



## Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

**Episode 90:**  
**Broker Malpractice: How Policyholders Can Proactively  
Protect Themselves**

By [Lynda Bennett](#), [Eric Jesse](#)

**JUNE 2024**

- 
- Kevin Iredell:** Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at [lowenstein.com/podcasts](https://lowenstein.com/podcasts). Or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud or YouTube. Now let's take a listen.
- Lynda Bennett:** Welcome to don't Take No For an Answer. I'm your host, Lynda Bennett, chair of the Insurance Recovery Group, and today I am joined by my partner in crime and insurance policy, sell it, Eric Jesse, welcome.
- Eric Jesse:** Hello. All right. It's the first time we've recorded a podcast together in a while, so let's get back to it.
- Lynda Bennett:** Let's get to it indeed. All right, so today we're going to talk about a really important issue, which is broker malpractice, and we want to address a recent and somewhat unfortunate New Jersey appellate division opinion that serves as a cautionary tale to policy holders. Eric, why don't you get us started by telling us a little bit about the case?
- Eric Jesse:** Yeah, so just for some table setting, this case is called Score Products LLC versus Bollinger Inc. Bollinger was the insurance broker here. You have the insured. The company name was Score Products. They obtained a property and business interruption policy, and they renewed it through their broker year after year after year. This was a policy holder that did somewhat unique work as we'll touch upon. They manufactured and sold chafing dishes and stands that were used by caterers and restaurants. In February 2014, there was a fire at the manufacturing facility, it damaged equipment and machinery. The total loss in terms of property damage and business interruption was about \$8 million, but the insured only had about \$1.8 million in combined limits there. The insured did pay out on this claim about \$1.5 million, but the insured here score products ended up suing their broker and the broker malpractice issue turned on the limits of liability and the broker's duty to meet with the insured or obtain increased coverage. And here the court ultimately ruled in favor of the broker.
- Lynda Bennett:** Well, that's unfortunate. How did the Appellate Division reach that conclusion?

**Eric Jesse:** Yeah, I think it's a classic example of bad facts making bad law. So one of the things that the Appellate Division highlighted was every year the broker would mail a renewal questionnaire to its policy holders and the questionnaire asked specific questions about whether company needed to make changes to its personal property limits, whether there had been purchases of additional equipment in the past year. There was the bold language at the bottom of the questionnaire that said, by not returning this to us or reaching out to us for changes, you acknowledge that no changes are needed. And so from 2005 to 2013, the policy holder here never did anything, never returned the questionnaire, never asked the questions, and the court recognized that. The court found that the policyholder never asked questions of the broker, even though the insured acknowledged that the broker was there ready, willing, and able to answer questions, so.

**Lynda Bennett:** What else did the court consider?

**Eric Jesse:** Yeah, so yeah, there's more. To determine the appropriate limits, this was unique machinery that had to be valued and it was difficult to value, but the owner of the insured score products testified that he didn't need help valuing the equipment. He had the necessary information to do it himself. He even agreed that the broker wasn't in a position to value the equipment. So bad facts on top of bad facts. I mean, what happens here, the parade of variables in a way is November 2013, the insured is talking to the broker because he's going to buy some new equipment and he happens to mention that he thinks his existing equipment is underinsured, so the broker is apparently responsive. Emails insurer the next day about that issue. The broker then emails the client asking for the contacting person, so an inspection can be scheduled.

And I don't know if we have the capability to add in crickets to the podcast, but that's what happened here, nothing from the policy holder. January rolls around. January 21st, I think is the date that the insurer did actually go and inspect the machinery. But the insurer says, "I don't really know how to value this. This is pretty customized, unique, one-of-a-kind operation equipment." January 29th, the week later, the broker reaches out and tells them what the insurer said, says, "You have two options. You can either increase the limits if you want or leave it as is", and if we have the audio, let's bring the crickets back. Nothing, right? Then a week later, the fire occurs. We just have the bad facts here of really a non-responsive insured. And the court really focused on that.

**Lynda Bennett:** This case was a head scratcher to me when it came out because you and I both know New Jersey law generally on broker malpractice is quite good.

**Eric Jesse:** It is.

**Lynda Bennett:** There's a heightened standard. The broker can't just be an order taker. There is a fiduciary duty that is owed to their clients when they're providing the insurance broker services. But the facts that you just laid out in careful detail seemed to suggest that this broker did all the right things, asked the

questions. And the upshot of the policy holder's position was that one moment of clarity when he said, "Gee whiz, my equipment may be underinsured here", but seemed awfully late in the game and then didn't seem to be super responsive after that moment of clarity passed.

**Eric Jesse:** Exactly.

**Lynda Bennett:** And so while brokers may be super excited about this case and waving it around to say, "See", it's actually a narrow duty. This case doesn't trouble me as much if I have a broker malpractice claim coming down the pipe in the future, if the facts are different. Would you agree with that?

**Eric Jesse:** Yeah, I agree. I mean, look here the insurer did nothing really, next to nothing or nothing, and so I agree with you. The court did reiterate the heightened standard. The court does talk about the duty of care being a fiduciary duty and that the insurer, that broker needs to understand the risks. They have to understand and appreciate gaps in insurance and really advise the client of that. Where the insured in this case had to go was they had to fall within a very narrow exception to this fiduciary duty rule where the court said you don't have a common law duty to advise the insured about the need for higher limits, which is the issue we're dealing with here upon renewal of the policy unless there is a special relationship. And so the court applied that very narrow standard to say, in order for this heightened duty of advising the client about higher limits, there needs to be a special relationship. And none existed here.

**Lynda Bennett:** I mean, I would've liked to have seen facts or maybe an expert report that would show a broker would ordinarily provide benchmarking limits, even though they sent the questionnaire out, as you said, and clearly had a lot of evidence to point back to the policy holder here in not providing the information. One of the things that is a very reasonable ask for policy holders of their brokers 'cause the limits issue is one that I do think you are relying on the broker and them being in the market every day, them having similar clients with similar risk profiles in similar industries. So it's not unreasonable for a policy holder to want to rely on the expertise of the broker. And we see our clients get benchmarking information from brokers all the time, and on the facts, at least as reported, that didn't happen here, but I think that really couldn't be leveraged in the face of the other facts that you outlined.

**Eric Jesse:** Agreed here. This was, I think, a narrow exception to what you just laid out. We often advise our clients to talk to their brokers because they have the data and can advise on appropriate limits. But here the court was very clear that because of the nature of this equipment, it was customized, it was unique, one-of-a-kind operation. It really couldn't be valued. And on top of that, the policy holder testified that, no, I'm the one who could value it, but he just did and never requested the increased limits. So this again, makes this case a factual outlier and not hopefully a major concern in terms of its precedential value.

**Lynda Bennett:** I don't like the language on the special relationship as discussed through these facts. So what are the things that the policy holder here could have, should have, would've done differently in presenting the case? I mean, you

outline what the facts were before the fire took place, but what are some things that the policy holder could have done differently in presenting their malpractice case since they decided to push the issue?

**Eric Jesse:**

Yeah, look, I think one thing you mentioned, it is an expert report, and I believe they might've even brought in an expert report, but it was way too late in the process. So that's one important thing. The expert report about the broker relationship, and I think it's also just emphasizing this fiduciary duty. One of the things I didn't like about the case, and maybe it wasn't presented in the right way, was in terms of this special relationship, the broker was able to describe the relationship as a standard practice. We just send a questionnaire.

And so I think there needs to be a little bit more than that because there was a personal relationship with the original broker and the policy holder that could have been leveraged much more. And then that relationship needs to continue. Because what happened here was Bollinger, who's the broker that was sued, they acquired a smaller shop. And so the existing relationship was with the broker there, his name was George Rourke and the policy holder there. So I think much more needed to be made out of that initial relationship because they became friends as the court talks about.

**Lynda Bennett:**

And so you talked about this, and we talk about it all the time on Don't Take No For An Answer, which is there is a difference in the law too. So in some jurisdictions, the broker's duty is limited to order taker. I only have to go get you asked me to go get. And then there are jurisdictions like New Jersey that may, will impose a higher fiduciary beauty standard on the broker. And that's really in recognition of the fact that insurance is a pretty complicated business. And so even though this policy holder unfortunately created a record of, I know better, and I don't need help, the real reality is that most of our clients are relying on the expertise of a broker because this is complicated. This is intricate, and as I said before, particularly when it comes to what the appropriate level of limits are, the broker has a lot more experience gauging what is market, what is standard, and has seen claims activity and how things can go wrong. That's really what policy holders are relying on in that expertise from the broker.

But as this case teaches us, you got to help yourself. You got to help yourself in the first instance, filling out the questionnaire, asking questions, and then even after you bring this case, you've got to help yourself by understanding the importance of New Jersey's special relationship standard and requirement to really get the benefit of that fiduciary duty legal standard.

**Eric Jesse:**

Yeah. One thing that was troubling to me about the case just on the law and its dicta thankfully, is that special relationship that the court looked at was specifically tied to the personal relationship between the insured and that individual broker, his name was Rourke and not the larger entity. So the court said even if there was a special relationship, that ended when Rourke retired, and the relationship just continued with the larger Bollinger firm. And that just doesn't make sense to me because if you're working with an individual and that individual moves on and you develop that special relationship and that individual moves on, all of a sudden you have to restart it again. So that was

troubling and hopefully will be again, an outlier here. So that stick to hopefully doesn't become the law.

**Lynda Bennett:** So because we like to be practical, what are the lessons learned? What are the things that our listeners should do differently so that they don't find themselves in this situation?

**Eric Jesse:** Yeah. Well, this was the perfect example of buying the policy and just putting it on the shelf. And so what this case really talks about, or one of the cautionary tales is, as you put it, you got to help yourself a little bit. You got to do something 'cause this insured did nothing. So it just requires some proactivity. Don't just put it on the shelf. Look, it's going to depend on the nature and size of your business, but at the end of the day, it comes down to asking the right questions and giving the broker the right pieces of information. And by the way, maybe by doing that and making a little bit of effort, that special relationship can be formed.

**Lynda Bennett:** Yeah, I mean, one of the shames of this case was it was a covered claim. Really, that's pretty astonishing. And so I can understand the desire to want to turn to the broker to say, well, why didn't I have enough insurance for this 'cause it was otherwise a covered claim. Yeah, I agree. You got to ask the questions, give the information. Another thing is you got to work with the right brokers, right?

**Eric Jesse:** Yes.

**Lynda Bennett:** So in this instance, Bollinger, good on them. They send the questionnaire year after year after year. They're not really doing their job when the questionnaire doesn't get returned, and no follow up questions are asked. You really want to put yourself with a broker who you do have a genuine special relationship where they understand your business, where they're going to be vigilant and diligent and not have this be a rote renewal process.

I mean, as you laid out the facts of this case, and you mentioned this was really bespoke machinery here, and having somebody that understood that and looked at the coverage to say, "This is really not enough." So yes, Bollinger, this case to defend themselves was able to say, "Well, we sent the questionnaire. They didn't fill it out." It actually would've been a better fact pattern, I would've felt better about this case if even in the face of not getting the completed questionnaire sent back, Bollinger would've also been able to say, "But yeah, we were trying to do right by them. Here's three- and four-years' worth of, we recommended \$5 million of limits. We recommended \$10 million of limits." You want to be working with a broker yourself that is proactive in that way.

**Eric Jesse:** Yeah, I think the takeaway here, just it's not the legal considerations as much as it's the practical considerations. So what you just described is it's a client service component, and where the broker is, here they truly were the order taker. They just renewed annually without much thought or input, and you want to have that phone picked up, that conversation had, just make a little bit of effort. But on the policy holder side, make the effort, do the necessary things to protect yourself. I would argue that the broker has, as New Jersey

law says, the broker needs to understand the risks, but don't wait for the question to be asked. Talk to your broker and say, this is what my company does. Do you see any gaps in coverage? Do you have any recommendations? What limits do you think I should have? And if those three questions had been asked at some time in this 10-year relationship, you might've had that special relationship.

**Lynda Bennett:** Well, exactly right. And you would've had a special relationship that would've had the right coverage in place, so you didn't have to sue your broker. You would actually just add coverage for the client, which is what we're going after in the end.

**Eric Jesse:** Exactly.

**Lynda Bennett:** One other final word I want to say is we talk all the time about how insurance policies are not all created equal, insurance companies are not all created equal, insurance brokers are not all created equal, right, Eric? So let's just talk very briefly about a couple of the things you need to look at with respect to brokers. Couple of the trip wires we've seen for other clients.

**Eric Jesse:** So part of it is, as we talked about, just that client services component, so brokers being thoughtful about your account. It is, as we've also talked about, a lot of policies are complex. And so you want a broker that specializes in DNO insurance placing your DNO policy. Cyber is another one. Here I don't know if they were the right broker in this case for this customized equipment, if there were other options there. And then the other thing to be aware of is a lot of times, I think a lot of the larger brokers will try it, have you sign a contract that restricts their common law duties and caps any liability that they would have. So that's another thing to keep in mind. We always try and push back on that as much as we can for our client.

**Lynda Bennett:** Really want to amplify that point, because reading the fine print at the end of that really snazzy PowerPoint deck that you get for your renewal is super important 'cause that's where some of these narrowing of their duty language appears, the limitation of liability caps, choice of forums, because as we also talk about all the time here on Don't Take No For An Answer and as we highlight it in today's episode, the law is different for the legal standard that applies. And so that's another thing that really needs to be looked at. Well, Eric, thank you for joining today to talk about broker malpractice, and hopefully our listeners picked up a couple of really excellent tips on how to avoid the kind of outcome in the case that we just discussed. So thanks for coming on today.

**Eric Jesse:** Absolutely. Take care.

**Kevin Iredell:** Thank you for listening to today's episode. Please subscribe to our podcast series at [lowenstein.com/podcast](https://lowenstein.com/podcast) or find us on Amazon Music, Apple Podcasts, Audible, iHeartRadio, Spotify, Soundcloud or YouTube. Lowenstein Sandler Podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. Content

reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast and all rights are reserved.