

People v. Wells Fargo Ins. Servs., Inc.: No Common-Law Fiduciary Duty for Insurance Brokers to Disclose Incentive Arrangements to Customers

On February 17, 2011, the New York Court of Appeals, in *People v. Wells Fargo Ins. Servs., Inc.*, held that an “insurance broker does not have a common-law fiduciary duty to disclose to its customers ‘incentive’ arrangements that the broker has entered into with insurance companies.”¹

I. Factual Background

The Attorney General brought an action against Wells Fargo Insurance Services, Inc. (“Wells Fargo”), an insurance brokerage firm. Wells Fargo allegedly “entered into a number of ‘incentive’ arrangements,” whereby insurance companies would reward Wells Fargo “for bringing them business.”² The complaint alleged that “as a result of the incentive programs, Wells Fargo ‘steered’ its customers to particular insurance companies and away from others that did not participate in the programs.”³ The complaint alleged that Wells Fargo did not disclose the incentive payments to its customers, but, as the court noted, did not allege “that Wells Fargo made any affirmative misrepresentations or that any customer suffered demonstrable harm from the incentive arrangements.”⁴

II. The Relationship between an Insurance Broker and a Purchaser of Insurance

In assessing the complaint, the Court of Appeals determined that the various causes of action asserted by the Attorney General could “all be boiled down to a claim for breach of fiduciary duty.”⁵ The court recognized the general “rule that one acting as a fiduciary in a particular transaction may not receive, in connection with that transaction, undisclosed compensation from persons with whom the principal’s interests may be in conflict.”⁶ In determining that the rule did not apply in this case, however, the court focused on the nature of the relationship between an insurance broker and a purchaser of insurance, and observed that while the broker “is the agent of the insured,” it “is sometimes the insurer’s agent also,” and thus occupies a “‘dual agency status.’”⁷ “Indeed, the word ‘broker’ suggests an intermediary -- not someone with undivided loyalty to one or the other side of the transaction.”⁸ As a result, the court found that disclosure by the broker to its customers of its contractual arrangements with insurance companies “is not normally required -- and if there are exceptions to that rule, this case does not present one.”⁹ In *dicta*, the Court of Appeals suggested that a different result would have been required had the broker given “advice in bad faith,” advised “a customer to buy coverage that [it] knew to be

¹ *People v. Wells Fargo Ins. Servs., Inc.*, No. 6, slip op. at 1 (N.Y. 2011).

² *Id.*

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 3-4 (citation omitted).

⁷ *Id.* at 5 (citation omitted).

⁸ *Id.*

⁹ *Id.* at 5-6.

inferior” or “breached [its] duty of loyalty.”¹⁰ The court held that entering into an undisclosed incentive compensation arrangement was not a breach of the duty of loyalty.¹¹

III. More Appropriate Way to Address Non-Disclosure

The court recognized that although “the parties seem to agree that arrangements like those the Attorney General complains of have been commonplace, and have not generally been disclosed,” “[t]his non-disclosure may be a bad practice.”¹² The court pointed to a recent regulation of the Insurance Department, 11 NYCRR § 30.3 [a] [2] [effective January 1, 2011], which, although not in effect at the time of the conduct in the case, would require disclosure to a purchaser of insurance if a broker would receive compensation from the selling insurer.¹³ According to the court, “[a] regulation, prospective in effect, is a much better way of ending a questionable but common practice than what the Attorney General asks us to do here: in substance to outlaw the practice retroactively by creating a new common-law rule.”¹⁴

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of the court’s opinion, please do not hesitate to call or email Thorn Rosenthal at 212.701.3823 or trosenthal@cahill.com.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 4-5.

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ *Id.*