Brokers – Feeling the Heat

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Insurance: a minefield

“Insurance is a subject notoriously replete with technical terminology and principles of which the average layman has no more than a rudimentary grasp.”

Café de Lecq v RA Rossborough (2012)
Claims on the increase

- Economic Climate
- Financial Pressures on Brokers
- Policy Disputes
- Brokers judged against more exacting standards

Scope of duty

- The law of agency
- ICOB Rules
- Authorised by FSA
- Duties in contract
- Duties in tort: reasonable skill and care
Broker’s Duties

- On placement
- On renewal
- A continuing duty

General Principles

- Ascertain clients’ insurance needs
- Keep proper records
- Advise on adequacy of sums insured and risks of underinsurance (average)
- Explain onerous terms
- Explain duty of disclosure and consequences of failing to do so
- Take reasonable steps to elicit material information

Demand and needs
General Principles

- Advise the client of the duty to disclose all material circumstances and the consequences of failing to do so
- Indicate the sort of matters which ought to be disclosed and elicit matters which the client might not think it necessary to mention
- Recommend a policy suitable for the client’s demands and needs
- Seek information to identify the client’s requirements having regard to the relevant details about the customer

(ICOB Handbook Rule 4.3 and Jones –v- Environcorn (2010))
Duties on Renewal

- Jones -v- Environcom [2010]
- Policy void for material non-disclosure
- Brokers should have enquired about previous incidents – reliance on “standard practice”
- Brokers must be satisfied that the client understands the policy conditions
  - Reliance on standard terms
  - Change of personnel
After Inception

- *Ground Gilbey v JLT [2011]*
- Failure to forward a Risk Improvement Notice
- Continuing duty to draw the client’s attention to onerous terms
- Duty not to expose clients to unnecessary risks of legal disputes with insurers
Continuing Liability for an Original Error

- *Standard Life Assurance v Oak [2008]*

- Beazley v Travellers [2011]
- “and/or Claimant” = £33m per word
- Continuing duty to ensure policy is suitable for the client’s needs

Duty of Sub-Brokers/Placing Brokers

- *Dunlop Hayward v Barbon Insurance [2009]*

- “No worse terms than current insurance”
- Placing brokers comply with instructions but should have questioned the instructions
- Sub-broker 20% liable
Who is the duty owed to?

- *Crowson v HSBC [2010]*

- Can a party who is not instructing the broker sue?
- Directors and Officers

Contributory Negligence & Causation

- **Client’s own conduct**
- Unlikely to be any contributory negligence (Dunlop Hayward)
- Does the insured have to sue his insurer? (*Standard Life v Oak*)
  - No – unless the insurer’s point is hopeless
  - The duty extends to protecting the client against the unnecessary risk of litigation
- Under settlement with the insurer (*Ground Gilbey v JLT*)
  - Court doesn’t need to consider policy point conclusively
  - Was the settlement reasonable?
Did the Breach make any difference?

Ground Gilbey
- Would the client have complied with the Risk Improvement Notice
- It would at least have led to a dialogue with insurers

Jones v Environcom
- If there had been full disclosure, the client would have been un-insurable or would have incurred expense which made the business unviable.
- Policy could have been avoided for other non disclosures

Learning the Lessons
- Anticipate policy wording which may be ambiguous
- Identify the clients needs – goes beyond simply acting on their instructions
- Ensure clients understand their obligations and warnings are brought to client’s attention
- The client is unlikely to be found to be at fault
- Take care with standard terms
- Don’t rely on “standard practice”
- Don’t rely on instructions obtained on previous placements
Future Developments

- Solvency of Insurers
- Internet broking
- Law Commission
  - Proposed changes to remedies for
    - Material non-disclosure
    - Breach of warranty