

Brokers' Errors and Omissions

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Structure

- Regulatory issues
 - Changes
 - Products
 - Control Issues
- Recent case law
 - Kidsons
 - Standard Life
- Conclusions



Regulatory Issues - changes

- New ICOBS rules
- Contract certainty – legacy issues
- European Commission Sector Enquiry on business insurance
- FSA review of commission disclosure
- European Commissions review of MiFID
- Insurance contract law reform



Regulatory Issues - changes

- New ICOBS rules
 - Most general insurance - FSA has moved from detailed to high level rules
 - Protection products – targeted additional rules
- Contract certainty
 - Continues to be an FSA supervisory priority
 - Concern is about legacy issues



Regulatory Issues - changes

- EC Sector Enquiry on business insurance
 - Restrictive business practices
 - Particularly interested in co-insurance
 - Three areas of concern
 - “BTC” clauses to the detriment of customers
 - Dual role of brokers gives rise to conflicts – left to MiFID review
 - Block exemption for horizontal co-operation to expire



Regulatory Issues - changes

- FSA review of commission disclosure
 - Wholesale/commercial market
 - Concerns re lack of transparency
 - Customers at risk £0.5m - £100m turnover
 - Mandatory rule too costly
 - Thematic work on conflicts
 - Education?



Regulatory Issues - changes

- European Commission review of MiFID
 - Cross border motor products
- Insurance contract law reform
 - Law Commission Consultation Paper July 07
 - Misrepresentation, warranties and intermediaries + pre contract information
 - Final recommendations awaited
 - Further Consultation Paper due shortly
 - Insurable interest and post contractual good faith

Regulatory Issues - products

- Connected Travel Insurance
 - 1 January 2009
- PPI
 - HFC Bank £1,085,000
 - Land of Leather £210,000
 - Cost of remedial action



Regulatory Issues - products

- Which? Money Saving Handbook top five insurances to avoid
 - Extended warranties
 - Identity theft cover
 - PPI
 - Mobile phone cover
 - Accidental death and injury cover



Regulatory issues - products

- PPI: how to claim if you've been mi-sold
- How to make a complaint to claim compensation for PPI
- What to do if your complaint is rejected
- Template letter to send to your lender



Regulatory issues - products



Regulatory Issues – control issues

- Land of Leather
 - Paul Briant £14,000
- Call centres
 - UNAT Direct Insurance Management £640,000
- Appointed representatives
 - FSA review reveals procedures not being followed and too much reliance on remote checking



Regulatory Issues - summary

- Change
 - Uncertainty
 - Error
 - Resources diverted from main activity
- Systems and controls
 - regulatory priority
 - control of business including ARs is vital
- Suitability! Suitability! Suitability!



Recent case law

- HLB Kidsons v Lloyds Underwriters & Ors [2007] EWHC 1951
- Standard Life Assurance Ltd v Oak Dedicated & Ors [2008] EWHC 222
- HIH Casualty & General Insurance v JLT Risk Solutions [2007] EWCA Civ 710



Kidsons

- Concerned notification of circumstances
- Has been appealed
- Some points of general application not appealed



Kidsons

“The Assured shall give to the Underwriters notice in writing as soon as reasonably practicable of any circumstance of which they shall become aware during the period specified in the Schedule which may give rise to a claim against them. Such notice having been given any loss or claim to which that circumstance has given rise which is subsequently made after expiry of the policy period specified in the Schedule shall be deemed for the purpose of this Insurance to have been made during the subsistence hereof.”



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Kidsons

- Notice had to be “as soon as practicable”
- Circumstances which were not notified as soon as practicable were not notified in accordance with policy term and conditions
- Matters notified after the end of the policy period were not circumstances
- Insured cannot notify something of which they are not aware even if covered by wording



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APPEALED



Kidsons

- Scope of notification also considered in *Kajima UK Engineering v The Underwriter*
 - Can give a “can of worms” notification
 - Insured must be aware of the circumstances when giving the notification
 - Further notifications must be given when the Insured becomes aware of new circumstances
 - The claim brought can relate to new damage flowing from the notified circumstance



Kidsons

- Other propositions in relation to London Market practice remain undisturbed
 - Placing broker must warn placing underwriter if information provided is intended to constitute a notification
 - Notification to be made to each Insurer absent agreement to the contrary
 - On these facts solicitors were not Insurers' representatives for notification purposes



Kidsons

- Estoppel or election
 - *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] 1 Lloyd's Rep IR Plus 13
- The law never compels a person to do that which is useless and unnecessary
 - *Lickiss v Milestone Motor Policies at Lloyd's* [1966] 2 Lloyds Rep IR Plus 13



Standard Life

- Concerned meaning and effect of excess wording contained in policy schedule
- Policy supersedes slip
- Slip used to aid construction of policy
- Schedule may qualify policy
- Causation easy to demonstrate in a soft market
- Preferring wording which exposed client to risk is negligent



HHH Casualty v JLT

- Film finance



HIH Casualty v JLT

- Film finance



7 foot boxing shrimp



HH Casualty v JLT

- Film finance
- JLT placed cover with HH and arranged back to back cover with reinsurers
- Warranties in both policies that three slates of films would be made
- Risk was that finance for films would not be repaid



HHH Casualty v JLT

- Finance not repaid
- Insured claimed for shortfall and HHH paid out
- Breaches of warranty as insufficient films produced
- Risk management reports passed by JLT to insurers and reinsurers noted this



HIH Casualty v JLT

- HIH could not claim on reinsurance
- HIH sued JLT on the basis that it had a post placement duty to alert HIH to the coverage issues that could arise from the reduced number of films produced
- First instance claim failed on causation
 - Reinsurers would not have changed terms
 - HIH could not show that they would not have paid out given they did not consult reinsurers



HH Casualty v JLT

- Court of Appeal upheld first instance decision
- BUT JLT should have acted as more than a letterbox
- For risky schemes post placement obligations are more likely to be imposed
- Longmore LJ formulated a wider post placement duty



HIH Casualty v JLT

“... an insurance broker who, after placing the risk, becomes aware of information which has a material and potentially deleterious effect on the ...cover ...is under an obligation to act in his client’s best interests by drawing it to the attention of his client and obtaining his instructions in relation to it.”



HIH Casualty v JLT

- No need to actively seek out information
- Not clear if test objective or subjective (ie should they notify what they consider to be material or all information)
- Where coverage is back to back should discuss information with insurers before sending to reinsurers and seek advice if concerned about conflicts
- Exclude?



Conclusions

- Take time to understand the impact of regulatory change – it's more expensive to get it wrong
- Notification – if in doubt notify in writing as per policy terms and keep notifications up to date
- Don't get involved in films involving 7ft boxing shrimps



Conclusions

- Take time to understand the impact of regulatory change – it's more expensive to get it wrong
- Notification – if in doubt notify in writing as per policy terms and keep notifications up to date
- Exclude post placement duties if at all possible



Any questions?



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