



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

- *Godina v. Tripemco Burlington Insurance Group Ltd. and Mitchell*, ONSC (2013)
- 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

- *Zefferino v. Meloche Monnex Insurance Company*, ONCA (2013)
- 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

- Dual agency scenarios generally occur when the broker has authority to bind the insurer:
1126389 Ontario Ltd. v. Dalton, ONSC (2000);
Piggott Construction (1969) Ltd. v. Saskatchewan Government Insurance Office, Sask. C.A. (1985).
- 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

- *Gore Mutual v. Barton, Black and Robertson*, BCSC (1979).
- 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*

- *Ostenda v. Bahena-Miranda*, ONSC (2012)
- 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*

- *Drader v. Sebastian*, Sask. C.A. (2009)
- 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*

- *Boudreau v. Ontario Soccer Assn.*, ONSC (2012)
- 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.