

## SPECIAL REPORT

### **“READ YOUR POLICY” SAYS THE COURT OF APPEALS JULY 31, 2008 MICHIGAN COURT OF APPEALS DECISION CLEARS WAY FOR MAJOR ISSUES FOR POLICYHOLDERS**

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A far-reaching July 31, 2008 published decision out of the Michigan Court of Appeals clarifies the significant duties upon any policyholder to read their policy and understand it or raise questions within a reasonable period of time.

The typical insurance agent will send a copy of the insurance policy to the client with a one page cover letter requesting that the client simply read the policy and call with any questions. If this sounds familiar to you, it is time for a new agent.

Do you read your insurance policies? If you do read them, do you understand what you are reading? Do you know what options are available to you by way of endorsements or otherwise? As noted by courts, insurance policies are legal contracts that policyholders in effect “sign” by purchasing and they are bound to the terms contained therein. There is a lot of fine print in such policies and it is rare for even a sophisticated business person to understand policies. In fact, many attorneys do not understand the intricacies of insurance policies and call upon experts to assist in analyzing the issues.

**“Get an agent who is willing to be more than an order taker for you. Order takers are for McDonalds. Get an agent who is competent and willing to try to negotiate broader than average coverages.”**

### **ZAREMBA V. HARCO AND THE INSURED’S DUTY TO READ THE POLICY**

In *Zaremba Equipment, Inc. v. Harco National Insurance Company and Patrick Musall*<sup>1</sup> an insurance company and an insurance agent were sued

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<sup>1</sup> \_\_\_ Mich App \_\_\_ (July 31, 2008)(No 274745)(for publication)

after a fire destroyed the primary commercial building occupied by Zaremba Equipment. Zaremba had purchased a commercial property insurance policy from Harco National Insurance Company through an insurance agent. This was the seventeenth (17<sup>th</sup>) consecutive year Zaremba had its insurance through this insurance company. The policy in effect at the time had limits of \$525,000 for the building and \$700,000 for the contents. Zaremba learned following the fire that it would cost \$1,192,000 to replace the building alone. In suing the insurer and the agent to recover the underinsured amount, Zaremba argued that prior to the fire it asked to be “fully insured so it could rebuild and replace its property in the event of a total loss.”

The insurer and the insurance agent defended the lawsuit, citing the ordinary rule that there is no duty to advise a policyholder of the adequacy of coverage, further arguing that Zaremba should have read its own policy. Zaremba’s representative testified that the policy was too long and too difficult to read and that a copy of the policy covering the period in question was not sent to him.

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At trial, the jury found in favor of Zaremba and awarded \$1,556,558. The insurer and the insurance agent appealed.

The Michigan Court of Appeals, in a published decision that is binding upon all trial courts as law they must follow, reversed the jury award stating that the jury should have been instructed by the trial judge that Zaremba had a duty to read its own policy, even if there was more than just an ordinary relationship with the agent, i.e. a special relationship involving a duty to advise of coverage adequacy.

The Court stated that the jury should have been instructed to consider any fault of Zaremba in failing to read the policy and further found that it did not matter that Zaremba was not given the policy that applied to the fire in question as it had prior policies it should have read. It further opined that even though the jury determined that there was more than an order-taker relationship between Zaremba and its insurance agent, Zaremba should still have read the policy.

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### **IMPLICATIONS OF ZAREMBA**

It is nothing new to Michigan law that an insurance policyholder has a duty to read its policy and raise any questions to the agent or insurer within a reasonable period of time. This is a major undertaking. In *Zaremba*, the Court of Appeals ruled that the trial court erred in not including an instruction that the jury analyze any fault of Zaremba for not reading its policy and reduce any verdict in its favor, or find in favor of the insurer and insurance agent if the jury found that the failure to read the policy was the proximate cause of the underinsurance.

What is new to the law from *Zaremba*, however, is the finding that even where the ordinary rule that the agent does not have to advise the policyholder is found to not apply because of a “special relationship” with the policyholder, there is still a duty of the policyholder to read the policy and the policyholder could be assessed a percentage of fault or not be able to recover at all against an insurance agent where it did not read its policies.

Some key lessons for policyholders:

1. It does not matter whether you are a commercial or personal insured, you should read your policy as soon as you get it and raise any questions with your agent in a prompt manner.
2. The insurance agent can be more important than the insurance company in many ways. For example, in *Zaremba*, the agent was found to have more than an ordinary relationship with the policyholder and thus had a duty to advise the company of the adequacy of coverage. However, the values on the building and contents were significantly underinsured. Get an agent that is willing to be more than an order-taker for you. **Order takers are for McDonalds.** Get an agent that is competent and willing to try to negotiate broader than average coverages. Most insurers will not give the broader coverages unless they are pressed to do so by the agent.

**“Most policyholders, even where they read their policies, are not likely going to understand the nuances of the fine print of the contract or the hundreds of optional endorsements or other policies that might be available to address the gaps. Get an agent who does more than place the entire burden on you by sending you the policy and asking you to read it.”**

3. If your agent sends you your policy with a simple letter that only says, “read your policy and call us with any questions,” it is probably time for a new agent. Insurance policies are complicated legal documents. Most people would not sign a forty page contract with a lot of fine print without first consulting with an attorney. However, the policyholder is charged with knowledge of the terms of the policy and cannot complain later that the terms were thought to be other than what they were.
4. The independent insurance agent that sells for many insurers is your legal agent as a general rule and is not the agent for the insurer. If your independent agent tells you something that is not correct, the statement is not likely going to be binding upon the insurer. Certificates of insurance that are issued by the agent are not likely to be binding upon the insurance company, even if the insurance company’s name is on the document. In fact, many insurance companies will not even accept copies of certificates issued by insurance agents.
5. Spend quality time on your commercial or personal insurance program and do it every year. Do not buy insurance the way that you buy janitorial supplies or groceries. There is no such thing as “apples-to-apples” quoting. All policies differ in their terms and conditions. Get an agent who explains the policies to you and understands what options are best for you.

**“We have seen hundreds of cases of inadequate coverage over many years in losses that ultimately end up in litigation. No one wins in this situation because even if you obtain a jury verdict in your favor, it will cost you attorney’s fees up to 1/3 of the recovery plus costs in most cases, not to mention the potential loss of your business, home and credit.”**

6. Most policyholders, even where they read their policies, are not likely going to understand the nuances of the fine print of the policy contract or the hundreds of optional endorsements or other policies that might be available to address the gaps. Get an agent who does more than place the entire burden upon you by sending you the policy and asking you to read it. Demand written narratives on coverage issues and availability from your agent, and if they will not provide such an analysis, go elsewhere.
7. Inadequate insurance programs can ruin you financially. We have seen hundreds of cases of inadequate coverage over many years in losses that ultimately end up in litigation. No one wins in this situation because even if you obtain a jury verdict in your favor, it will cost you attorney's fees up to 1/3 of the recovery plus costs in most cases, not to mention the potential loss of your business, home and credit.
8. Use an attorney who has knowledge in insurance matters to advise you. As noted in this paper, many attorneys will defer reviewing of insurance policies because they do not want the liability and typically do not understand the intricacies of coverage. There are some insurance agencies that employ attorneys who are trained to negotiate better than average policy conditions.

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