

# ANDERSON KILL NEW JERSEY

## ALERT

### New Jersey Courts Provide Clarity on Insurance Broker Liability

By Robert D. Chesler, Steven J. Pudell and Janine M. Stanisz

New Jersey law broadly protects policyholders against errors by their insurance agents and brokers and also provides considerable scope for findings of broker liability. In *Aden v. Fortsh* the state's Supreme Court held that a policyholder need not even read its insurance policy, but rather can rely upon its broker. 169 N.J. 64 (1999). Importantly, the court also held that an insurance broker is in a fiduciary relationship with a policyholder.

After *Aden*, however, New Jersey courts were quiet on issues of broker liability until recently, when two Appellate Division decisions revisited the issue of broker liability and provided additional guidance to brokers on the obligations they owe policyholders. See *Huggins v. Liberty Mut. Ins. Co.*, No. A-1187, 2014 N.J. Super. Unpub. LEXIS 1102 (N.J. App. Div. May 14, 2014); *Duffy v. Certain Underwriters at Lloyds of London*, No. A-5797, 2014 N.J. Super. Unpub. LEXIS 1789 (N. J. App. Div. July 21, 2014).

In *Huggins*, the homeowner requested from the sales agent, the most inclusive coverage available. The homeowner testified that she wanted "all beneficial coverage options" and advised the agent that the house had a sump pump. The policy that Liberty Mutual ultimately sold did not provide sump pump coverage, although such coverage was available by endorsement. The following year, the policyholder's sump pump failed, resulting in a \$35,000 loss.

The homeowner sued Liberty Mutual not for coverage, but for failure to advise them of the availability of sump pump coverage. Liberty Mutual's sales agent testified that the homeowner had been offered such an endorsement, but had decided not to purchase sump pump coverage. While the agent claimed he had taken notes regarding this discussion, on his initial interview questionnaire he testified that he had lost those notes. Liberty Mutual prevailed on Summary Judgment, but the Appellate Division reversed. The Appellate Division found that "[t]here [wa]s no dispute that [the homeowner] did not specifically ask for the sump pump option, but there [wa]s a factual dispute as to whether it was offered" to the homeowner. *Huggins*, 2014 N.J. Super. Unpub. LEXIS 1102 at \*4.

*Huggins* heightened the burden on agents and brokers in New Jersey when offering and issuing insurance policies. The *Huggins* decision is rooted in the homeowner's request for "the most inclu-

ANDERSON KILL  
1251 Avenue of the Americas  
New York, NY 10020  
(212) 278-1000 Fax: (212) 278-1733

ANDERSON KILL  
864 East Santa Clara Street  
Ventura, CA 93001  
(805) 288-1300 Fax: (805) 288-1301

ANDERSON KILL  
1600 Market Street, Suite 2500  
Philadelphia, PA 19103  
(267) 216-2700 Fax: (215) 568-4573

ANDERSON KILL  
1055 Washington Boulevard, Suite 510  
Stamford, CT 06901  
(203) 388-7950 Fax: (203) 388-0750

ANDERSON KILL  
1717 Pennsylvania Avenue, Suite 200  
Washington, DC 20006  
(202) 416-6500 Fax: (202) 416-6555

ANDERSON KILL  
One Gateway Center, Suite 1510  
Newark, NJ 07102  
(973) 642-5858 Fax: (973) 621-6361

ANDERSON KILL  
JP Morgan International Plaza III  
14241 Dallas Parkway, Suite 650  
Dallas, TX 75254  
(972) 728-8753 Fax: (805) 288-1301

www.andersonkill.com





## who's who

### Robert D. Chesler

is a shareholder in Anderson Kill's

Newark office. Mr. Chesler represents policyholders in a broad variety of coverage claims and advises companies with respect to their insurance programs.

[rchesler@andersonkill.com](mailto:rchesler@andersonkill.com)  
(973) 642-5864



### Steven J. Pudell

is the managing shareholder in Anderson Kill's Newark office. Mr. Pudell regularly represents policyholders in

insurance coverage matters and disputes.

[spudell@andersonkill.com](mailto:spudell@andersonkill.com)  
(973) 642-5877



### Janine M. Stanisz

is an attorney in Anderson Kill's Newark office. Ms. Stanisz's practice concentrates on insurance recovery, exclu-

sively on behalf of policyholders as well as in real estate and construction.

[jstanisz@andersonkill.com](mailto:jstanisz@andersonkill.com)  
(973) 642-5063

"New Jersey Courts Provide Clarity" continued from p1

sive" coverage available. Similarly, it is not unusual for an agent or broker to offer, for example, to examine a policyholder's operations and risks and advise the policyholder regarding what insurance coverage the policyholder should purchase. Such commitments by the agent or broker in effect make them a risk manager, who must be knowledgeable of all a policyholder's risks and the insurance remedies that are needed and available.

If *Huggins* enlarged an agent's and broker's duty in some circumstances, *Duffy* narrowed it in other circumstances. In *Duffy*, the policyholder changed brokers and insisted that the new broker issue a policy that would not increase the policyholder's premium. The policyholder gave information during the insurance application process, but much of the information was inaccurate. That issued policy offered coverage in the amount of \$150,000, yet when the policyholder's house burnt down, the damage was valued at \$460,000. The policyholder sued the broker for professional negligence as a result of procuring inadequate insurance coverage, but both the trial court and the Appellate Division negated the claim. The Appellate Division reasoned that the amount of insurance coverage was "clearly and prominently stated and easily understood. Were plaintiff dissatisfied with the extent of coverage, an opportunity to raise such concerns presented itself with each annual renewal." *Duffy*, 2014 N.J. Super. Unpub. LEXIS 1789, at \* 18-19. The trial court granted the broker's summary judgment motion and the Appellate Division affirmed. The Appellate Division explained, "the facts reflect [the policyholder's] desire to obtain a level of homeowner's coverage that was consistent with her expired . . . policy; she did not desire modifications that would raise her premium[.]" *Id.* at \*21.

Both *Huggins* and *Duffy* offer lessons for policyholders, brokers and agents. Policyholders should seek the broadest coverage possible and look to hold their brokers liable should it turn out that the broker or agent failed to provide the coverage that was promised. Policyholders should confirm in writing that they are seeking the broadest or most comprehensive coverage. For their part, insurance brokers and agents need to listen to policyholders and offer the requested coverage. In order to better protect their interests, brokers and agents also need to keep detailed records to demonstrate that they offered coverage options in accordance with their customers' needs. Company checklists and proper filing of records are essential tools in this regard.

*Huggins* specifically underscores the best broker and agent risk management device – keep records. Write down what coverage was offered, and what coverage the policyholder refused.▲



# New Jersey Passes ‘Ban the Box’ Law — Barring Early Criminal Checks on Job Applicants

By Bennett Pine

Joining a growing trend, on August 11, 2014, Gov. Chris Christie signed the Opportunity to Compete Act, a species of so-called “ban the box” laws which bars New Jersey employers from asking job applicants about their criminal history at the early stages of the employment process. Removing such questions (e.g., “Have you ever been convicted of a crime?”) at the job application stage is part of a growing national movement to “ban the box” regarding criminal conviction inquiries.

## Purpose and Details

The New Jersey legislature found that the use of criminal background checks by employers has become more prevalent in recent years as part of the hiring process; that individuals with criminal histories represent a large proportion of job seekers; that such background checks act as a significant barrier to permitting such persons to enter, re-enter, contribute and become productive members of the workforce; and that striking a fair balance will improve the economic viability, health and security of the state.

## Who is Covered

The law covers employers who employ at least 15 employees over 20 calendar weeks and who do business, employ persons or take employment applications within New Jersey; and includes job placement, referral and employment agencies. There are exceptions for law enforcement, corrections, homeland security, judiciary and other positions where a criminal history background check is required by law, rule or regulation.

## What Is Prohibited

Under the new law, employers are forbidden from (1) publishing a job advertisement or posting stating that the employer will not consider applicants who have been arrested or convicted of one or more offenses, (2) requiring a job applicant to complete an employment application that makes any inquiries regarding the applicant’s criminal record, or (3) making any oral or written inquiry regarding an applicant’s criminal record during the “initial employment application process.”

*“New Jersey Passes Ban the Box Law” continued*

Bennett Pine is a shareholder in Anderson Kill’s New York and Newark offices and is chair of the firm’s employment & labor group. Mr.



Pine has broad-based labor and employment law experience and regularly plays a hands-on role offering preventative maintenance advice and counseling to employers in the full range of legal issues affecting the workplace.

**bpine@andersonkill.com**

**(212) 278-1288**

**(973) 642-5006**

The information appearing in this alert does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations. We invite you to contact the alert editor Robert D. Chesler at rchesler@andersonkill.com or (973) 642-5864, with your questions and/or concerns.

## ANDERSON KILL NEWSLETTERS & ALERTS



### BE CARBON CONSCIOUS

Please consider switching your subscription to email and you will also receive our timely email-only *Client Alerts*. It’s easy, just send your mailing and email address to [andersonkill@andersonkill.com](mailto:andersonkill@andersonkill.com).

### TO SUBSCRIBE PLEASE VISIT:

[www.andersonkill.com/  
publications\\_subscribe.asp](http://www.andersonkill.com/publications_subscribe.asp)

### TO UNSUBSCRIBE PLEASE EMAIL:

[unsubscribe@andersonkill.com](mailto:unsubscribe@andersonkill.com)



*"New Jersey Passes Ban the Box Law" continued from p3*

The "initial employment application process" is the period beginning when an applicant first makes inquiry to the employer about a prospective employment position or vacancy, and ending when the employer has conducted a first interview of a job applicant in person or by other means.

#### **What Is Allowed**

An employer permissibly may inquire into and consider the criminal history of the applicant *after* the employer has conducted an initial employment interview or if the applicant voluntarily discloses his or her criminal record during the initial employment application process.

#### **Penalties**

Employers and employment agencies that violate the New Jersey law face civil penalties of up to \$1,000 for the first violation, up to \$5,000 for a second violation, and \$10,000 for each subsequent violation. No private cause of action is created.

#### **Effective Date**

The New Jersey law will take effect on March 1, 2015.

#### **Growing Trend**

According to the law's sponsors, five other states (Hawaii, Illinois, Massachusetts, Minnesota and Rhode Island) have similar ban the box laws that cover private employers. According to the National Employment Law Project, 12 states and 60 cities and counties have such laws applicable to public employment. San Francisco has just adopted such a ban the box law and New York is expected to follow suit shortly.

#### **Recommendation**

New Jersey employers should be well aware of the new ban the box restrictions and should take appropriate steps to ensure that improper inquiries or restrictions regarding an applicant's criminal background are removed from job advertisements, job applications and interviews that take place during the "initial employment applications process." It is permissible, however, to make such inquiries thereafter. Employers have until March 1, 2015, to implement this distinction in their employment application and selection procedures. ▲

