NEW YORK LAW SCHOOL

NYLS Law Review

Volume 43 | Issue 2 Article 10

January 1999

MURPHY v KUHN: DEFINING THE INSURANCE BROKER'S EXPOSURE TO PROFESSIONAL LIABILITY LAWSUITS INNEW YORK

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MURPHY V. KUHN: DEFINING THE INSURANCE BROKER'S EXPOSURE TO PROFESSIONAL LIABILITY LAWSUITS IN NEW YORK

Murphy v. Kuhn,[1] adjudicated on June 27, 1997, by the New York Court of Appeals,[2] is "an interesting case that should provide some comfort to insurance agents and brokers across the state."[3] The decision in *Murphy* maintained that the state of New York, contrary to other states, will not yet recognize that insurance brokers have a continuing duty to advise clients with regard to their insurance coverage.[4] The court declined to recognize the existence of a "special relationship" between a broker and an insured that would impose such a duty.[5] The court of appeals' refusal to recognize this "special relationship" distinguishes it from approximately twenty other states, whose courts have held that the existence of a special relationship between insurance agent and insured can result in a duty to advise.[6]

Part I[7] of this Case Comment provides a brief introduction to insurance brokers' exposure to errors and omissions lawsuits in the last twenty years. Part II[8] discusses the facts and case history of *Murphy v. Kuhn*. Part III[9] outlines New York's definition and application of the "special relationship" theory. Part IV[10] examines how New York has ap-

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1. 682 N.E.2d 972 (N.Y. 1997).

2. *See id.*

3. Evan H. Krinick, *Insurance Law Decisions Widely Diverse*, N.Y.L.J., Oct. 20, 1997, at S18.

4. *See Murphy*, 682 N.E.2d at 974.

5. *See id.* at 976.

6. *See* Appellant's Brief at 16-18, *Murphy* (No. 9138-92) (citing cases indicating that the following 19 states have recognized the existence of the "special relationship" in the insured/broker context: New Jersey, Minnesota, Michigan, Washington, Texas, Wisconsin, Idaho, Indiana, Maine, North Dakota, California, Arkansas, Ohio, South Dakota, North Carolina, South Carolina, Iowa, Georgia, and Massachusetts).

7. *See infra* notes 14-29 and accompanying text.

8. *See infra* notes 30-57 and accompanying text.

9. *See infra* notes 58-77 and accompanying text.

10. *See infra* notes 78-88 and accompanying text.

plied the "special relationship" theory to the insured/broker context. Part V[11] explores the application of the "special relationship" theory in other states. Part VI[12] of this Case Comment examines how the "continuous treatment doctrine," a New York common law theory, has defined the courts' posture towards the insurance "profession." Finally, Part VII[13] analyzes the reasoning behind the court of appeals' decision in *Murphy*.

I. INTRODUCTION

The exposure of insurance brokers to errors and omissions lawsuits in this litigious age of professional liability has evolved dramatically over the last twenty years.[14] In the past, brokers could rely on the insurance companies they represented to work out claims arising from innocent errors made by brokers.[15] In the mid-1980s, the "hardening"[16] of the insurance market forced insurance brokers to seek out new companies willing to write policies.[17] Brokers, regardless of their long-term relation-

11. *See infra* notes 89-94 and accompanying text.

12. *See infra* notes 95-109 and accompanying text.

13. *See infra* notes 110-137 and accompanying text.

14. *See* Harry F. Brooks, *Agents' and Brokers' Professional Liability—Part I*, AM. AGENT & BROKER, Apr. 1996, at 18.

15. *See id.*

16. *See* Art Wiegel, *The Insurance Crunch*, BUS. VIEW, Feb. 1987, at 33 (explaining the reason for the "hardening" of the insurance market in the mid-1980s).

> Many of the current insurance problems can be traced back to the rampant inflation at the turn of the decade. Inflated returns on investments caused companies to practice "cash flow underwriting,"—underpricing their products to compete for premium dollars for investing. High interest rates from investments, rather than premiums, covered liabilities.
>
> Then inflation screeched to a halt. Investment rates plummeted, and liability awards skyrocketed as America had a "litigation explosion," [causing insurance premiums to rise dramatically].

Id.

17. *See* Brooks, *supra* note 14, at 18.

ships, could no longer rely on one particular insurance company to write policies.[18] Although this situation provided new opportunities for insurance brokers, it also removed the safety net established previously by their long-standing insurance company counterparts, whom the brokers once relied on to settle errors and omissions claims.[19]

In the late 1980s, the insurance market "softened,"[20] and the previous difficulties experienced by brokers in finding insurance companies to write policies diminished.[21] The market became more competitive than ever before.[22] For insurance brokers, the ability to procure insurance coverage was no longer unique;[23] simply providing insurance was not a distinguishing characteristic within the highly competitive brokerage community.[24] To attract clients, brokers ceased to represent themselves as merely agents of insurance companies.[25] Instead, they represented themselves as "insurance counselors," "risk managers," and "professionals."[26]

Due to the removal of the insurance companies' safety net, coupled with the "professional status" brokers were awarding themselves, insur-

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18. *See id.*

19. *See id.* ("In the past, one frequently heard that an insurance agent did not have to worry about errors or omissions because, if one represented a 'good' insurer, any problems would be worked out with the help of the carrier.").

20. *See* Matt Roush, *Plummeting Stocks May Boost Premiums*, CRAINS DETROIT BUS., Sept. 8, 1997, at 12 (distinguishing between a "hard" and "soft" insurance market). "Traditionally, insurance has veered sharply between 'soft' markets, marked by heavy price competition in attempts to grab market share, and 'hard' markets, which occur when insurance companies begin losing big on cheap policies and then suddenly boost premiums and tighten conditions." *Id.*

21. *See id.*

22. *See id.*

23. *See* Lee Ann Gjertsen, *Broker: Excess & Surplus Market Must Keep Adapting*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Sept. 15, 1997, at 19 (explaining that many brokers become "niche" or "specialty" brokers to remain competitive).

24. *See id.*

25. *See* Brooks, *supra* note 14, at 18.

26. *See id.*

ance brokers suddenly faced professional liability lawsuits usually entertained by doctors, lawyers, accountants, architects, and engineers.[27] Courts nationwide have not reached a consensus on the issue of whether a broker may be held liable for failing to advise a client under a special relationship theory.[28] *Murphy v. Kuhn*[29] represents New York's controlling decision on this issue.

II. THE FACTS AND CASE HISTORY OF *MURPHY V. KUHN*

Murphy v. Kuhn involved a serious automobile accident that took place in 1991.[30] Plaintiff Thomas Murphy's ("Murphy") son was involved in the accident, which resulted in the death of one person.[31] Murphy's son's automobile insurance was covered under Murphy's commercial automobile liability policy, which was provided by defendant Don Kuhn's ("Kuhn") insurance brokerage.[32] The policy was written by The Hartford Insurance Company ("Hartford"), which provided a limit of $250,000 per person and a $500,000 policy aggregate per accident.[33] Although Hartford paid the $500,000 aggregate limit on behalf of Murphy, Murphy had to borrow an additional $194,429 above Hartford's payment to settle the damaged parties' claims and pay $7,500 in legal fees.[34]

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27. *See When Professional Liability Coverage Is Appropriate*, PUB. LIABILITY, Dec. 1996 (identifying that doctors and lawyers are generally exposed to "professional liability" lawsuits, while accountants, architects, and engineers have been sued for "errors and omissions").

28. *See* Appellant's Brief, *supra* note 6, at 16-18, *Murphy* (No. 9138-92) (outlining case law from many states, both supporting and denying allegations that a broker can assume a duty to advise via a special relationship).

29. 682 N.E.2d 972 (N.Y. 1997).

30. *See id.* at 973.

31. *See id.*

32. *See id.*

33. *See id.* Insurance Dictionary defines "aggregate limit" as "the maximum benefit to be paid on a property and casualty policy, or under a health insurance policy, either per occurrence or for the entire policy. Upon reaching that limit, the policy terminates." INSURANCE DICTIONARY 9 (Michael C. Thomsett ed., 1991).

34. *See* Murphy v. Kuhn, 682 N.E.2d 972, 973 (N.Y. 1997).

Murphy brought this action against Kuhn to recover the money he borrowed to settle the claims and pay legal fees.[35] Murphy had characterized Kuhn as "an 'insurance consultant' providing 'complete insurance service.'"[36] Accordingly, Murphy contended that Kuhn's business included assessing an insured's exposure to loss, and thereafter providing adequate insurance coverage to protect the insured against such loss.[37] Murphy's reliance on Kuhn as his insurance professional evolved from their long-standing relationship.[38] Kuhn provided Murphy with insurance for his two golf courses (Webster Golf Course) since 1957,[39] and provided Murphy with personal insurance since the early 1970s.[40] According to Murphy's testimony, the two met annually to discuss and "reassess the insurance coverage situation for both golf courses [and] to make sure there were no gaps in the coverage."[41] In Murphy's own words, "[the] Kuhn Agency had handled the insurance—the club's insurance—for years, they knew what our liability was and we trusted them."[42]

Kuhn's description of his relationship with Murphy de-emphasized Murphy's claimed dependence on Kuhn in his capacity as an insurance professional.[43] According to Kuhn, in the twelve years prior to the date of the automobile accident, he and Murphy never met to discuss Murphy's insurance matters.[44] In fact, "[a]t no time prior to March, 1991 did either Mr. Murphy . . . or anyone else from Webster Golf Course request an increase in liability limits on the commercial automobile policy, nor did anyone request umbrella[45] coverage."[46]

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35. *See id.*

36. Appellant's Brief at 6, *Murphy* (No. 9138-92).

37. *See id.*

38. *See id.* at 7.

39. *See* Brief for Defendants-Respondents at 4, *Murphy* (No. 9138-92).

40. *See* Appellant's Brief at 7, *Murphy* (No. 9138-92).

41. *Id.* at 6.

42. *Id.* at 7.

43. *See* Brief for Defendants-Respondents at 9-10, *Murphy* (No. 9138-92).

44. *See id.* at 9.

45. Insurance Dictionary defines "umbrella policy" as "a business liability policy that offers protection above the policy limits of other, existing policies. The purpose is to

Murphy's claim for recovery was based on the theory that a "special relationship" can and did develop between himself and Kuhn.[47] Such a "special relationship," if developed, gives rise to a duty to advise on the part of the broker who is being relied upon in a professional capacity.[48] Murphy specifically contended that the long, continuing course of business between himself and Kuhn "generat[ed] special reliance and an affirmative duty to advise with regard to appropriate or additional coverage."[49]

Kuhn argued that the well-settled common law principle mandated that insurance brokers have a duty of reasonable care to the insured.[50] This duty requires obtaining the requested coverage within a reasonable time after a request, or informing the insured of the broker's inability to do so; the broker, however, owes "no continuing duty to advise, guide, or direct" the insured to obtain additional coverage.[51] Kuhn also argued against the finding of a "special relationship" on the ground that no such relationship has ever been recognized in New York between an insurance broker and an insured.[52] Based on these two common law arguments, Kuhn sought dismissal, via summary judgment, of Murphy's claim for damages.[53]

The supreme court issued summary judgment in favor of Kuhn at the trial level, finding no question of fact with regard to the existence of a "special relationship" between Murphy and Kuhn.[54] On appeal, the supreme court, appellate division, affirmed.[55] Before the court of appeals,

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protect against losses that are uncovered in standard contracts." INSURANCE DICTIONARY 216-17 (Michael C. Thomsett ed., 1989).

46. Brief for Defendants-Respondents at 10, *Murphy* (No. 9138-92).

47. *See* Appellant's Brief at 11-15, *Murphy* (No. 9138-92).

48. *See* Hardt v. Brink, 192 F. Supp. 879, 881 (W.D. Wash. 1961).

49. Murphy v. Kuhn, 682 N.E.2d 972, 974 (N.Y. 1997).

50. *See* Brief for Defendants-Respondents at 12, *Murphy* (No. 9138-92).

51. *Murphy,* 682 N.E.2d at 974 (emphasis added).

52. *See* Brief for Defendants-Respondents at 21, *Murphy* (No. 9138-92).

53. *See Murphy,* 682 N.E.2d at 973.

54. *See id.* at 974.

55. *See id.* at 973.

Murphy argued that, because a jury properly instructed on the elements of a "special relationship" could find that Kuhn assumed a duty to advise, both lower courts erred in granting the defendants' motion for summary judgment.[56] The court of appeals decided in favor of defendant Kuhn.[57]

III. NEW YORK'S DEFINITION AND APPLICATION OF THE "SPECIAL RELATIONSHIP"

The general rule summarizing the common law duty owed by a broker to an insured was pronounced in *Wied v. New York Central Mutual Fire Insurance Co.*[58] In *Wied*, the court stated that:

> [u]nder New York law, an insurance agent has a duty to the customer to obtain the requested coverage within a reasonable time after the request or to inform the customer of the agent's inability to do so, but the agent owes no continuing duty to advise, guide or direct the customer to obtain additional coverage.[59]

Contrary to New York's general rule, the courts of approximately twenty states have recognized that although brokers have no common law duty to advise their insureds, they may assume such a duty through a special relationship of trust and confidence, where the insured reasonably relies on the agent for advice.[60] The seminal case outlining this special relationship is *Hardt v. Brink*.[61] In *Hardt*, the United States District Court in Washington, applying Washington state substantive law, stated: "This is an age of specialists and as more occupations divide into various spe-

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56. *See* Appellant's Brief at 14, *Murphy* (No. 9138-92).

57. *See Murphy*, 682 N.E.2d at 973.

58. 618 N.Y.S.2d 467 (3d Dep't 1994).

59. *Id.* at 468 (citing Erwig v. Edward F. Cook Agency, Inc., 570 N.Y.S.2d 64, 65 (2d Dep't 1991)).

60. *See* Appellant's Brief at 16-18, *Murphy* (No. 9138-92).

61. *See* Hardt v. Brink, 192 F. Supp. 879 (W.D. Wash. 1961).

cialties and strive towards 'professional' status the law requires an even higher standard of care in the performance of their duties."[62] The court held that the defendant/broker was under a duty to advise the insured as to its potential liability in the context of the insured's business, and to recommend insurance accordingly.[63] The court so held because the broker held himself out as a highly skilled insurance advisor, and the insured relied on the broker's advice.[64]

Although New York has not recognized the existence of an assumed special relationship in the broker/insured context, it has recognized such a relationship in other contexts. For example, in *Cuffy v. City of New York*,[65] the court of appeals outlined the following four elements of a special relationship between a municipality and the claimant:

> 1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) some form of direct contact between the municipality's agents and the injured party; and 4) that party's justifiable reliance on the municipality's affirmative undertaking.[66]

In *Florence v. Goldberg*[67] the court of appeals recognized that a municipality could be held liable for a breach of duty to a particular person or class of persons:[68]

> [T]o sustain liability against a municipality, the duty breached

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62. *Id.* at 881 (citing Restatement (Second) Torts § 299A (Tentative Draft No. 4, 1959)).

63. *See id.* at 882.

64. *See id.* at 881.

65. 505 N.E.2d 937 (N.Y. 1987)

66. *Id.* at 940.

67. 375 N.E.2d 763 (N.Y. 1978).

68. *See id.* at 767.

> must be more than a duty ow[ed] to the general public. There must exist a special relationship between the municipality and the plaintiff, resulting in the creation of 'a duty to use due care for the benefit of particular persons or classes of persons[.]'[69]

The court of appeals concluded that "a municipality whose police department voluntarily assumes a duty to supervise school crossings the assumptions of that duty having been relied upon by parents of school children may be held liable for its negligent omission . . . ."[70]

In *Kimmell v. Schaefer*,[71] the court of appeals recognized the existence of a special relationship in the context of commercial transactions.[72] In *Kimmell*, the court found that the defendant had negligently misrepresented the company in which he solicited the plaintiff to invest.[73] The court stated that "liability for [a] negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified."[74]

The courts of New York have also found special relationships to exist between consumers and travel agents;[75] engineers and home buyers;[76] and tour operators and their tour participants.[77]

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69. *Id.* at 766 (quoting Motyka v. City of Amsterdam, 204 N.E.2d 635, 637 (N.Y. 1965)).

70. *Id.* at 765.

71. 675 N.E.2d 450 (N.Y. 1996).

72. *See id.* at 451.

73. *See id.* at 454-55.

74. *Id.* at 454.

75. *See* Pellegrini v. Landmark Travel Group, 628 N.Y.S.2d 1003 (City Ct. Westchester County 1995).

76. *See* Ricciardi v. Frank, 620 N.Y.S.2d 918 (City Ct. Westchester County 1994).

77. *See* Cohen v. Heritage Motor Tours, 618 N.Y.S.2d 387 (2d Dep't 1994).

IV. NEW YORK'S APPLICATION OF THE "SPECIAL RELATIONSHIP" IN THE BROKER/INSURED CONTEXT

Having established that New York law recognizes the existence of a "special relationship," the question then becomes why New York does not extend the recognition of this relationship to the insurance broker/insured context, as the Washington District Court did in *Hardt v. Brink*?[78]

The seminal case in New York regarding the application of a special relationship theory in the broker/insured context is *Blonsky v. Allstate Insurance Co.*[79] In *Blonsky*, defendant broker Samuel Feldman Brokerage Corporation was sued by an insured for negligence and malpractice.[80] The court of appeals held that "an insurance broker, in his capacity as an insurance broker, may be sued only for failing to do what he is required to do."[81] Extending the court's logic, it therefore follows that an insurance broker may not be sued for failing to advise, guide, or direct an insured's coverage after he has complied with the insured's request to procure specific insurance.

New York courts have continued to follow the precedent established in *Blonsky*. In *Erwig v. Edward F. Cook Agency*,[82] the supreme court, appellate division, stated that:

> [w]hile an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain the requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so, the agent owes no continuing duty to advise, guide or direct the customer

78. 192 F. Supp. 879 (W.D. Wash. 1961).
79. 491 N.Y.S.2d 895 (Sup. Ct. N.Y. County 1985).
80. *See id.* at 896.
81. *Id.* at 897.
82. 570 N.Y.S.2d 64 (2d Dep't 1991).

insured to obtain additional coverage.[83]

Similar holdings were reached in *Harnish v. Joseph J. Naples & Associates, Inc.*[84] and *Rogers v. Urbanke*.[85] Both cases cited *Erwig* and *Blonsky*.

The New York case that most clearly denies the application of a special relationship theory to the broker/insured relationship is *Wied v. New York Central Mutual Fire Insurance Co.*[86] In *Wied*, the plaintiff, an insured, presented case law from other states that held that an insurance broker has an affirmative duty to advise an insurance customer where a special relationship exists between the broker and the customer.[87] To clarify this issue in New York, the supreme court, appellate division, held:

> [N]o New York case has gone as far in this respect as the out-of-State cases relied on by [the New York] Supreme Court. In New York, the duty owed by an insurance agent to an insurance customer is ordinarily defined by the nature of the request a customer makes to the agent. Under New York law, an insurance agent . . . owes no continuing duty to advise, guide or direct the customer to obtain additional coverage.[88]

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83. *Id.* at 65 (citing Blonsky v. Allstate Ins. Co., 491 N.Y.S.2d 895 (Sup. Ct. N.Y. County 1985)).

84. 581 N.Y.S.2d 504, 504 (4th Dep't 1992) (holding that defendant/broker had no duty either to obtain replacement coverage or to advise, guide, and direct the insured to obtain coverage).

85. 599 N.Y.S.2d 697, 698 (3d Dep't 1993) (holding that defendant/broker had no duty to "advise, guide or direct plaintiffs to obtain coverage other than that requested").

86. 618 N.Y.S.2d 467 (3d Dep't 1994).

87. *See id.* at 468.

88. *Id.*

V. OTHER STATES' APPLICATION OF THE "SPECIAL RELATIONSHIP" THEORY TO THE INSURED/BROKER RELATIONSHIP

Although New York courts have refused to recognize that an insurance broker can assume a duty to advise via a special relationship, other states have found such a relationship pursuant to the *Hardt* ruling. In *Bicknell v. Havlin*,[89] the Appeals Court of Massachusetts ruled that the defendant insurance broker made many recommendations over a considerable period of time, "and that these were 'special circumstances of assertion, representation and reliance' for which [defendant] may be liable."[90]

The North Dakota Supreme Court set the standard for a special relationship between an insurance broker and an insured in *Rawlings v. Fruhwirth*.[91] The court stated:

> [I]t is apparent that something more than the standard policyholder-insurer relationship is required in order to create a question of fact as to the existence of a 'special relationship' obligating the insurer to advise the policyholder about his or her insurance coverage. There must be, in a long-standing relationship, some type of interaction on a question of coverage, with the insured relying on the expertise of the insurance agent to the insured's detriment.[92]

In *Bruner v. League General Insurance Co.*,[93] the Michigan Court of Appeals held that "[a] duty to advise may arise when a 'special relationship' exists between the insurance company or its agent and the policyholder. Where such a duty has been breached, liability may be based

89. 402 N.E.2d 116 (Mass. App. Ct. 1980).

90. *Id.* at 119 (quoting Rapp v. Lester L. Burdick, Inc., 146 N.E.2d 368, 371 (Mass. 1957)).

91. 455 N.W.2d 574 (N.D. 1990).

92. *Id.* at 578 (quoting Bruner v. League Gen. Ins. Co., 416 N.W.2d 318, 321 (Mich. Ct. App. 1987)).

93. 416 N.W.2d 318 (Mich. Ct. App. 1987).

thereon."[94]

VI. THE CONTINUOUS TREATMENT DOCTRINE: NEW YORK'S REFUSAL TO VIEW INSURANCE BROKERS AS "PROFESSIONALS"

The refusal of New York courts to recognize an insurance broker's duty to advise may be better understood in the context of the continuous treatment doctrine.[95] By applying this doctrine, New York courts have made it clear that insurance brokers are not regarded as "professionals" in the same manner as are doctors, lawyers, architects, and accountants.[96] The policy underlying the continuous treatment doctrine seeks to maintain the physician/patient relationship in the belief that the most efficient treatment can only be attained if the initial physician remains on the case from start to cure.[97] The doctrine allows the statute of limitations for a malpractice claim to accrue at the end of the continuous treatment, between doctor and patient, if the treatment has been for the same injury out of which the claim for malpractice arose.[98]

While the continuous treatment doctrine had usually been applied against physicians, New York courts have extended the doctrine to other professional fields, including attorneys, architects, and accountants.[99] At least one lower court in New York has extended the continuous treatment

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94. *Id.* at 320.

95. *See* Ewing v. Beck, 520 A.2d 653 (Del. 1987). The continuous treatment doctrine establishes that the statute of limitations for a malpractice claim, by a patient against a treating physician, does not begin to run until the period of treatment is over. *See id.* at 659. The intent of the doctrine is to prevent termination of the patient/physician relationship so that the patient can initiate a malpractice suit within the statute of limitations. *See id.* at 659-60.

96. *See* Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1098 (N.D.N.Y. 1977).

97. *See Ewing*, 520 A.2d at 659-60.

98. *See Holdridge*, 440 F. Supp. at 1098.

99. *See id.* at 1098; *see also* Siegel v. Kranis, 288 N.Y.S.2d 831 (2d Dep't 1968) (attorneys); County of Broome v. Vincent J. Smith, Inc., 358 N.Y.S.2d 998 (Sup. Ct. Broome County 1974) (architects); Wilkin v. Dana R. Pickup & Co., 347 N.Y.S.2d 122 (Sup. Ct. Allegany County 1973) (accountants).

doctrine beyond the area of malpractice actions against "professionals."[100] For example, in *Colpan Realty Corp. v. Great American Insurance Co.*,[101] the supreme court applied the continuous treatment doctrine to an action brought by an insured against its insurer.[102] The court's decision indicates, however, that New York does not consider insurance providers as "professionals" in the same sense that physicians, attorneys, architects, and accountants are considered professionals.[103]

The supreme court reiterated this distinction in *Flora's Card Shop, Inc. v. Paul Krantz & Co., Inc.*[104] In this case, the court refused to apply the continuous treatment doctrine against an insurance broker who failed to procure riot and civil commotion coverage for their insured.[105] The court articulated the difference among professionals by stating that "the surface analogy between the doctor, lawyer, accountant, architect on one hand and the insurance broker on the other hand breaks down upon closer scrutiny. The trust reposed in the insurance broker is a business trust as contrasted with a professional trust."[106]

New York's refusal to recognize insurance brokers as "professionals," in the same manner that doctors, lawyers, architects, and accountants have been viewed as "professionals," does not justify the court of appeals' denial that a special relationship may develop between an insurance broker and an insured. After all, municipalities,[107] travel agents,[108] and tour operators[109] can hardly be recognized as "professionals" within the parameters of *Flora's Card Shop*, yet the courts in New York have

100. *See Holdridge*, 440 F. Supp. at 1098.

101. 373 N.Y.S.2d 802 (Sup. Ct. Westchester County 1975).

102. *See id.* at 805.

103. *See Holdridge*, 440 F. Supp. at 1098.

104. 445 N.Y.S.2d 392 (Sup. Ct. N.Y. County 1981), *aff'd*, 458 N.Y.S.2d 880 (1st Dep't 1983).

105. *See id.* at 393.

106. *Id.*

107. *See* Florence v. Goldberg, 375 N.E.2d 763 (N.Y. 1978).

108. *See* Pellegrini v. Landmark Travel Group, 628 N.Y.S.2d 1003 (City Ct. Westchester County 1995).

109. *See* Cohen v. Heritage Motor Tours, 618 N.Y.S.2d 387 (2d Dep't 1994).

extended the special relationship theory to claims against individuals in these fields.

VII. CONCLUSION: AN ANALYSIS OF THE COURT'S REASONING IN *MURPHY*

The *Murphy* opinion stated that "[a]s a matter of law, 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."[110] The court specifically refuted application of a special relationship in the broker/insured context by not recognizing a justified reliance of Murphy on Kuhn.[111] In other words, the court did not find one of the elements needed to create a special relationship pursuant to *Cuffy*.[112] The court stated, "[T]here is no indication that Murphy ever inquired or discussed with Kuhn any issues involving the liability limits of the automobile policy. Such lack of initiative or personal indifference cannot qualify as legally recognizable or justifiable reliance."[113]

This conclusory statement made by the court exhibits circular reasoning. The record indicates that Murphy made the following statement summarizing his reliance on Kuhn as his insurance broker: "[T]he Kuhn Agency had handled the insurance—the club's insurance—for years, they knew what our liability was and we trusted them."[114] If Murphy knew nothing about insurance, and if his statement on the record is indicative of his reliance on Kuhn, why would he ever inquire about the specifics of his policy? Would a patient inquire as to which procedure her doctor was planning to use in upcoming surgery? Would a client inquire as to which cases her attorney was relying on for trial? Would a client inquire as to which accounting principles her accountant was using

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

111. *See id.*

112. Cuffy v. City of New York, 505 N.E.2d 937 (N.Y. 1987).

113. *Murphy*, 682 N.E.2d at 975 (emphasis added).

114. Appellant's Brief at 7, *Murphy* (No. 9138-92).

to complete her tax returns? If a client of any professional asserts that she has relied on that professional to do his job, the fact that the client did not inquire into the specifics of how that professional was actually doing the job should not be used to negate justifiable reliance. It was Murphy's failure to inquire into the specifics of how Kuhn determined his level of insurance coverage, however, that the court pointed to in negating Murphy's claim of justifiable reliance on Kuhn.[115] Thus, the court did not find the existence of a special relationship.[116]

The *Murphy* decision is also heavily weighted with policy considerations. Fearful of opening the floodgates of litigation, the court distinguished the insurance profession from other professions by maintaining that "[i]nsureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers . . . ."[117] The court then relied on various policy arguments outlined in *Farmers Insurance Co., Inc. v. McCarthy*.[118] In *Farmers*, the Missouri Court of Appeals itemized the following policy arguments supporting their decision not to impute a duty to advise on the part of insurance brokers:

1. [I]mposing liability on insurers and their agents "would remove any burden from the insured to take care of his own financial needs . . .";[119]

2. [I]mposing such a duty would transform insurance companies from a competitive marketplace industry "into . . . guardians of the insured . . .";[120]

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115. *See Murphy*, 682 N.E.2d at 975.

116. *See id.*

117. *Id.* at 976.

118. *See id.* (describing Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82, 85 (Mo. Ct. App. 1994)).

119. Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82, 85 (Mo. Ct. App. 1994) (citing Dubreuil v. Allstate Ins. Co., 511 A.2d 300, 302 (R.I. 1986) (quoting Gibson v. Govt. Employees Ins. Co., 162 Cal. App. 3d 441, 451-52 (1984))).

120. *Id.* (quoting *Dubreuil*, 511 A.2d at 302).

3. [I]nsureds know their personal assets and abilities to pay better than an insurance agent. Therefore, it should be their responsibility to advise the agent of the insurance they want . . .;[121]

4. [I]mposing such liability on the insurance industry would subject insurance companies to liability for failing to advise their own customers of every possible insurance option available through the company . . .;[122] and,

5. [B]y creating such a duty insureds would have the opportunity to seek coverage for a loss after it occurred merely by asserting that they would have bought additional coverage if it had been offered.[123]

It is the court's consideration of the *Farmers* policy arguments that led to their decision not to extend the special relationship theory to the broker/insured context.[124] Whether Murphy actually relied on Kuhn as his insurance professional is a question of fact. The record does not clarify the exact nature of Murphy and Kuhn's business relationship. According to Murphy, the two men met annually to "reassess the insurance coverage situation for both golf courses [and] to make sure there were no gaps in [the] coverage."[125] A jury may have viewed this annual meeting as one at which Murphy was consulting with his insurance professional, who was acting in an advisory capacity. On the other hand, Kuhn's testimony was quite to the contrary. According to Kuhn, the two men had not met for several years to discuss Murphy's insurance.[126] Without any interaction regarding Murphy's insurance, a jury may have found that Kuhn had not acted in an advisory capacity. In any event, the nature of

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121. *Id.*
122. *Id.* at 85-86.
123. *Id.* at 86.
124. *See Murphy*, 682 N.E.2d at 976.
125. Appellant's Brief at 6, *Murphy* (No. 9138-92).
126. *See* Brief for Defendants-Respondents at 9, *Murphy* (No. 9138-92).

Kuhn's relationship with Murphy was a question of fact that should have been examined by a jury. By objectively declaring that there was no justifiable reliance by Murphy on Kuhn, and therefore no creation of a special relationship as a matter of law, the court engaged in circular reasoning.

Further, the *Murphy* decision has left open the question of whether insurance brokers should be regarded as "professionals."[127] Although other states recognize that an insurance broker and client can enter into a "special relationship" whereby the broker assumes a duty to advise, and although New York recognizes the existence of the "special relationship" in other "non-professional" fields, the New York courts have not extended this theory to insurance brokers.[128]

Finally, the *Murphy* court hinted that one of three "exceptional" situations might justify imputing a duty of advisement on the insurance broker in New York.[129] These situations are: 1) if "the agent receives compensation for consultation apart from payment of the premiums;"[130] 2) if there were "some interaction regarding a question of coverage, with the insured relying on the expertise of the agent;"[131] or 3) if there were "a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on."[132] Because the court did not find the existence of any of the above "exceptional" situations, it did not determine when the special relationship theory may apply in the insurance context.[133]

Based on the court of appeals' discussion regarding "exceptional" situations,[134] there may be an increased likelihood that the special rela-

127. *See Murphy*, 682 N.E.2d at 976.
128. *See id.*
129. *See id.* at 975-76.
130. *Id.* at 975.
131. *Id.*
132. *Id.* at 975-76.
133. *See id.* at 976.
134. *See id.* at 975-76.

tionship theory will apply to brokers in New York. The market conditions of the insurance industry are forcing brokers to solicit clients by expanding on the products and services they offer.[135] Insurance companies, partly because of the excellent condition of the stock market, are then able to rely on their investment income, more so than the premiums they generate from writing insurance policies, to stimulate profits.[136] Because insurance policies are being written so inexpensively, insurance brokers are finding it necessary to: 1) offer consulting-type services to their clients; and 2) charge service fees to compensate for the lack of incoming commission—a direct result of inexpensive insurance products.[137] This turn of events may present itself in a lawsuit in the near future, at which time it is quite probable that New York courts will decide whether situations involving insurance brokers may qualify as "exceptional."

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135. *See* Carolyn Hirschman, *Four P&C Insurers Buck Down Trend*, BUS. FIRST-COLUMBUS, June 24, 1991, at 1.

136. *See* Roush, *supra* note 20, at 12.

137. *See* Tom Gress & Brent Schondelmeyer, *Competition Heating Up Among KC Insurance Brokerages*, KANSAS CITY BUS. J., Dec. 5, 1988, at 21.

* The author would like to thank Faraci, Lange, Johns, Regan & Schwarz, LLP (attorneys for Appellants) and Lustig & Brown, LLP (attorneys for Respondents) for making their briefs available for the writing of this Case Comment.