



Current Articles 2001 – November

Watch out for a "gap"

In several articles, I have referred to the Fine's Flowers case. The decisions in this 25 year old case identified the broker as a 'professional' and established the duty of care required of such a professional.

The Fine's Flowers case deals with policies that do not provide particular coverage. To quote: " It was the duty of the defendant agent to either procure such coverage, or draw to the attention of the plaintiff his failure or inability to do so and the consequent gap in coverage." It later states; 'It is the agent who has the requisite skill to understand the nature of his client's business and to assess the risks that should be insured'.

The courts have been very liberal in decisions as to the effects of a "gap" and certainly not to the favour of the broker. The possibility of a "gap" can be caused in a number of ways, some of which I will relate to as they have occurred in actual E & O situations:

One such case dealt with a broker not making the client aware of the territorial restriction on an automobile policy. The client was involved in a very serious accident in Mexico and when told the coverage does not apply in Mexico, an action was commenced against the broker for not advising of this territorial limitation (the gap). Now honestly, how many auto clients do you advise that 'coverage does not apply in Mexico? I don't believe that I would have made the client aware unless, of course, the client inquired as to a possible trip to Mexico. Another auto situation deals with the OPCF 27 'Legal Liability for Physical Damage to Non-Owned Automobiles. The broker told the client that it would cover loss or damage to rented vehicles, up to a specific dollar amount. The client rented a car in England and guess what? It was damaged beyond repair and the "gap" cost the broker an E & O!!

The territorial limitation on many commercial policies is limited to Canada and the continental United States of America excluding Alaska. How many commercial clients have you made aware of this limitation? One case involves the theft of a lap top computer, owned by the business and stolen from a hotel room in Germany. Again, no cover and the "gap", not being explained to the client, resulted in an action against the broker.

Homeowner's policies, particularly comprehensive forms, have become very lengthy and complicated. As a result, there are many exclusions, conditions, special limitations, all of which can cause a "gap" in the eyes of the court. Recall the exclusions and limitations for a Home Business. Even if the broker had no knowledge of the operation of a Home Business, he may be liable for not bringing to the attention of the insured, the applicable limiting clauses.

And now we approach the practicality of this issue in relation to the broker. How much time can you afford to spend to explain and review every word in a policy! When a lawyer confronted me with this situation my reply to him was that if I wrote his homeowner, I would insist that I spend 4-5 hours with him and his wife to 'read' the policy to them. And how long would it take to 'read' the 64 page Ontario Auto Policy??? Unfortunately, the courts do not give much sympathy to this

defense. Even if a client, and particularly a commercial client, should have prior knowledge about the insurance policies, the best the court may award is a small contributory judgment against the client but the bulk of the award may be with the broker.

The best prevention for the "gap" is a thorough knowledge of your client's interests, operations, manufacturing processes, etc. It used to be that the adage 'Buyer Beware' would apply to insurance. Today it is 'Seller Beware.'

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