CLIENT MEMORANDUM

Unanimous Jury Verdict in Precedent-Setting Case Relating to Insurance Broker Duties

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On October 31, 2014, Willkie won a jury trial in what is believed to be the first case to go to trial on the issue of whether an insurance broker shared a "special relationship" with its client, such that the broker owed its client enhanced duties beyond those in a standard broker/client relationship. In *Tiara Condominium Association Inc. v. Marsh USA Inc.*, Case No. 9:08-cv-80254-DTKH, the United States District Court for the Southern District of Florida previously held that the insurance broker had not breached either the terms of its contract or the standard duties owed by brokers. However, the court also held that the question of whether the broker, by its actions, had created a special relationship with its client was an issue of fact for the jury. If there was a special relationship, then, contrary to the well-established common law throughout the United States, the broker would have been required to advise the client on the types and amounts of insurance it should have bought. After a two-week trial, the jury decided that the broker had not entered into a special relationship with the client and the case was dismissed.

It is well established across the country that, for sound public policy reasons, insurance brokers generally have no duty to advise their clients with respect to the types or amounts of coverage to purchase. As numerous courts have explained, "[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 . . . ." *Murphy v. Kuhn*, 660 N.Y.S.2d 371, 375 (N.Y. 1997). Indeed, if the obligation to select limits were imposed on the broker, it "would remove any burden from the insured to take care of his or her own financial

needs and expectations . . . ." *Harts v. Farmers Ins. Exchange*, 597 N.W.2d 47, 50 (Mich. 1999). Further, imposing a duty to advise on insurance brokers "could result in liability for a failure to advise a client 'of every possible insurance option,'" *id. at* 50, and cause insurance brokers "to advise their customers to buy the highest, most comprehensive and expensive coverages rather than more modest packages that most people of similar means would find suitable." *Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 486 (Alaska 2001). *Accord Murphy*, 682 N.E.2d at 976 (duty to advise "might well open flood gates to even more complicated and undesirable litigation").

Despite the public policy concerns, the concept of imposing a heightened duty on an insurance broker that would require the broker to advise its client on the amount of coverage to purchase, often referred to as a "special relationship," has been gaining acceptance in courts across the country. For example, the New York Court of Appeals recently held that a broker, either expressly or by its conduct, can take on a heightened duty through a special relationship that requires the broker to advise the client regarding the amount of insurance to buy – in that instance, the dispute related to business interruption insurance. *See Voss v. Netherlands Ins. Co.*, 985 N.Y.S.2d 448, 452-53 (N.Y. 2014). Although courts have recognized the special relationship concept, we believe that the claim by Tiara was the first to test it through trial.

During trial, Willkie focused on two key concepts relating to the existence of a special relationship. First, Willkie argued that the exception was narrow and that for a special relationship to exist, the insurance broker had to agree to perform more services than those regularly performed by commercial insurance brokers. That is, there clearly must be something more than an ordinary or standard broker/client relationship. *See Indiana Restorative Dentistry, P.C. v. The Laven Ins. Agency, Inc.*, 999 N.E. 2d 922, 929 (Ind. Ct. App. 2013) ("something more than the standard insurer-insured relationship is required to create a special relationship"); *Sintros v. Hamon*, 810 A.2d 553, 556 (N.H. 2002) (same); *Sadler v. The Loomis Co.*, 776 A.2d 25, 35 (Md. Ct. App. 2001) ("A special relationship in the context of insurance requires more than the ordinary insurer [agent]-insured relationship."). Thus, while the jury was entitled to undertake a multiple factor analysis to determine whether the broker shared a special relationship with Tiara, a crucial component of that analysis – indeed, the starting point – was an understanding of what is standard in a relationship between a large commercial broker and its client. Second, Willkie argued that the key to finding a special relationship is the transfer of decision-making authority; specifically, for a special relationship to exist, the insurance broker must be in the driver's seat with respect to selecting the types and amounts of insurance the insured will purchase.

Based on jury instructions that took account of these two important concepts, and a significant amount of evidence adduced during the trial, the nine-person jury returned a unanimous verdict agreeing that the plaintiff had failed to establish it had entered into a special relationship with its broker. We expect the case to provide a key precedent for insurance brokers as the special-relationship doctrine continues to develop across the country, particularly with respect to the factors to be considered by the finder-of-fact in determining whether an insured has established the existence of such a relationship.

If you have any questions regarding this memorandum, please contact the lawyers who handled the jury trial, Mitchell J. Auslander (212-728-8201, mauslander@willkie.com) and Christopher J. St. Jeanos (212-728-8730, cstjeanos@willkie.com), or the Willkie attorney with whom you regularly work.

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