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A Look At NJ Insurance Brokers' Standard Of Care Since Sandy

By **Gary Strong**

It seems like natural disasters like hurricanes, earthquakes and floods are becoming a more common occurrence in the United States and worldwide. With these disasters, the role of an insurance broker has become more prevalent with policyholders submitting claims to their respective insurance carriers expecting to be made whole after the natural disasters cause personal injury and property damage. Many times, however, the relationship between the insurance broker and client is not formalized with a written document. Sometimes, the insurance broker is a family friend who is tasked with providing baseline insurance for the individual and his/her family. Nevertheless, when a catastrophe strikes and insurance companies either deny coverage or limit the coverage provided, the insurance broker is in the crosshairs of what can turn out to be a litigious claim. This article focuses on the duty of insurance brokers in New Jersey and how these duties come into play, particularly after Superstorm Sandy, an event that destroyed homes and other personal property.



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In New Jersey, the "base-line" standard against which an insurance producer's conduct is measured was set down in *Rider v. Lynch*, 42 N.J. 465 (1964) and remains the law today. An insurance producer has a duty to: (1) have the degree of skill and knowledge requisite to his or her employment responsibilities, (2) exercise good faith and reasonable skill and care diligence in the execution of his or her 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 or her inability to do so. *Rider*, 42 N.J. at 476-477.

The duty of an insurance broker was further clarified by the New Jersey Supreme Court in *Aden v. Fortsh*, 169 N.J. 64, 78 (2001) and in the New Jersey Administrative Code. Addressing the Administrative Code first, section 11:17 A-4.10 specifically provides that: "An insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business." N.J.A.C. § 11:17A-4.10. Further, in *Aden*, the New Jersey Supreme Court held that: "An insurance broker owes a fiduciary duty of care to the insured." *Aden v. Fortsh*, 169 N.J. 64, 78 (2001). This duty is enhanced because frequently, the insurance broker affirmatively promises the policyholder that it would review the company's operations and advise it as to the insurance that it needs. Indeed, many insurance brokers now style themselves as risk consultants to emphasize that they have a broader role than merely procuring insurance. A risk management consultant must advise its client of "any additional coverages that the risk management consultant believed should be carried." *Warren Cnty. Vocational Technical Sch. v. Brown & Brown*, No. a5937-05 (N.J. Super. Ct. App. Div. May 24, 2007).

The case of *George M. Ring and Dorothy A. Ring v. Meeker Sharkey Associates LLC*, Docket No. OCN-L-760-13 affirmed A 2619-15T4 (N.J. Sup. Ct. App. Div. Sept. 26, 2017) addresses the duty of insurance brokers as it pertains to homeowners' insurance and flood insurance in connection with Superstorm Sandy. Plaintiffs George and Dorothy Ring had a primary residence in Watchung, New Jersey, and in late 1993, they purchased two beachfront homes in Mantoloking, New Jersey. See Trial Court Decision, Feb. 9, 2015 at p. 6. On July 1, 2010, the plaintiffs authorized Meeker Sharkey to serve as broker of record for the homeowner's insurance on the properties that had been provided by

Chubb. Id.

Prior to July 1, 2010, Willis NA had been the broker of record for the Chubb homeowner's insurance policies as well as the Selective flood insurance policies which had maximum flood insurance coverage on each of the properties for \$250,000. Id. at p. 7. Before becoming broker of record, Meeker Sharkey communicated with George Ring[1] and advised that Meeker Sharkey did not have an agency agreement with Selective and could not become broker of record for the Selective flood insurance policies. Id. Based upon this information, the plaintiffs decided to keep Willis as broker of record for the Selective flood insurance policies.

After Superstorm Sandy struck New Jersey, the Mantoloking properties were destroyed. See Appellate Division Decision, Sept. 26, 2017, at p. 4. Upon making claims to both their homeowners' insurance and flood insurance carriers, The plaintiffs learned that their insurance coverage was inadequate. See Trial Court Decision at pp. 6-7. The plaintiffs primary allegation of negligence against Meeker Sharkey and Willis was that neither informed the plaintiffs of the availability or need for excess flood insurance to cover the gap between the plaintiffs' homeowners insurance and flood insurance — a gap that totaled in excess of \$1 million when considering both contents and building coverage for both homes. Id. The plaintiffs contended that, despite being aware of significant coverage gaps between the amounts the Mantoloking properties were insured for under the homeowners' insurance policies versus the amounts they were insured for under the flood insurance policies, Meeker Sharkey and Willis failed to disclose excess flood insurance coverage to close those coverage gaps. Id. at pp. 4-5.

Meeker Sharkey argued that the homeowner's insurance policies (Chubb policies) which were procured by Meeker Sharkey and in the Ring's possession prior to Super Storm Sandy contained provisions that explained that the policies did not cover flood damages, but that flood insurance and excess flood insurance may be available through Chubb if requested by the insured. Meeker Sharkey added that even though it was not requested by Ring, Meeker sent a letter to Ring explaining that the Chubb homeowner's insurance policy it procured does not cover flood insurance and if Ring wanted, Meeker could provide a quote. See Trial Court Decision at pp. 31-32. Ring, however, never responded to the letter.

In granting Meeker Sharkey's summary judgment motion, the trial court agreed that the language in the homeowners' policies concerning flood insurance provided sufficient notice to Ring that the policies issued by Meeker Sharkey did not cover flood insurance. The "New Jersey Flood Insurance Notice" stated in pertinent part:

If you are an NFIP policyholder now and have excess flood insurance from a provider other than Chubb, or do not have excess flood insurance, but believe you should, please contact your agent or broker to discuss coverage options and eligibility for excess coverage from Chubb. See Trial Court Decision at p. 34.

The trial court, in granting Meeker Sharkey's motion for summary judgment on reconsideration, held that Ring was under a duty to read the clear and unambiguous language of their homeowners' insurance policies to know it did not cover flood damage in any way. Id. at pp. 34-36. More significantly, however, the trial court differentiated the duty of care between Meeker Sharkey and Willis. On the one hand, the trial court determined that Meeker Sharkey's duties as insurance broker pertained only to procurement of homeowner's insurance and as referenced above the information in the homeowners' policies gave Ring enough information concerning the lack of flood insurance coverage within the homeowners' policies. Id. On the other hand, the trial court applied the duties set forth in Rider and Forsch as against Willis in holding there was an issue of fact as to whether Willis breached its duties to Ring. The bottom line, in the trial court's eyes was that Willis was the broker of record for the flood insurance policies and had a duty to Ring to explain base flood insurance and excess flood insurance. Id.

Ring argued on appeal that Willis' role as broker for their flood insurance did not diminish Meeker's "fiduciary duty" to the insureds. The appellate court disagreed and affirmed the trial court's decision by stating the "[trial] judge acknowledged that he 'failed to recognize' in his earlier decision 'that there is a marked distinction between the posture or circumstance of [Meeker Sharkey] and Willis vis-à-vis their relationship with plaintiffs.'" See Appellate Division Decision at p. 5.

The Ring v. Meeker Sharkey case signified that insurance brokers do have a heightened standard of care when advising insureds about insurance. Simply offering insurance policies without explaining how something like excess flood insurance can be beneficial can lead to exposure for the insurance broker. However, courts are sensitive to the insurance brokers duties when there is a clear delineation of who is supposed to procure specific insurance like in the Ring v. Meeker Sharkey case where both the trial and appellate courts felt that Meeker Sharkey's duties were limited to procuring homeowner's insurance with Willis being responsible for the procurement of flood insurance.

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[1] One of the key events that was relied upon the trial court was the that fact that George Ring passed away shortly after the litigation commenced. Dorothy Ring testified she had no knowledge as to the discussions that were had between George Ring and anyone from Meeker Sharkey. Therefore, both the trial court and appellate division in affirming relied upon Thomas Sharkey's testimony that he told George Ring in 2010 that Meeker Sharkey could no longer procure flood insurance for the properties. See Trial Court Decision at p. 29.

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