The Relationship Between Brokers, Insureds, and Insurers

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Overview

1. Duties of brokers to insureds

2. Duties of brokers to insurers

3. Duty of insurers to provide advice to an insured when the insured is represented by a broker
Role of Agents and Brokers

• Outside of Ontario, the terms “insurance agent” and “insurance broker” are used interchangeably.

• In Ontario, an agent is only permitted to represent one insurer.

• In Ontario, a broker is a part of a self-regulating professional body, and is able to place insurance with multiple insurers.
Dual Agency

• Brokers are intermediaries – they are “middle men” between the insurer and insured who will owe contractual and common law duties to both insured and insurer

• Depending on the particular role undertaken by the broker in any given transaction, a broker may be found to be acting either as agent of the insured for certain functions (completing and filing the application for insurance) or as agent of the insurer (binding coverage).
Broker’s Primary Duty

• The broker’s primary duty is to the insured.

• Registered Insurance Brokers of Ontario: brokers represent their client's best interests when negotiating a contract between the client and the insurer.

• RIBO sets out a code of conduct for brokers, but generally those obligations are less stringent than the duties recognized at common law.
Duties of Agents and Brokers to Insureds

• Brokers’ professional duties to their clients (insureds) are quite onerous:
  – Understand nature of insured’s business
  – Ascertain/assess risks
  – Advise of proper coverage
  – Place proper coverage or advise of unavailability
  – Explain gaps/exclusions in coverage

• Customers rely on brokers’ expertise
Duties of Agents and Brokers to Insureds

• Brokers must ensure that insureds are protected against all foreseeable, insurable risks: *Fine’s Flowers v. General Accident*, ONCA (1977).

• In *Fine’s*, insured’s request was for “full coverage”

• Court commented that a broker must have a full understanding of the nature of the insured’s business and be able to properly assess the risks to offer the brokerage service
Duties of Agents and Brokers to Insureds

• “Stringent duty to provide both information and advice” if customer relies on it: *Fletcher v. Manitoba Public Insurance Corporation, SCC* (1990).

• Need for clear communication with client and insurer, proper analysis of risk, presentation of available products and procurement of cover appropriate to needs.
Recent Broker’s Liability Decision


- Plaintiff did not purchase optional Income Replacement Benefits (IRBs).
- Plaintiff involved in serious motor vehicle accident. Permanently disabled.
- Broker had explained the availability of optional benefits and asked plaintiff whether basic benefits would be sufficient.
Recent Broker’s Liability Decision

• Plaintiff argued that broker should have inquired about other income continuation plans and recommended/quoted optional IRBs.

• Judge found that broker met standard of care by having explained availability of optional IRBs.

• Evidence showed that plaintiff only wanted minimal coverage and low premiums in the past.
Recent Broker’s Liability Decision


- Broker did not offer optional Statutory Accident Benefits and was found negligent
- But the plaintiff did not prove that the broker’s negligence caused the loss – that is, the court found that the plaintiff would not have purchased optional benefits in any event.
Authority to Bind


• Authority can be: express, implied or apparent/ostensible
Authority to Bind

• The particular terms of the **express** authority given to a broker by the insurer are generally set out in the contract dealing with procurement of business.

• **Implied** authority may arise from a pattern of conduct by broker to which insurer has acquiesced – for example, ratification by the insurer of previously unauthorized acts by the broker.
Authority to Bind

• **Apparent/Ostensible** authority can arise through direct dealings with the insured – where the insured is led to believe by the conduct of the insurer that the broker has authority

• The insurer must honour commitments by intermediaries when they are made in the course of express, implied or apparent authority
Brokers’ Duties to Insurers

• Broker owes a duty of good faith to insurer.
• Brokers can potentially be held liable to insurers for failing to:
  – Convey material information from the insured
  – Discover facts relevant to insurability/risk
  – Follow instructions to transmit information to insured
  – Act in way which does not compromise the insurer’s rights to deny coverage or rely on defences and exclusions
Example – Broker’s Failure to Make Inquiries of Insured


• Mobile home was insured.

• Broker advised by insured of address change.

• Broker assumed mobile home was still at same trailer park when, in fact, it was moved to new location.

• Mobile home damaged by wind.
Example – Broker’s Failure to Make Inquiries of Insured

• Insurer paid claim and sought recovery from broker.

• Insurer said it would not have insured mobile home at new location – material change.

• Judge: breach of broker agreement to advise insurer of any change affecting the risk.

• Broker found liable to insurer for damages.

• Broker should have asked insured if mobile home was in new location.
Example – Broker’s Failure to Communicate Risks to Insurer

- *MacLean v. Canadian General Insurance, NBQB (1990).*
- Insured owned music club.
- Applied for insurance on house where band members would generally stay 3 – 4 nights/week; otherwise empty.
- Told broker of this.
- Broker advised insurer that house was “tenant occupied”.

Example – Broker’s Failure to Communicate Risks to Insurer

• Band members complained of not enough heat. Damaged electrical panel.
• House empty for about 50 days during repair.
• Fire occurred while house empty.
• Judge: insurer was required to pay insured.
• However, broker had to pay insurer.
• Broker should have advised insurer about special risk.
Example – Broker’s Failure to Advise Insured of Limitations Under Policy

- **G.R. Young Ltd. v. Dominion Insurance, BCSC (1979).**
- Insured wanted fire insurance on an actual cash value (ACV) basis.
- Insurer only prepared to issue policy with wreckage value endorsement (value of materials of building and structures).
- Policy issued, but agent (broker) did not advise insured of endorsement.
Example – Broker’s Failure to Advise Insured of Limitations Under Policy

• Fire occurred.

• Judge: insurer responsible under policy for ACV since insured was not advised of wreckage value endorsement.

• However, broker had to indemnify insurer for amount in excess of wreckage value.

• “Clear” that broker had duty to insurer to advise insured of limitation under policy.
Brokers’ Duties to Insurers

• The duties owed to insurers must be considered in light of the knowledge expected of the underwriter.

• Presumption that the underwriter will have taken the necessary steps to obtain information available to it: *Adams-Eden v. Kansa General Insurance, Man. Q.B. (1995).*

• Therefore, the court will not look highly on an insurer’s blind reliance on a broker.
Interplay Between Brokers and Insurers: Ostenda

- Trucking company insured by insurance policy.
- Ostenda was employee of trucking company.
- Ostenda lost both legs in motor vehicle accident in United States.
- Defendant driver had minimal liability limits.
- Policy did not have OPCF 44R family coverage protection endorsement.
Ostenda - Facts

• Prior to insuring trucking company, and prior to renewals, insurer conducted risk assessments.

• Insurer provided risk assessment reports to company.
Ostenda - Issue

• Did insurer stand exposed to liability in the same manner as a broker, having regard to its dealings with the trucking company?

• Plaintiff argued that insurer had a duty to advise trucking company of potential gaps in coverage because insurer had provided advice to company on risks.
Case Relied On - Drader

• Homeowner’s policy.
• Swarovski figurines not covered under policy.
• Insureds sued broker and insurer.
• Court: when an insurer receives an application for insurance from a broker, there is no general duty on the insurer to review the insured’s insurance needs, absent a specific request by a broker.
Case Relied On - *Boudreau*

- Serious soccer injury. Plaintiff became a quadriplegic.
- Under insurer’s policy, only $40,000 for quadriplegia.
- Plaintiff sued insurer, broker, and soccer association.
Case Relied On - *Boudreau*

- Judge: when dealing with an experienced broker, the insurer owes no personal duty directly to the insured.

- The insurer’s only obligation is to issue a policy in accordance with the application submitted.
Judge’s Findings in Ostenda

- No evidence that trucking company relied on insurer for insurance advice.

- Insurer’s risk assessments were to assess the risks from an underwriting standpoint and to reduce the potential for claims.

- Logical that insurer had to understand company’s operations in order to assess the risk.
Disclaimer Clause

- In insurer’s risk assessment reports, there was particular wording.
- “By delivery of this Report, the insurer does not assume any responsibility for discovery, notification or elimination of hazards or risks”.
- “Neither the insurer nor its representatives shall be liable...for any loss [or] damage” in connection with the report.
Public Policy Reasons

• Brokers are part of a regulated industry with codes of conduct and specific obligations.

• To impose the same duties on insurers would result in considerable duplication of effort and would increase premiums.
Agency

- Plaintiff argued that insurer was liable for mistakes of the broker due to principal/agent relationship.
- Judge did not agree.
- Evidence did not show that broker had legal authority to affect insurer’s position.
- Broker was an intermediary, not an agent. Did not have authority to bind the insurer.
Lessons Learned from *Ostenda*

- If an insured asks for advice on insurance requirements, it is probably best to refer them to the broker. Let the broker do its job.
- Court could find that duty of care on insurer arises if insurer starts to provide advice on coverage needs.
- Consider a disclaimer clause in risk assessment reports.