



Insurance: Broker's duties

June 2013

Disclosure and the broker's role

Our briefing in May 2013, *Looking after coverage*, outlined some of the key insurance issues of which businesses should be aware to protect their policy coverage. This briefing looks more closely at the duty of disclosure and at the broker's role in helping business clients to comply with this onerous duty.

Duty of disclosure

The duty of disclosure places a positive obligation on businesses to tell the insurer (often through a broker) about matters material

to the underwriting decision i.e. things that affect the premium or the decision to take the risk.

There are, however, some things that businesses do not need to disclose: facts which reduce the risk, facts which the insurer knows, facts which are common knowledge or where the insurer has waived disclosure.

The duty arises before the policy is taken out and whenever it is renewed.

Key Points

- The insurer sets the premium/policy terms on the basis of the information provided to it;
- If insufficient or inaccurate information is provided all coverage can be lost;
- Businesses must therefore actively disclose all material matters when applying for cover;
- Most businesses do not have the knowledge, experience, contacts or desire to approach the insurance market directly;
- Brokers fill the gap - they act as the business's agent to obtain the appropriate insurance;
- The broker is obliged to pass on information provided by the business to the insurer and inform the insurer of all material matters of which it is aware. If it fails to do so coverage can be lost;
- The broker owes duties to the business and regulatory obligations to assist the business in making proper disclosure;
- Brokers themselves must maintain insurance cover for any breaches by them of their duties to the business which result in lost or defective cover.

Role of the broker

Insurance is placed in a number of ways and can involve a number of parties including (by way of example) more than one insurer or broker, brokers with access to a limited number of insurers and brokers with mandates from insurers to solicit business or sign contracts on their behalf.

Brokers can perform roles on behalf of both businesses and insurers. Brokers are often paid by insurers. Businesses are not always sure whether the broker is acting for them or the insurer. It is therefore important to be clear for each task whether the broker is acting for the business or the insurer.

Typically, for any reasonably sized business, when it comes to disclosing information to insurers, the broker will be acting for the

business. This means that insurers would have a defence to a claim by the business if the broker failed to pass on information in its possession that was material to the underwriting decision. However, the insured would in turn have a claim against the broker for this failure.

Key points about the relationship between insured, broker and insurer in the context of disclosure are in the *Key Points box above*.

The duties of the broker in relation to disclosure

The scope of the broker's duties to the business will depend on its retainer and the facts of each case. However, broadly, the duty is to advise on and obtain a policy suitable to the

client's needs. This duty includes a number of aspects relevant to disclosure:

- Advising the client of the duty to disclose all material circumstances;
- Explaining the consequences of a failure to disclose;
- Indicating the sort of matters which ought to be disclosed; and
- Taking reasonable care to elicit matters which ought to be disclosed but which the client might not think it necessary to mention.

Conclusions

The duties owed by brokers to businesses in respect of disclosure mean that brokers must actively engage with clients at original placement and each renewal to help them provide the appropriate information to insurers. Standard wordings in proposal forms and broker retainer letters will not be enough to discharge those duties. This is an important aspect of the broker's role given the unusual nature of the disclosure obligation, the difficulty for those not well versed in insurance in determining what might be material to insurers and the harsh consequences of non-disclosure.

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