



Current Articles 2009 – October

Dealing with Exclusions

All insurance policies contain exclusions. With the introduction and availability of more “All Risk” policies the number of exclusions in policies has increased considerably. This follows the basic premise of an All Risk policy that if it is not excluded, it is covered. There have been previous articles reviewing exclusions contained in habitation, commercial and liability policies for Terrorism, Data, Motorized vehicles, Loading and Unloading, Home businesses and many others.

My last few expert witness assignments have all tried to develop what the standard of care should be for a broker in dealing with policy exclusions. In several situations coverage has been denied because of the vacancy exclusion. In a particular case a couple had bought a new home but had not moved in as they were doing some painting and carpet replacement themselves. They were at the house every day. There was a major water leak causing over \$80,000 damage. Vacancy was not discussed with the client but the broker requested a vacancy permit. The client did not understand that their house was deemed vacant. Furthermore the client never received a copy of the policy; only a renewal certificate. It appears that the broker “rolled” a book of business to an alternate insurer and the alternate insurer treated it as a renewal and therefore did not forward a copy of their policy wording. Furthermore the vacancy permit stated that coverage for water damage was not covered but the vacancy permit was not sent to the client until after the loss! The broker, knowing the vacancy situation, should have alerted the client of the vacancy exclusion and its conditions in regard to water damage. Is it possible that the insurer may be responsible since they were in error in not forwarding their policy wording?

Recently, I have been asked by two friends to review their insurance. One of them is an accountant and operates from his home. The other is a manufacturer’s representative for a foreign company and operates solely from his home. Both are insured by the same direct writer! Without the home business extension, there is no coverage on the house. It excludes “any building used in whole or in part for business or commercial purposes”. There is also no business liability (the accountant regularly has clients visit his house). There is also no off premise property coverage as well as other shortfalls in coverage. When the accountant called the insurer, he was told three times that he was covered for his business because “they had noted it in the file” and if they added it to the declaration page “they would have to charge additional premium”. What an answer!! In the other case, he was told that because he never has clients come to his house, he is covered. Neither of these exceptions is in the policy. Furthermore the Insurance Act under section 131(1) – Waiver of Term or Condition – states “*No term or condition of a contract shall be deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer*”. That is why we have endorsements and the insurer is in error in handling these situations.

My last situation is following a denial of coverage for a serious injury in a gymnastics event. The broker had recently replaced the coverage for a summer day camp with an alternate insurer which included a "circus events exclusion". This exclusion was not part of the previous policy. The question is whether the broker brought this to the attention of the client. More interestingly the policy did not define what the term "circus events" applied to. Is a gymnastic event a circus event? I don't believe so! And if the insurer did not define this exclusion do you think that the court will interpret this exclusion to apply to what a reasonable person would infer from the term "circus event"? It is the broker's duty to explain the exclusion and if the broker does not understand what the intent is, to refer to the insurer for a proper definition and clarification.

The standard of care of the broker comes back to the decision in the Fine's Flowers decision when the judge stated: *To the extent that the insurance coverage proves to be insufficient, I hold that such deficiency is due to negligence on the part of (the broker) who, for consideration, was providing professional advice."It is (the broker) who has the requisite skill to understand the nature of his client's business and to assess the risks that should be insured against."*

Getting to know your clients business or personal activities is the only sure way that you can give the proper advice and to make the client aware of any relevant exclusion.

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