

Legal Corner

Broker Beware

A risk management overview

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As global insurance markets harden, including reduced capacity and increased rates, insurance brokers will come under increased pressure to deliver value for their clients. At the same time, brokers will be expected to provide their local and multinational insureds with the global coverages they need to address increasingly complex risks, including emerging areas of exposure. In the context of this challenging commercial landscape brokers will need to navigate the legal minefields that continue to expand at the expense of the international brokerage community.

This article will discuss generally the global duties imposed on insurance brokers, common claim types and best practices to minimize and/or mitigate the risk of professional liability claims against brokers.

Initially, it is critical for insurance brokers to appreciate that the law in many jurisdictions holds them to a much higher standard than mere “order taker.” Although the duties of an insurance broker in certain jurisdictions simply may be to act in good faith and follow the instructions of an insured, in many

other jurisdictions an insurance broker may be held to the standard of a fiduciary, including the duty to exercise reasonable skill in identifying the insureds’ needs and advising them on available coverages.

The Supreme Court of New Jersey set down the standard against which an insurance producer’s conduct is measured in *Ryder v. Lynch*, 42 NJ, 465 201 A.2d 361 (1964):

“One who holds himself out to the public as an insurance broker is required to have the degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of good faith and reasonable skill, care and diligence in the execution of the commission. He is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected. If he neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby.”

Moreover, courts are increasingly expressing the view that an insured can be expected to rely on the broker as an “expert.” This view is supported by the representations commonly made by brokers who in this increasingly competitive marketplace hold themselves out as “experts,” including website promises of providing:

- “A range of experience in specific industries to offer you exactly the coverages you need,
- . Tailor-made risk management solutions based on expert advice,
- . A strategic decision risk analysis, including identifying new and emerging exposures,
- . The design of comprehensive and complete programs for both insurance and risk management,
- . Performance beyond the required ... in all we do,
- . The best products and services for your needs,
- . The most favorable terms for you.”

In assessing the duties owed in any particular case, courts also may focus on the nature and extent of the relationship between broker and client, including their prior course of dealings. In this regard, courts are likely to analyze the following:

- . The receipt of compensation above the customary commissions on premium paid for expert advice or additional services
- . The broker’s counseling of the insured concerning a coverage issue
- . The broker’s declaration that he is a highly skilled insurance expert coupled with the unsophisticated insured’s reliance on the broker’s expertise
- . The broker’s exercise of broad discretion in servicing the insured’s needs
- . A course of dealing over an extended period of time that can be said to have put an objectively reasonable broker on notice that his advice is being relied on specially.

As a practical matter, the modern trend is for courts around the world to hold brokers responsible for identifying the needs of their clients, communicating those needs to the insurance marketplace, obtaining the best “quotes” relating to available coverages; explaining to the insured the significant differences between competing “quotes”; ensuring that the policy issued responds to the clients’ needs; and servicing the clients in a responsible fashion if a claim is made or loss occurs.

In this regard, common claim types against insurance brokers include:

- . Failure to obtain insurance or notify insured of such failure
- . Failure to obtain proper coverage
- . Creation of a coverage gap
- . Placing insurance with an unsound insurer
- . Failure to obtain excess insurance
- . Failure to renew or maintain coverage
- . Wrongful termination of insurance
- . Failure to notify the insured of cancellation
- . Misrepresentation of the risk
- . Failure to timely notify proper carrier about a claim.

Although E&O claims against insurance brokers are an inherent risk of the profession, best practices can reduce the risk of claims and assist brokers in defending claims.

In conclusion, given the increasing scope of potential liability for insurance brokers under the laws of many jurisdictions, brokers should take reasonable steps to understand the nature and extent of their clients’ current insurance requirements and recommend appropriate cover to meet those requirements. ●

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Best Practices

Meetings/Communications with Clients

- . Independent assessment of risks and needs
 - . Comprehensive review of existing program
 - . Broad inquiry into changing circumstances
 - . Documentation of insured requests in writing
 - . Documentation of broker recommendations in writing
 - . Policy review and explanation of coverages obtained
 - . Written communication of coverages not obtained
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Creation and Maintenance of File/Documentation

- . Letters/Faxes/Emails/File Notes to confirm and detail meetings and communications
 - . Create contemporaneous notes of all telephone discussions
 - . Document all in person meetings/discussions
 - . Avoid texting: If use text/other transmissions, must find a way to preserve record
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Applications and Renewals

- . Investigation to disclose all facts and circumstances
 - . Investigation to report all potential claims
 - . Use of diary system
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Notice/Reporting of Losses and Claims

- . Timely notice to all primary and excess carriers
 - . Avoidance of conflicts of interest
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Notice/Reporting to Broker's E&O Carrier of Facts or Circumstances

- . Uncovered loss or declination
- . Communication from insured or counsel
- . Request for file or records
- . Subpoena

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