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'Professional' Status Denied Insurers for Malpractice

BY JOHN CAHER

ALBANY — Resolving a split among Appellate Divisions, the Court of Appeals yesterday held that insurance agents and brokers are not "professionals" for malpractice purposes, and are therefore subject to the six year statute of limitations for breach of contract rather than the three year period for professional malpractice.

In two cases decided in a single opinion yesterday, the Court of Appeals explored for the first time the meaning of the term "professional:" in the context of malpractice. Its decision, which will certainly affect New York and may also have national repercussions, clarifies the legislature's intent in enacting §214 (6) of the Civil Practice Law and Rules (CPLR), and applies a six year statute of limitations in claims against insurance brokers and agents where breach of contract is asserted. It also held for the first time that the continuous treatment doctrine is not applicable to brokers and agents.

Chase Scientific Research Inc. v. The NIA Group Inc. 24 and Gugliotta v. Apollo Roland Brokerage Inc. 25, settles a nettlesome question that has divided appellate panels. The First Department held that a broker is not a professional and the Second and Third Departments found that brokers are professionals.

The insurance broker cases presented the Court of Appeals with the novel question of just what "malpractice" means in the framework of CPLR §214(6). In 1996, the Legislature amended the CPLR to provide that a three year statute of limitations is applicable to "an action to recover damages for malpractice, regardless of whether the underlying theory is based in contract or tort." Under the provision, the three year statute of limitations, not the six year statute of limitations governing breach of contract, governs in cases involving professional malpractice.

The Chase case arose when Chase Scientific Research retained the NIA Group

in May 1995, to secure commercial property insurance.

In January 1996, when the policy was in effect, Chase's warehouse sustained heavy damage in an ice storm. Chase demanded \$550,000 policy limit on claimed losses exceeding \$1 million, but the carriers offered only \$50,000. After settling for \$275,000, Chase sued NIA in January 1999, three years and seven months after the policy was procured.

Cases Reinstated

The Second Department said the brokers were shielded by the three year statute of limitations for professional malpractice and dismissed both the Chase and Gugliotta suits as untimely. Yesterday's ruling reinstates those actions.

Chief Justice Judith S. Kaye, writing for the Court, observed that when the Legislature amended CPLR 214 (6), "it ended one quandary but exposed another: who are the 'professionals' whose misfeasance toward clients is subject to the shortened limitations period?"

In answering that question, Judge Kaye noted that the term "professional" has several generic meanings: "it denotes a measure of quality, as in professional dry cleaners; a distinction from trade or business people, and from armature status, as in professional golfers; a lifework as opposed to pastime, as in professional musicians." Frequently, a destination as a professional requires licensure, Judge Kaye said citing barbers, electricians and real estate brokers as examples.

Yet the Court found out that the legislature could not have had "such a vast, amorphous category of service providers in mind" when it amended CPLR 214 (6), leaving to the Third Branch to define what lawmakers did not.

The Court adopted a narrow definition limited to those who are engaged in a "pro-

fession" in which there is a code of conduct, standards beyond those normally accepted in the market place, a system of discipline for violating those standards and a relationship of trust and confidence carrying a duty to advise and counsel. Any broader definition, the court reasoned would, "for the future make it hard to draw meaningful distinctions and groups covered by CPLR 214 (6) would quickly proliferate."

Standard of Conduct

Under its newly adopted criteria, the Court concluded that insurance agents and brokers do not fall under the CPLR 214(6) umbrella. It said that while agents and brokers are "held to high standards of education and qualification," they are not required to undergo the more intensive training of lawyers and engineers, nor are they bound by any similar standard of conduct.

In yesterday's decision, the Court also reaffirmed its 1997 holding in *Murphy v. Kuhn*, 90 NY2d 266, which distinguished the professional relationship doctors, lawyers and architects have with their clients from the relationship insurance brokers have with their customers.

Observers have suggested the case was under close watch nationally since several states are currently wrestling with a similar issue. Courts in Florida and Kentucky have held that insurance agents and brokers are not professionals for malpractice purposes, while courts in Rhode Island and Arkansas have held that they are.

Appearing in the Chase case were Scott D. Brenner, of Barton Barton & Plotkin LLP in Manhattan, for Chase, and Stephen C. Cunningham, of Lustig & Brown in Manhattan, for NIA. Mr. Cunningham also appeared for Apollo in the Gugliotta matter. Steven H. Beldock, of Birbrower Montalbano Condon & Frank PC in New City, argued for Mr. Gugliotta.

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