it had a special relationship with Nickel, who had reviewed plaintiff's operations; provided advice on insurance, bonding, banking, contracts, and product development; and added the plaintiff in creating its business plan and corporate information statement. The plaintiff claimed that R&K had a continuing duty to advise and guide it, obligating R&K to procure the additional coverage that would have included the underlying loss.

This Court rejected the plaintiff's assertions. Id., 7 N.Y.3d at 157. This Court held that the plaintiff's claim that Hoffend's testimony that he told Nickel about the Argentina project and that it was to be "covered" was too vague to establish a specific request for coverage, and his recollection

"that we are covered" was insufficient to impose liability on R&K. Id. This Court relied upon its prior ruling in Murphy, supra, to support dismissal and again held that a "general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage." Id., at 157-58. (See Point III of this brief for a more detailed discussion of the request for coverage in Hoffend.) This Court continued that despite the plaintiff's arguments as to what services Nickel provided in his capacity as an R&K employee, it "did not rise to the level of a special relationship." Id., at 158. In reaching its conclusion that Nickel and R&K were not liable, this Court noted that the plaintiff was "a sophisticated commercial entity" that had not delegated its insurance decision-making to R&K. Id. This Court concluded that this was an "ordinary broker-client relationship" where the plaintiff told R&K in general what insurance the plaintiff "had decided to purchase. It did not ask R&K what that insurance should be." Id.

The facts in this case are similar. American Building's accusations as to what insurance it allegedly told Petrocelli to purchase was akin to the plaintiff's requests in Hoffend & Sons. Moreover, and significantly, American Building, a sophisticated business entity, asked Petrocelli to procure insurance; it did not seek advice as to what the insurance should be. Thus, the complaint was correctly dismissed.

## POINT III

**AS A MATTER OF LAW, AMERICAN BUILDING FAILED TO SPECIFICALLY REQUEST THE COVERAGE FOUND LACKING HERE. CREATING A DUTY TO ADVISE OF THE NEED TO CHANGE COVERAGE BASED ON THE VAGUE AND AMBIGUOUS TESTIMONY HERE WOULD EXPAND BROKERS' LIABILITY BEYOND REASONABLE LIMITS.**

Where no special relationship exists between an insurance broker and an insured, as we respectfully submit is the case here (Point II), the only other premise for broker liability is the failure of the broker to secure the insurance coverage specifically requested by the insured, coupled with the failure to so advise the insured within a reasonable time. Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 7 N.Y.3d 152, 818 N.Y.S.2d 798 (2006); see, Murphy v. Kuhn, 90 N.Y.2d 266, 660 N.Y.S.2d 371 (1997).

As this Court recognized in Hoffend, there must be a specific request for specific coverage: "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage." 7 N.Y.3d at 158; see also Frost v. Mayville Tremaine, Inc., 299 A.D.2d 839, 750 N.Y.S.2d 398 (4th Dep't 2002). Moreover, where there was pre-existing coverage, the mandate to demonstrate a request for specific additions or changes to that coverage is especially important. See, Loevner v. Sullivan & Strauss Agency, Inc., 35 A.D.3d 392, 393, 825

N.Y.S.2d 145 (2nd Dep't 2006)(No premise for liability "absent a specific request for coverage not already in a client's policy"); MDW Enterprises, Inc. v. CNA Ins. Co., 4 A.D.3d 338, 342, 772 N.Y.S.2d 79, 82 (2nd Dep't 2004); M & E Mfg. Co. v. Frank H. Reis, Inc., 258 A.D.2d 9, 692 N.Y.S.2d 191 (3rd Dep't 1999).

Notably, this well-entrenched mandate for proof of a specific request for specific insurance coverage acts as a limitation on the duty of an insurance broker, which "is ordinarily defined by the nature of the request a customer makes to the [broker]," Chase's Cigar Store, Inc. v. Stam Agency, Inc., 281 A.D.2d 911, 912, 722 N.Y.S.2d 320 (4th Dep't 2001) (citation omitted); see Obomsawin v. Bailey, Haskell & Lalonde Agency Inc., 85 A.D.3d 1566, 924 N.Y.S.2d 878 (4th Dep't 2011); Empire Indus. Corp. v. Insurance Cos. Of N. Am., 226 A.D.2d 580, 641 N.Y.S.2d 345 (2nd Dep't 1996). As discussed in Point II of this brief, the need for and public policy underpinnings of that limitation were expressed in Murphy v. Kuhn, supra, 90 N.Y.2d at 273:

> "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.

See also M & E Mfg. Co. v. Frank H. Reis, Inc., supra, 258 A.D.2d

at 11 ("insureds are the final decision makers in. . . risk management determinations").

Accordingly, ambiguous or generalized requests for coverage, such as a request that insurance be obtained to "cover [the insured] on everything," or to obtain the "best" coverage or "full" coverage, or to obtain "top of the line coverage" so that the insured is "fully covered" or "fully insured," will not suffice. See, Catalanotto v. Commercial Mut. Ins. Co., 285 A.D.2d 788, 729 N.Y.S.2d 199 (3rd Dep't 2001); M & E Mfg. Co. v. Frank H. Reis, Inc., supra; Madhvani v. Sheehan, 234 A.D.2d 652, 650 N.Y.S.2d 490 (3rd Dep't 1996); Empire Indus. Corp., supra; Chaim v. Benedict, 216 A.D.2d 347, 628 N.Y.S.2d 356 (2nd Dep't 1995); see generally Hoffend & Sons, supra.

In this case, the only assertedly "specific request" allegedly made by the insured to the broker to provide general liability coverage without a cross-liability exclusion for injuries to an "employee of any insured" (R 270),[3] although that exclusion appeared in the pre-existing Burlington policy renewed through Petrocelli, derived from the following testimony by Peter Lech:[4]

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3 The failure or inability of the broker to obtain a policy from an insurer licensed in New York was not shown to have caused the insured any injury in this matter.

4 Howard Kahn, who owned the insured, advised the broker only that "I need liability, umbrella, make sure everybody's covered, things you expect your broker to do" (R 22), leaving all particulars concerning coverage to his manager, Peter Lech (*Id.*).

"Q. Other than sending him the Burlington policy and the lease requirements, did you send him anything else?

A. I don't believe so.

Q. At that time, did you have any conversations with Mr. Longueira or anyone at Petrocelli with regards to the type of insurance that you wanted for DRK or American Building Supply?

A. I told them what type of operations were at the locations. The Bronx specifically, we had basically only workers in there, as far as there was no customers as such. Wherein, the Manhattan location, there was, you know, more retail. The Bronx location only had drivers, warehouse men and laborers.

* * *

Q. What, if anything, was discussed with regards to insurance for American Building Supply and/or DRK at that meeting?

A. What we needed for insurance and what the operations were at each location.

Q. Specifically, what did you say you needed for insurance?

A. Certain limits of liability for the IDA, they needed general liability for the employees and for the, you know, customers in Manhattan if anybody was to trip and fall or get injured in any way?

Q. Anything else that was discussed?

A. Not that I recall.

* * *

Q. When the first Burlington policy was up for renewal in approximately June of 2005, did you have any discussions with Mr. Longueira about the renewal policy?

A. Yes. I stated before that I asked him to see if he could remark it and get it on the direct bill.

Q. Was he able to get it on direct bill?

A. I don't recall. I don't believe so.

Q. Did you ask him to change any of the terms or conditions that were in the Burlington policy for 2004 to 2005 for the next upcoming policy year?

A. I wasn't sure of any conditions in the policy. I rely on the broker to, you know, issue me a policy that is appropriate for my operations.

Q. Did you ask him to make any changes in the policy, the 2004 to 2005 policy, for the next policy period?

A. Not that I'm aware of.

* * *

Q. Did you have any discussions with Mr. Longueira about the application at the time you faxed it to him?

A. No, I just, you know, I explained my operations to him again, and I wanted to make sure that I was covered for, you know, whatever went on. I mean, it says, you know, 'building materials dealer, both locations, owner or occupant of location number one,' which is Bruckner Boulevard, so that would be DRK. He knew what my operations here. When I was looking through the other pages, you know, I'm a building materials dealer." (R 71-R 73, R 79).

The suggestion that this ambiguous request for coverage for all aspects of the insured's operations is sufficient to constitute a "specific request" for elimination of the pre-

existing cross-liability endorsement not only offends any reasonable understanding of the term "specific," but directly contradicts this Court's decision in Hoffend & Sons, Inc., supra; which was also discussed in Point II of this brief. In that case, the Appellate Division had found, inter alia, a question of fact as to whether the insured had made a specific request for foreign builder's risk coverage (in addition to liability coverage) for a project in Argentina (Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., 19 A.D.3d 1056, 1057, 796 N.Y.S.2d 790, 792 (4th Dep't 2005)), apparently based on the following testimony (although the Appellate Division nevertheless dismissed the insured's claim against the broker because the insured received and retained the policy without objection):

> Q. Did you tell Rose and Kiernan what coverages you needed or did you rely on Rose and Kiernan to advise you of the necessary coverage?
>
> * * *
>
> A. We discussed - - I discussed the job with Mark, the features of the job, the cost, the selling price, the situations, the shipping, the contracting and the supervision, all those facets I discussed with Mark, passed it to him, the specifications that were the contractual requirements of the job and relied solely on him to make sure that we were covered for everything.
>
> Q: Did you ever tell him what you wanted to be covered for?
>
> * * *

A. Cover us in the event of any loss that we would have physical damage, people, plane shipments, whatever.

Q. Did you tell him what that is, what you want to be covered for or did you rely on him to tell you what you needed to be covered for?

* * *

A. We did discuss everything that I knew at least one conversation of the dangers of doing work in Argentina and all of the aspects of that with the intent that he would come back with making sure that everything we could think of was covered during this entire project.

Q. So you did not tell him what risks you wanted to be covered for, you told him about a project and relied on him to advise you what risks you needed to be covered for and how to go about obtaining the coverage?

* * *

Q. Is that accurate?

A. I don't think exactly.

Q. How is what I just said inaccurate?

A. It was a discussion, it was a dialogue of risk of what we have seen happen. He'd tell me of things that could happen. I tell him things that I have - - horror stories that I have heard of . . .

* * *

Q. Did you ask him for coverage for any risk in particular?

A. No, Jonathan. Cover us here is all the things that I know that could go wrong, you told me of all of the things that you know

> could go wrong, cover us. And his response was don't worry, I'll cover you." (Record on Appeal in Hoffend, pp. 374-376).

This Court in Hoffend found it unnecessary to address the policy retention issue which the Appellate Division deemed dispositive, and instead expressly held that the "vague" testimony of the insured failed to raise an issue of fact concerning whether a "specific request" had been made for the specific coverage found lacking after the fact. 7 N.Y.3d at 157. The similarity between the vague description of the coverage demanded in Hoffend and that demanded here similarly warrants dismissal on that ground in our case as well,

To the extent that American Building relies on the alleged inclusion of the words "general liability for the employees" (R73) in the expression of the coverage requested, that argument says too much. Obviously, all general liability policies contain some form of employee injury exclusion See and compare, Graphic Arts Mut. Ins. Co. v. Bakers Mut. Ins. Co., 45 N.Y.2d 551, 410 N.Y.S.2d 571 (1978) (employee exclusion only excludes direct claims), with Insurance Co. of N. Am. v. Dayton Tool & Die Works, Inc., 57 N.Y.2d 489, 457 N.Y.S.2d 209 (1982) (revised employee exclusion excludes direct and indemnity claims, but not contribution), with Commissioners of the State Ins. Fund v. Insurance Co. of N. Am., 80 N.Y.2d 992, 592 N.Y.S.2d 648 (1992) (further revised exclusion excludes all such claims), an

endorsement which, were the insured's words to be taken literally, would violate that "specific request." Today, and for many years, clauses which exclude coverage for injuries to an employee of "an insured" or "any insured," such as appeared in both Burlington policies here, are commonplace (see, e.g., Herrnsdorf v. Bernard Janowitz Constr. Corp., 96 A.D.3d 1011, 947 N.Y.S.2d 552, (2nd Dept. 2012); Utica Ins. Co. v. RJR Maintenance Group, Inc., 90 A.D.3d 554, 934 N.Y.S.2d 701 (1st Dep't 2011); Campoverde v. Fabian Bldrs., LLC., 83 A.D.3d 986, 922 N.Y.S.2d 435 (2nd Dep't 2011); Richner Dev., LLC v. Burlington Ins. Co., 81 A.D.3d 705, 916 N.Y.S.2d 211 (2nd Dep't 2011); DRK, LLC v. Burlington Ins. Co., 74 A.D.3d 693, 905 N.Y.S.2d 58 (1st Dep't 2010); Guachichulca v. Laszlo N. Tauber & Assoc., LLC, 37 A.D.3d 760, 831 N.Y.S.2d 234 (2nd Dep't 2007); Sixty Sutton Corp. v. Illinois Union Ins. Co., 34 A.D.3d 386, 825 N.Y.S.2d 46 (1st Dep't 2006); Bassuk Bros. v. Utica First Ins. Co., 1 A.D.3d 470, 768 N.Y.S.2d 479 (2nd Dep't 2003); Tardy v. Morgan Guar. Trust Co. of N.Y., 213 A.D.2d 296, 624 N.Y.S.2d 34 (1st Dep't 1995)).

The suggestion that the vague and general instructions given by this insured to this broker constitute a "specific request" to eliminate this commonplace exclusion, which appeared in the existing policy renewed through this broker, would seriously undermine the public-policy mandate limiting broker liability to circumstances in which a specific request for specific coverage

was made. No such specific request was made here.

## CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

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Respectfully submitted,

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