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COURT OF APPEALS

STATE OF NEW YORK

AMERICAN BUILDING SUPPLY CORP.,

Appellant,

-against-

No. 188

PETROCELLI GROUP, INC.,

Respondent.

27 Madison Avenue
New York, New York 10010
October 10, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 188, American
2 Building Supply.

3 (Pause)

4 CHIEF JUDGE LIPPMAN: Okay, counselor.
5 Close enough. Let's talk insurance. Go ahead.

6 MR. ZISHOLTZ: Good morning, Your Honor.
7 Thank you.

8 CHIEF JUDGE LIPPMAN: Do you want any
9 rebuttal time, counselor?

10 MR. ZISHOLTZ: Excuse me?

11 CHIEF JUDGE LIPPMAN: Rebuttal time?

12 MR. ZISHOLTZ: Two minutes, Your Honor.

13 CHIEF JUDGE LIPPMAN: Two minutes. Go
14 ahead.

15 MR. ZISHOLTZ: Thank you, Your Honor.

16 My name is Stuart Zisholtz. I'm here for
17 the appellant.

18 There are two issues on this appeal. One
19 is the issues of fact that the Appellate Division and
20 the lower court found that there is issues of fact,
21 and the second issue on this appeal is the issue
22 involving the failure by the insured to read the
23 policy. And briefly, I'd like to just touch on the -
24 - -

25 CHIEF JUDGE LIPPMAN: Why shouldn't you be

1 obligated to read the policy?

2 MR. ZISHOLTZ: Say again, Your Honor.

3 CHIEF JUDGE LIPPMAN: Why shouldn't you be
4 obligated to read the policy?

5 MR. ZISHOLTZ: Well, in most instances, I
6 would agree that it would be advantageous for most
7 people to read the policy, but in this particular
8 instance and - - -

9 JUDGE CIPARICK: Now, if you were suing the
10 insurance company, there would be no liability,
11 right, on behalf of the insurance company? There's
12 no cause of action, so why should there be one
13 against the broker?

14 MR. ZISHOLTZ: The problem that we have
15 here is that there is one against the bro - - - if
16 the insurance company did not disclaim in this
17 particular instance, then the policy would have been
18 in full force, and they would have had coverage. The
19 fact of the matter is the Burlington Insurance
20 Company disclaimed because of this obscure - - -

21 JUDGE CIPARICK: Right.

22 MR. ZISHOLTZ: - - - unusual cross-
23 liability exclusion clause --

24 JUDGE PIGOTT: Well, do we know what
25 happened in the Lucero case? Is that still pending

1 or - - -

2 MR. ZISHOLTZ: It's actually scheduled for
3 trial in January, Your Honor. There was a motion - -
4 -

5 JUDGE SMITH: Why wasn't it barred by
6 Workers' Comp, just out of curiosity?

7 MR. ZISHOLTZ: Well, interesting question,
8 Your Honor. Actually, in the Lucero case, they
9 dismissed - - - they voluntarily discontinued the
10 action against American Building Supply who was the
11 primary insured, but the remaining additional
12 insureds still are - - - exist except recently the
13 court in Supreme Bronx (sic) came down with a
14 decision dismissing the case against Howard Kahn
15 individually and the IDA, but we kept the case
16 against DRK, the additional insured.

17 JUDGE CIPARICK: The owner.

18 MR. ZISHOLTZ: So as it stands today, the
19 case is pending for trial in January only against
20 DRK, the additional insured.

21 JUDGE SMITH: Does that change the
22 insurance picture? Does that mean - - - I mean, I
23 guess not; it's still a claim by an employee of an
24 insured even though - - -

25 MR. ZISHOLTZ: Correct.

1 JUDGE SMITH: - - - it's not against the -
2 - -

3 MR. ZISHOLTZ: It's still the additional
4 insured. The case is still exactly the same.
5 There's just one of the additional insureds which is
6 the New York City IDA has been released from the
7 case.

8 CHIEF JUDGE LIPPMAN: Counselor, what is
9 your obligation here? What's your obligation? You
10 asked for certain insurance. Let's agree that you
11 didn't get it. What's your obligation?

12 MR. ZISHOLTZ: Well, what I say - - -

13 CHIEF JUDGE LIPPMAN: I'll ask your
14 adversary about their obligation.

15 MR. ZISHOLTZ: What I say is do I have a
16 duty to review it? It would be wise. I mean, we
17 just had hundreds of people in here. I'm sure most
18 people, when they get an auto policy or a general
19 liability policy don't review it at all. Obviously -
20 - -

21 CHIEF JUDGE LIPPMAN: I think that's true -
22 - -

23 MR. ZISHOLTZ: Right.

24 CHIEF JUDGE LIPPMAN: - - - but what about
25 here where you had trouble with your old coverage and

1 now you're asking for - - - to correct that
2 insufficiency? Does that change the picture as
3 opposed to, totally right that most people get their
4 auto policy, whatever it is, they stick it in a
5 drawer and they forget about it?

6 MR. ZISHOLTZ: I would say in this
7 particular instance there would be no difference - -
8 -

9 CHIEF JUDGE LIPPMAN: Why? Why?

10 MR. ZISHOLTZ: - - - because the issue that
11 most - - - when I'm dealing with a layperson who owns
12 a lumberyard, what he's looking for and what he's
13 going to tender over to the other additional insureds
14 such as the New York City IDA in this particular
15 instance would be the declaration where the material
16 terms are - - - or the binder where the material
17 terms of what the insurance are is provided by the -
18 - - in this particular instance, the respondent or
19 Petrocelli, they would tender over the declaration or
20 a binder - - -

21 JUDGE CIPARICK: Do you have - - -

22 MR. ZISHOLTZ: - - - saying how much
23 coverage we have, who the additional insureds are and
24 so on. But the intricate details of the hundred-page
25 insurance policy single spaced with all these

1 exclusions - - -

2 JUDGE CIPARICK: Okay. At the very least -
3 - -

4 MR. ZISHOLTZ: - - - I think is a little
5 extreme to ask a layperson to review completely and
6 understand, no less.

7 JUDGE CIPARICK: At the very least, you
8 have these lease agreement provisions, these minimums
9 that you had to maintain.

10 MR. ZISHOLTZ: Yes.

11 JUDGE CIPARICK: And I think it was a five
12 million dollar minimum for bodily and personal
13 injury. At the very least, you knew that this policy
14 did not comport with that, right?

15 MR. ZISHOLTZ: Well, the - - - no.

16 JUDGE CIPARICK: There was only a million
17 dollars.

18 MR. ZISHOLTZ: The original policy, Your
19 Honor, that was procured by Pollack did not obtain
20 the proper amount. Ultimately, when we went to
21 Petrocelli, they were able to get - - -

22 JUDGE CIPARICK: You got your five million.

23 MR. ZISHOLTZ: They got the five million
24 with the umbrella and so on. So they got - - - when
25 we got our declaration, when we got the binder

1 saying, I got you covered, American Building, and
2 your additional insureds, it was our belief, great,
3 you got the insurance, we forwarded it onto the IDA.

4 JUDGE SMITH: But you didn't get one with a
5 New York State licensed or certified or whatever it
6 was?

7 MR. ZISHOLTZ: We did not.

8 JUDGE SMITH: But you knew that, right?

9 MR. ZISHOLTZ: We knew that, and the IDA -
10 - -

11 JUDGE SMITH: But that's never - - - that's
12 really not part of your claim.

13 MR. ZISHOLTZ: No, it is and it isn't. The
14 IDA, for all intents and purposes, let that go.
15 Whether it's deemed a waiver or not, that was never
16 an issue.

17 CHIEF JUDGE LIPPMAN: Were you disturbed
18 that it was the same insurance company again that you
19 were having trouble?

20 MR. ZISHOLTZ: Yes.

21 CHIEF JUDGE LIPPMAN: You knew it was
22 Burlington, right?

23 MR. ZISHOLTZ: We knew it was Burlington,
24 but we didn't know anything about this cross-
25 liability exclusion that - - -

1 CHIEF JUDGE LIPPMAN: You just thought that
2 they managed to get you what your old agent did not -
3 - - was not able to get you or didn't get you?

4 MR. ZISHOLTZ: Right. The agent before as
5 Pollack, was unable to get the amount necessary under
6 the terms of the lease with the IDA. Ultimately,
7 Petrocelli did.

8 CHIEF JUDGE LIPPMAN: Did they - - - is
9 your basic contention that they had an obligation to
10 come back to you and say, you know what, we basically
11 got you the same insurance?

12 MR. ZISHOLTZ: No. I think it's more than
13 that, Your Honor. I think that when you're - - -

14 CHIEF JUDGE LIPPMAN: If they had told you
15 that, you would have said, wait a second, that's not
16 what we want, right?

17 MR. ZISHOLTZ: If they explained to us what
18 exactly was in the policy, a hundred percent correct,
19 Your Honor, we would have said, wait a second - - -

20 JUDGE SMITH: And you didn't --

21 MR. ZISHOLTZ: - - - this policy, for all
22 intents and purposes, will not protect anybody who is
23 inside the facility because - - -

24 JUDGE SMITH: But you're saying as far as
25 you knew, the only thing wrong with it was the

1 licensing issue?

2 MR. ZISHOLTZ: At the time prior to the
3 incident, that would be correct.

4 JUDGE SMITH: Yes. So actually all those
5 years you had had a policy which you say was
6 illusory. It says it covers everyone except
7 employees and nobody's going to get hurt except
8 employees, so you're paying your premiums for
9 nothing.

10 MR. ZISHOLTZ: That's my position, yes.

11 JUDGE GRAFFEO: If you could just step away
12 from the facts of this particular relationship,
13 what's the rule that you would ask us to adopt with
14 respect to the duty of a broker to insure a customer?

15 MR. ZISHOLTZ: Well, I think that the Court
16 has ready findings - - - between the Court of
17 Appeals, this Court, as well as the Appellate
18 Division, there are findings and holdings that, if we
19 can combine them all, we would have a correct
20 determination.

21 JUDGE SMITH: What is it? What is it?

22 MR. ZISHOLTZ: That would be, if there's a
23 general request by an insured for insurance, then
24 there should be no liability on the part of the
25 broker.

1 JUDGE GRAFFEO: And that includes oral as
2 well as written?

3 MR. ZISHOLTZ: Yes, I don't have a problem
4 with that.

5 JUDGE GRAFFEO: I mean, this would be a
6 heck of a lot easier case if - - -

7 MR. ZISHOLTZ: If there was - - -

8 JUDGE GRAFFEO: - - - if you folks had
9 written a letter and said, this is what we're asking
10 for.

11 MR. ZISHOLTZ: Correct, it would be. But I
12 think that based on the testimony and the record
13 below, there is a determination, and that's why the
14 Appellate Division and the lower court came down with
15 issues of fact saying, look, we - - - it's a supply
16 house; there are no retail sales. The only people
17 inside the location are the laborers. So if
18 someone's going to get hurt inside the location, it's
19 not going to be a third party walking down the
20 street; it's going to be someone who's an employee of
21 the insured.

22 JUDGE READ: And I guess you would say to
23 us, too, that the failure to read is not dispositive.
24 The question we had - - - I think that's the question
25 we left open in Hoffend, that you don't lose just

1 because you conceded you didn't read the policy.

2 MR. ZISHOLTZ: Correct.

3 JUDGE READ: It's different with a broker
4 than with an insurance company.

5 MR. ZISHOLTZ: Well, in Hoffend, there was
6 a written proposal by the broker, and there was
7 follow-up writings from the broker to the insured
8 about the exclusions. Here, there was a form letter
9 sent by the broker saying here's your policy, good
10 luck, I'm washing my hands of it.

11 JUDGE GRAFFEO: Tell me how, from a policy
12 standpoint, we avoid every insured who gets a
13 disclaimer letter from bringing - - -

14 MR. ZISHOLTZ: So here's the - - -

15 JUDGE GRAFFEO: - - - a lawsuit and saying,
16 I told my broker I wanted XYZ and I didn't get it.

17 MR. ZISHOLTZ: Here's - - -

18 JUDGE GRAFFEO: I'm just concerned about
19 the future application of the rule.

20 MR. ZISHOLTZ: Here's the answer, Your
21 Honor. Here is the answer. General request, someone
22 calls up, I need general liability, five million,
23 doesn't ask for anything in particular, there's no
24 liability. I would agree with that. That's what the
25 law is. That's what the law has been for years. The

1 difference is when you get to specific, and that's
2 where there are issues of fact. If there's a
3 specific request being made for particular insurance
4 that is detailed - - - in this particular instance,
5 we have detailed specific requests by the appellant -
6 - -

7 JUDGE SMITH: But I think maybe Judge
8 Graffeo's problem is you say you have in testimony in
9 the lawsuit a detailed specific request, but it was
10 oral. And what she suggested, isn't that going to
11 happen every time, aren't you going to say - - -
12 isn't everybody going to say, oh, yeah, I made a
13 detail-specific request.

14 JUDGE GRAFFEO: Everybody's going to come
15 in and say I made a specific request - - -

16 MR. ZISHOLTZ: There's more - - - but
17 there's more to it.

18 JUDGE GRAFFEO: - - - if we don't have a
19 requirement that this has to be in writing. I'm
20 trying to figure out how we avoid a flurry of these
21 lawsuits every time there's a claim that falls
22 outside the terms of the policy.

23 MR. ZISHOLTZ: The problem with that is
24 that you can't - - - there's no specific - - - there
25 has to be some reasonable request, whether it be from

1 - - - orally or writing is what I would say because -
2 - -

3 CHIEF JUDGE LIPPMAN: Is the difference
4 here that you switched brokers? Is that what you're
5 saying? Or is really in every case it's going to be
6 very fact specific as to what you said or didn't say?
7 And I guess the point is - - - I think what the point
8 that Judge Graffeo is making is that, boy, if in
9 every case we say there's a disclaimer, I wanted the
10 coverage that would have made - - - would have been
11 applicable in this case and the disclaimer is wrong
12 because I thought I had other coverage. How do you -
13 - -

14 MR. ZISHOLTZ: I would say, Your Honor,
15 that the - - -

16 CHIEF JUDGE LIPPMAN: What do you need to
17 get to this point?

18 MR. ZISHOLTZ: I would say that they would
19 have to be when the tendering of the policy is sent
20 to the insured.

21 CHIEF JUDGE LIPPMAN: Yeah.

22 MR. ZISHOLTZ: There should be some
23 communication from the broker setting forth what the
24 exclusions are and at least, at the very least - - -

25 CHIEF JUDGE LIPPMAN: Is that based on law

1 or established precedent?

2 MR. ZISHOLTZ: No, but Your Honor had asked
3 me what - - -

4 JUDGE GRAFFEO: But that's not the common
5 practice, is it? I mean, all my policies just come
6 with a transmittal letter saying - - -

7 MR. ZISHOLTZ: Correct.

8 JUDGE GRAFFEO: - - - thank you for - - -

9 MR. ZISHOLTZ: And that's what happened in
10 Hoffend though. This Court - - - one of the findings
11 in the Hoffend case - - -

12 CHIEF JUDGE LIPPMAN: Did - - - when you
13 got the policy, did it say, this is how your policy
14 has changed? Often when you get these letters, it
15 says, look, there's a new coverage or a new lack of
16 coverage or a new exclusion. But in your case, it
17 was basically the same policy, right?

18 MR. ZISHOLTZ: Yes, it was basically the
19 same policy, but the difference was that here - - -

20 CHIEF JUDGE LIPPMAN: But you allege, at
21 least, that you asked for different coverage.

22 MR. ZISHOLTZ: Yes, and - - - but in this
23 particular instance, what I say should occur, and
24 Your Honor has asked me how things should be played
25 out differently. I believe that if the broker brings

1 it - - - who's the - - - who we're relying on, who's
2 getting a commission for procuring this policy, if
3 we're asking them to procure a policy for the benefit
4 of an insured and there are - - - it's a detailed
5 policy with multiple exclusions, there should be
6 something provided to the insured saying, listen,
7 this is the problems you have.

8 JUDGE SMITH: Suppose all you say - - - you
9 call up and say, hello, my name is American Building
10 Supply Corporation, I want liability insurance, no
11 more specific instruction than that, and he sends you
12 a policy. And after the -- after there's a claim,
13 you look at it and it says, hey, building supply
14 companies are excluded, we don't cover building
15 supply companies, is he - - - do you have a claim
16 against your broker for getting you that policy?

17 MR. ZISHOLTZ: I would say under a general
18 request for a policy the answer would be no, but - -
19 -

20 JUDGE SMITH: You mean he can do that, but
21 here where - - - just because you said - - - because
22 your guy testified, he said I want the employees
23 covered?

24 MR. ZISHOLTZ: But that's where the issue -
25 - -

1 JUDGE SMITH: It sounds to me like my
2 hypothetical case should be a better case for the
3 plaintiff.

4 MR. ZISHOLTZ: No, but that's where the
5 issues of fact are. That's why in this particular
6 instance where there's a reliance upon a broker to
7 obtain certain insurance that needs to be done to
8 conform with the lease - - -

9 JUDGE SMITH: I guess what I'm suggesting
10 to you is, would it be a possible way to resolve this
11 dilemma to say that the broker does have a duty to
12 have some idea what business his customer is in and
13 to get him insurance that's appropriate for that
14 business?

15 MR. ZISHOLTZ: Yes, that - - -

16 JUDGE SMITH: And you could prevail on that
17 theory, couldn't you?

18 MR. ZISHOLTZ: Yes.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.
20 You'll have rebuttal. Let's get your adversary.

21 MR. CUNNINGHAM: Good morning, Your Honors.
22 My name is Steve Cunningham. I'm with the firm of
23 Keidel, Weldon & Cunningham, and we represent the
24 respondent, Petrocelli.

25 JUDGE CIPARICK: So - - -

1 CHIEF JUDGE LIPPMAN: Counsel, what do they
2 need you for if they - - - if they're relying on you
3 to provide coverage that meets their needs, you
4 don't, and then you just don't tell them anything?
5 What's your obligations in this situation? Someone
6 could argue their obligations are to read it. What
7 is your obligation in this particular circumstance?
8 Just to - - - were you hired just to renew their
9 policy?

10 MR. CUNNINGHAM: Yes, Your Honor. And I
11 think the Court - - - this Court set the standard for
12 claims against insurance agents and brokers very
13 specifically in Murphy v. - - -

14 CHIEF JUDGE LIPPMAN: What's your
15 responsibility?

16 MR. CUNNINGHAM: Under Murphy v. Kuhn, this
17 Court's decision in 1997, an agent or broker has no
18 duty to advise, guide or direct an insured to
19 purchase coverage absent a specific request.

20 CHIEF JUDGE LIPPMAN: You agree that if you
21 were not able to obtain the insurance that was
22 requested, you have an obligation to tell them,
23 right?

24 MR. CUNNINGHAM: Absolutely yes.

25 JUDGE GRAFFEO: That you knew - - -

1 JUDGE CIPARICK: They claim that they had a
2 specific request, so aren't there issues of fact here
3 that have to be resolved by a trial court?

4 MR. CUNNINGHAM: Well, first I would argue
5 that there is not a specific request. The only
6 request - - - the only - - -

7 CHIEF JUDGE LIPPMAN: But they allege that
8 there is.

9 JUDGE CIPARICK: But they say there is.

10 MR. CUNNINGHAM: They allege that there is.
11 The only specific request that was made in this
12 matter was a request for increased umbrella coverage
13 from the prior policy. That was done. There was
14 also the request for the - - -

15 JUDGE GRAFFEO: You didn't know that they
16 had no retail business and there were only employees
17 at - - - I guess it's the one site?

18 MR. CUNNINGHAM: I don't remember if there
19 was a specific indication as to that, but I believe
20 so, Your Honor. Yes, they knew it was a wholesale
21 company.

22 JUDGE GRAFFEO: Isn't that enough to
23 indicate that there had to be coverage for the
24 employees?

25 MR. CUNNINGHAM: Well, there was. In fact,

1 their request that they're saying was a specific
2 request was - - - and I'll read the whole quote,
3 "certain limits of liability for the IDA, which was
4 procured, they needed general liability for the
5 employees and for, you know, customers in Manhattan
6 in case anybody was to trip and fall." So general
7 liability for employees - - - liability covers
8 someone when they are sued.

9 JUDGE SMITH: You say you got them the
10 customers in Manhattan?

11 MR. CUNNINGHAM: Correct.

12 JUDGE SMITH: But you knew that the main -
13 - - one of the major locations here was a warehouse,
14 and you got them a policy that was essentially
15 useless for that warehouse.

16 MR. CUNNINGHAM: No, Your Honor, because
17 there's many circumstances could arise. A vendor is
18 within the premises, a repair person to come to work
19 on the equipment.

20 JUDGE SMITH: I mean, it's a - - - wasn't
21 this a pretty strange kind of policy to get for a
22 business that wasn't - - - that had no - - - where
23 the only people exposed to significant danger ninety-
24 five percent of the time are employees?

25 MR. CUNNINGHAM: Well, first of all, the

1 employees did have their own insurance. They were
2 covered if they caused an injury, and we were
3 specifically told that they had Workers' Comp
4 insurance in place that would cover them if the
5 employees were - - -

6 JUDGE SMITH: I'm not sure what you meant
7 by your first point. They were covered if they
8 caused an injury?

9 MR. CUNNINGHAM: If they caused an injury
10 to someone and the employee was sued, there was
11 liability insurance in place - - -

12 JUDGE SMITH: Oh, if - - -

13 MR. CUNNINGHAM: - - - that would have - -
14 -

15 JUDGE SMITH: You mean if the employee is
16 sued by a third party?

17 MR. CUNNINGHAM: Correct.

18 JUDGE SMITH: But I guess I - - - shouldn't
19 an insurance broker who's getting insurance for a
20 warehouse know that he's got to protect his client
21 against - - - when employees get hurt?

22 MR. CUNNINGHAM: If there was a specific
23 request - - -

24 JUDGE SMITH: Even without a specific - - -

25 MR. CUNNINGHAM: - - - and there wasn't.

1 made. There had never been a specific request.

2 Brokers frequently step in and try to act as

3 advocates for their clients - - -

4 JUDGE SMITH: In fact, I mean - - -

5 MR. CUNNINGHAM: - - - and try to persuade
6 the companies to provide coverage.

7 JUDGE SMITH: - - - there was no bad faith
8 here. You were as surprised as your client was when
9 it turned out this thing didn't cover?

10 MR. CUNNINGHAM: I don't know if there's
11 any evidence one way or the other as far as a
12 surprise goes.

13 JUDGE CIPARICK: From his testimony - - -

14 MR. CUNNINGHAM: It's certainly not - - -

15 JUDGE CIPARICK: There's deposition
16 testimony by Mr. - - - one of the principals of
17 Petrocelli that he understood the exclusion clause to
18 mean something else - - -

19 MR. CUNNINGHAM: After the loss - - -

20 JUDGE CIPARICK: - - - that they were - - -

21 MR. CUNNINGHAM: He was never asked for his
22 opinion prior to the loss. No one ever asked him to
23 analyze it. If he had, then we may have a different
24 situation, but that's not the case here.

25 JUDGE CIPARICK: Well, he understood it to

1 mean cross-claims against employees.

2 MR. CUNNINGHAM: I'm sorry. What's your
3 question, Your Honor?

4 CHIEF JUDGE LIPPMAN: Isn't it a pretty bad
5 mistake that you didn't understand what's in your
6 policy and the most basic kind of coverage?

7 MR. CUNNINGHAM: First of all, the only
8 evidence is what happened afterwards. If - - - such
9 as the First Department's decision in Baseball where
10 a broker says, oh, I looked at your policy and it
11 doesn't have this coverage and you make a mistake,
12 that's a specific misrepresentation.

13 JUDGE CIPARICK: Yeah.

14 MR. CUNNINGHAM: In this particular case,
15 they brought us a policy - - -

16 JUDGE CIPARICK: In that case, they also -
17 - -

18 MR. CUNNINGHAM: - - - that was in effect.

19 JUDGE CIPARICK: - - - they also said that
20 comparative negligence would be used, that it wasn't
21 a complete bar that the policyholder had not read the
22 policy.

23 MR. CUNNINGHAM: Correct.

24 JUDGE CIPARICK: Would that be a good rule
25 here?

1 MR. CUNNINGHAM: Absolutely it is
2 unnecessary, Your Honor. The way the court decisions
3 in New York have come down, it is neither appropriate
4 nor necessary for the comparative standard to be
5 adopted with regards to receipt of the policy. The
6 Murphy v. Kuhn court had a lengthy discussion where
7 they specifically said that insurance agents and
8 brokers are not personal financial counselors,
9 they're not guarantors of coverage.

10 CHIEF JUDGE LIPPMAN: So you had no
11 responsibility here? You did what they - - - in your
12 view, you did what they asked you to do, which is
13 just to get any old kind of insurance?

14 MR. CUNNINGHAM: Well, it wasn't any old
15 kind of insurance.

16 CHIEF JUDGE LIPPMAN: Well, it certainly
17 wasn't - - -

18 MR. CUNNINGHAM: It was insurance that was
19 - - - that they were presented with.

20 CHIEF JUDGE LIPPMAN: As Judge Smith
21 indicated to you before, doesn't seem that it's the
22 kind of coverage that they would be wanting and that
23 they had just switched agents. Aren't there any
24 questions raised by all of that?

25 MR. CUNNINGHAM: Well, once again, when the

1 policy was first presented with us, there was a
2 request to get coverage through an admitted New York
3 carrier. As a result - - -

4 CHIEF JUDGE LIPPMAN: Well, you didn't do
5 that either, right?

6 MR. CUNNINGHAM: Well, we marketed it to
7 several different companies that were listed in - - -

8 CHIEF JUDGE LIPPMAN: But you didn't do it.

9 MR. CUNNINGHAM: There was no coverage
10 available.

11 JUDGE PIGOTT: When you were done, were you
12 satisfied that the IDA was properly covered?

13 MR. CUNNINGHAM: Well, IDA was an
14 additional insured, and there was coverage to them as
15 an additional insured under the policy.

16 JUDGE PIGOTT: So you were satisfied when
17 you delivered the policy that IDA, in the event if
18 Lucero sued them, was going to be covered?

19 MR. CUNNINGHAM: If the claim was asserted
20 against IDA by someone who isn't an employee, yes,
21 there probably would have been coverage.

22 JUDGE PIGOTT: I guess it's been asked, but
23 it's surprising that - - - I mean, he's not an
24 employee of IDA, so he can sue IDA without - - - I
25 mean, it would seem to me that that doesn't apply.

1 MR. CUNNINGHAM: Well, the IDA has now been
2 dismissed from the underlying claim.

3 JUDGE PIGOTT: I understand that, but I'm
4 looking at it from your point of view. If you're
5 providing insurance in the event that IDA gets sued,
6 the fact that it gets sued by an employee of what - -
7 - ABS here is irrelevant, and the same with DRK,
8 wouldn't it? And he's not an employee of DRK so - -
9 -

10 MR. CUNNINGHAM: No, he's not an employee
11 of DRK, but DRK is not the plaintiff in this lawsuit
12 either.

13 JUDGE PIGOTT: Right. So when Lucero sued
14 those two, if you were satisfied, I would think
15 you're right. I think you've got coverage for those
16 two. That's why I was wondering what happened to the
17 Lucero lawsuit, because I don't see any disclaimers
18 there unless you failed to cover them as an
19 additional insured.

20 MR. CUNNINGHAM: I know in the Lucero
21 lawsuit the claims against American Building Supply
22 were just - - - about six weeks ago were
23 discontinued.

24 JUDGE PIGOTT: Forget those. I'm talking
25 about the lawsuit against the IDA.

1 MR. CUNNINGHAM: And IDA was also - - - the
2 Court granted the motion dismissing the claims
3 against the IDA. The only remaining - - -

4 JUDGE PIGOTT: Well, then you have no worry
5 because there's no liability.

6 MR. CUNNINGHAM: Excuse me?

7 JUDGE PIGOTT: Then you have no worry
8 because there's no liability.

9 MR. CUNNINGHAM: Correct.

10 JUDGE PIGOTT: So what are we arguing
11 about?

12 JUDGE SMITH: But DRK is still in the case.

13 MR. CUNNINGHAM: Yes, there is still claims
14 against DRK.

15 JUDGE PIGOTT: Well, DRK is covered because
16 they're not the employer.

17 MR. CUNNINGHAM: Right. Well, DRK would -
18 - - there is no coverage to DRK because of the cross-
19 liability employee exclusion.

20 JUDGE SMITH: As I read the exclusion, it
21 says, we don't cover any claims brought for any
22 injury to any employee of any insured; it doesn't
23 matter who's suing who.

24 MR. CUNNINGHAM: Correct.

25 JUDGE SMITH: Yeah.

1 JUDGE PIGOTT: And that makes it the - - -
2 were you surprised at that yourself? In other words,
3 when all of a sudden this hits the fan - - -

4 MR. CUNNINGHAM: I think it's a pretty
5 standard exclusion - - -

6 JUDGE PIGOTT: I've never seen it in my
7 life, and I used to do this for twenty-five years.

8 MR. CUNNINGHAM: In fact, I know in the
9 First Department's decision where they reversed Judge
10 Gammerman and held that the language was clear and
11 unambiguous, I think they cited to a New Jersey case
12 where this same exclusion was litigated in New
13 Jersey. So a cross-liability exclusion is not
14 unusual.

15 JUDGE PIGOTT: Well, I guess that's the
16 point. When you have to go to New Jersey to find out
17 what the law is, it sounds like it was not the law in
18 the state of New York at that time.

19 MR. CUNNINGHAM: Well, once again, I'll
20 defer to the First Department who found that the
21 policy was clear and unambiguous and - - -

22 JUDGE PIGOTT: Right. So your argument is
23 we at Petrocelli knew damned well what we were doing
24 and we knew this provision - - - let me finish - - -
25 and when we gave them the policy, we were satisfied

1 that we provided what he wanted, and we knew that in
2 the event that anybody in that building sued anyone
3 that there was going to be no coverage.

4 MR. CUNNINGHAM: No, Your Honor. Agents
5 and brokers are not guarantors. They're not going to
6 know - - -

7 JUDGE PIGOTT: But you said this is a
8 common phrase.

9 MR. CUNNINGHAM: - - - every single term
10 with every single policy.

11 JUDGE PIGOTT: You said - - - but you said
12 this is common. This is like a ten-twenty policy in
13 car insurance or twenty-five-fifty. This is - - -
14 everybody knows that when you get CGL policies of
15 this nature that this is a provision, and you're
16 shocked, surprised, and amazed that ABS didn't know
17 it.

18 MR. CUNNINGHAM: Well, first, this was - -
19 - I'm not saying it's common in every policy. It is
20 not an unusual policy term that you see, particularly
21 a risk such as one through the non-admitted market,
22 which was the only market available to them because,
23 and there's some discussion in the testimony, our
24 client tried to find them coverage through Travelers
25 and other carriers that wouldn't write this. They

1 said their loss history is too bad, they have too
2 much lumber in their - - -

3 CHIEF JUDGE LIPPMAN: You don't think
4 that's a subject of discussion with them that - - -
5 when you had so much trouble getting coverage?

6 MR. CUNNINGHAM: Well, you'd have to
7 reverse Murphy and say a broker has a duty to give
8 advice on things that may come up. I mean, the
9 courts know there are hundreds of - - -

10 JUDGE SMITH: But doesn't there - - -

11 MR. CUNNINGHAM: - - - ways carriers deny
12 claims.

13 JUDGE SMITH: - - - doesn't there come a
14 point when you do have to - - - yeah, if the guy
15 comes to you and you shop for insurance and you go
16 back to him and you say, look, I'll get you a policy,
17 I just got to tell you one thing about it, that
18 you're going to be paying your premium and they're
19 never going to pay a claim because everything is
20 excluded. Isn't that something you ought to mention?

21 MR. CUNNINGHAM: Well, once again, it's - -
22 - there are illusory policies; we all recognize that.
23 But it is always up to the insured to read his
24 policy, and it's the broker's job - - -

25 JUDGE PIGOTT: Let me ask you this. Let's

1 assume instead of a forklift accident this was a 240
2 case. They happen all the time. And usually the
3 employer ends up on the short end because it gets
4 kicked back to him, but the landowner gets nailed
5 first because the 240 says that you, the landowner,
6 are responsible to provide a safe place to work. All
7 right. So if this was a 240, the IDA would say,
8 obviously I'm liable and I'm going to kick it down to
9 the employer. But you'd say, there's no insurance.

10 MR. CUNNINGHAM: Well, for example, if a
11 contractor had been in the building and it was the
12 contractor's employee that got hurt, there would have
13 been coverage for this under the 240 claim.

14 JUDGE PIGOTT: No, no. I'm saying that if
15 this was a 240 case where an employee of ABS was hurt
16 falling off a ladder in a building owned by ECIDA or
17 DRK, whoever owned it, they would - - - they're
18 strictly liable, so they got to pay, but then they
19 pass it on to the employer, and that's why you have
20 additional insured in all these, by the way, but
21 you're saying that there would be no coverage for
22 that 240, right?

23 MR. CUNNINGHAM: Now, once again, every
24 claim has to be reviewed by the carrier. I don't
25 know if there would be coverage on that.

1 read the - - - I mean, there's a lot of talk about
2 who reads the policy. The broker is supposed to read
3 the policy, isn't he?

4 MR. CUNNINGHAM: And Mr. Longoria said that
5 he did in this case.

6 JUDGE SMITH: Yeah, and Justice Sullivan in
7 Baseball said that basically that's, yeah, that's
8 what you hire a broker for. Very few people read
9 their own policies. They have a broker who tells
10 them what it says. Isn't that reasonable?

11 MR. CUNNINGHAM: Yes, and I agree with
12 Justice Sullivan in Baseball. In that decision, the
13 court said, although the insured received its policy,
14 the broker had reviewed the policy and had
15 affirmatively misrepresented what the coverages were
16 on the policy, and therefore, the court denied the
17 broker's motion to dismiss in that case, just as the
18 First Department and the Court below here.

19 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
20 you, counsel.

21 MR. CUNNINGHAM: Thank you, Your Honor.

22 CHIEF JUDGE LIPPMAN: Rebuttal.

23 MR. ZISHOLTZ: Thank you, Your Honor.

24 I'd just like to mention the issue with
25 respect to Murphy, which counsel has brought up, this

1 Court actually found that the insured didn't rely on
2 the broker and also that there was some indication
3 this Court wrote in its decision about the issue with
4 other jurisdictions and the fact that there is an
5 issue that should be addressed at some point about
6 the expertise of the agent.

7 And it's on page 10 of my reply brief
8 specifically quoting out of Murphy that there are
9 exceptional and particularized situations may arise
10 in which insurance agents, through their conduct or
11 by express or implied contract with customers and
12 clients, may assume or acquire duties in addition to
13 those fixed in common law.

14 JUDGE PIGOTT: But how does that apply
15 here? I mean -- well, as they've pointed out in
16 their motion for summary judgment, you had had a
17 policy cancelled for nonpayment. As he points out,
18 there were a bunch of people who wouldn't write you,
19 and so they tried to do the best they can and - - -

20 MR. ZISHOLTZ: But they never said that,
21 Your Honor. They never said, we're doing the best we
22 can under these circumstances. All they did - - -

23 JUDGE PIGOTT: They even went to bat for
24 you in '06 when the exclusion was applied, and they
25 said we don't think it applies, and they tried to

1 cover for you.

2 MR. ZISHOLTZ: All the respondent did - - -
3 all Petrocelli did was go out - - -

4 JUDGE PIGOTT: Well, you're going to be
5 self insured the way this is going.

6 MR. ZISHOLTZ: I might as well have been.
7 The truth of the matter is - - -

8 JUDGE PIGOTT: Oh, you'd rather have the
9 sixty grand, I suppose.

10 MR. ZISHOLTZ: Right. I mean, the truth of
11 the matter is, Your Honor, that's true. I mean, they
12 paid almost 60,000 dollars a year in premiums. And
13 the reality is a layperson who barely has any college
14 education is not going to be able to read and
15 understand the cross-liability exclusion clause. I
16 barely understood it, and I went to at least law
17 school.

18 JUDGE PIGOTT: Mr. Petrocelli - - - I mean
19 Mr. Longoria in his letter said - - -

20 MR. ZISHOLTZ: He didn't even understand
21 it.

22 JUDGE PIGOTT: - - - I don't think this
23 applies, and that's why I kind of agreed with him.
24 But obviously somebody else has made a decision, I
25 guess, because it doesn't - - -

1 MR. ZISHOLTZ: So with respect to that, you
2 need an expert. There has to be somebody that we're
3 relying on. We're paying these premiums where
4 they're getting a fee.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MR. ZISHOLTZ: And for that reason, Your
7 Honor, there should be responsibility.

8 CHIEF JUDGE LIPPMAN: Okay. Thank you.

9 MR. ZISHOLTZ: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you both.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals matter of American Building Supply Corporation v. Petrocelli Group, Inc., No. 188, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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