CLAIMS

There are significant differences in the functions of an agent and a broker in respect of a claims settlement. For example,

(a) A broker cannot bind an underwriter in respect of any risk until the broker's slip is accepted and signed.

(b) On the other hand, an agent can bind his underwriting principal on risks, giving cover notes and certificates.

(c) An agent has a generous, persuasive influence over his underwriting principal's attitude to a claim in respect of a claim settlement, i.e. the underwriter will be more willing to make an *ex-gratia* payment even when the claim falls outside the scope of the policy.

(d) On the other hand, the underwriter would be more inclined to make a commercial decision when faced with the same situation from a broker. Reason? There is no certainty that when the claim is settled, even on a *ex-gratia* basis, that the broker will offer the risk to the underwriter for renewal but the agent is almost sure to secure the risk for renewal. Thus, an agent and his/or her client is likely to develop a closer relationship with the principal which would work to the benefit of all parties.

to eliminate moral as well as physical hazard in risk; unlike brokers who have the option of removing a risk from one underwriting office to another when an adverse feature is the subject of restrictions or excesses, an agent's task is to eliminate the hazard so as to enjoy a good profit commission and preferential rates of commission.

Insurance agents hold a power of attorney and an agency agreement with one or more selected underwriting principals over which they can bind their underwriting principals immediately on risks, e.g. issuing of cover notes, letters of commitment, etc. Some agents even have the power to issue insurance certificates and policies and can settle claims (up to a stated limit) on behalf of their underwriters - such agents are known as General Agents.

There are approximately 39 registered General Insurance Agents in Jamaica employing in excess of 1,500 persons and are, therefore, contributing to the country's gross national income. General Insurance Agents have a proud and enviable position in the insurance market and are not known to breach any of the regulations laid down by the Office of the Superintendent of Insurance, as became public a few years ago.

GENERAL INSURANCE BROKERS

General Insurance Brokers should have no contractual arrangement with any Underwriting Company. That is, they should hold no power of attorney or agency agreement, as by their very registration they should use their best judgement in investigating and placing risks on behalf of their clients for who they are acting as an agent. Although they perform this function, it is under Underwriter who pays them a commission. There are currently 38 registered Brokers while there is approximately 50% less Underwriting Companies.

Lastly, you can, therefore, note that while the Insurance Agent and a Broker have some similar functions the Agent acts under an agency agreement and a power of attorney with one or more Underwriting Companies of their choice while the Broker has not such obligation.

Prepared and presented by
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THE ROLE OF GENERAL INSURANCE AGENTS AND BROKERS

AN OVERVIEW

Until the early 1970s, the insurance business, excepting for a few small local companies was written through local branch offices and agents of overseas based companies. Life business was written on behalf of Canadian companies while on the General Insurance side, UK companies. Marine Insurance was conducted through Lloyds' corresponding intermediaries and British composite companies. The overseas based companies, through their branch offices, were headed by expatriate staff who sent most of the premium income out of the country via specially arranged reinsurance treaties, leaving little for the development of the local economy and the local industry.

ADVENT OF THE INSURANCE ACT (1971)

(i) There was, therefore, a need to regularise the industry as there was much outcry from policy holders who were experiencing difficulty in having claims settled and even personal injury judgement paid by some companies who had settlement limits over which they could not go and had to await final decisions from their overseas companies.

(ii) Reinsurers abroad were reluctant to deal with some companies because of lack of underwriting and statistical data.

(iii) There was need for legislation to create a public office (Office of the Superintendent of Insurance) pertaining to the levels of solvency, liquidation, managerial skills and control, certification, etc. The Act, therefore, which was introduced sought to achieve the goals of economic growth, professionalism and expertise among Jamaicans and ultimately protection of policy holders as well as investors' equity. Thus the insurance industry became localised and the players in the industry who required registration before they could operate were:

(a) Underwriting Companies - risk takers

(b) Brokers (Intermediaries) - introducers of business to underwriting companies

(c) Agents - introducers of business as well as general agents writing business and settling claims on behalf of underwriting principals.

GENERAL INSURANCE AGENTS

From the above it can be readily seen that insurance agents were among the earliest players in the insurance market and must, therefore, be duly recognised as contributing to the development of the insurance business in Jamaica.

REGISTRATION

The major requirements of the Insurance Act are:

(a) The management should consist of at least one professionally qualified and/or experienced person, subject to the satisfaction of the Office of the Superintendent of Insurance.

(b) Payment to Accountant General of Jamaica:

(i) **Agents** – the sum of $1,800 per class of insurance for registration

(ii) **Brokers** – $3,500 per class of insurance for registration, excluding Marine and Aviation for which the amount is $1,500

(c) Paid up capital of $5M for Agents and $8M for Brokers. This is a requirement by the Office of the

Superintendent of Insurance although it is not yet a legal requirement.

(d) Professional indemnity insurance against acts of errors and omissions, etc.

(e) Cash flow projections and a balance sheet with opening balances.

(f) A Registration fee for each class of business to be underwritten and, of course, the manager and the persons who influence the formation of an insurance contract must be registered as "sales men".

GENERAL COMMENTS

In recent years the agency business has grown significantly out of a desire of some former managers and other insurance executives to go into their own business while other agents were registered where companies control a large block of business, and also where there is no underwriting office to serve large areas in rural townships.

MAIN FUNCTIONS OF GENERAL AGENTS

Agents give personalised service to their clients and practice risk management in cooperation with their underwriting principals

INSURANCE:
DISCLOSURE AND CLAIMS MANAGEMENT

INTRODUCTION

I think the first question a presenter at one of these seminars asks himself or herself is "why me?"

I presume that I have been invited to be a presenter at this Seminar because my legal career has included three (3) phases during which as an Attorney I have served the general insurance industry in different ways.

In the first phase between 1983-1993, I was a litigation Attorney in a law firm whose major clients included several general insurance companies.

In the second phase, between 1993 and 1996 I served as an in-house consultant in one of the major general insurance companies.

In the third and ongoing phase I have developed a "niche" practice specializing in settling on behalf of insurance companies claims by third parties and insureds against some of those same companies.

This background has provided me with an opportunity to look at the interaction of the legal professional with the insurance professional from both sides. I will say a lot more about this interaction when I specifically consider claims management and the roles played by the insurance professional and the Attorney-at-Law.

circumstance would have had an effect on the mind of a prudent insurer in weighing up the risk, not whether had it been fully and accurately disclosed it would have had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so at what premium. The test accorded with the insured's duty to disclose all matters which would be taken into account by the underwriter when assessing the risk

2) However, for an insurer to be entitled to avoid the policy for misrepresentation or non-disclosure, not only did the misrepresentation or non-disclosure have to be material but **in addition** it had to have induced the making of the policy on the relevant terms. Accordingly an underwriter **not** so induced could not rely on the misrepresentation or non-disclosure.

Thus the majority of the lawlords held that it was a good answer to an insurer's defence of misrepresentation and non-disclosure that the act or omission had no effect on the decision of the actual underwriter.

So the insurers who had won an overwhelming victory in ***CTI v Oceanus 1984 LLR 416 (CA)*** had one of the two limbs of that decision over-ruled. The test of materiality was still very much phrased in a way favourable to the insurance industry but the law no longer contemplated insurance companies **not** paying even where the non-disclosure was unrelated to the risk and had no effect on the underwriter.

used, the insurer is tempted to deny indemnity but it must weigh the following:

1. there is no evidential basis to seek a declaration under section 18(3) of the Motor Vehicle Insurance (Third Party Risks) Act that the insurer is entitled to avoid the policy for misrepresentation and non-disclosure because the evidence, what little there may be, relates to the time of the accident and not of the proposal .

2. The evidence usually relates to one use of the vehicle rather than a consistent pattern of use and the Jamaican Court of Appeal in the case of **THE ADMINISTRATOR GENERAL (Administrator Estate Hopeton Samuel Mahoney, deceased) v NEM ASS. LTD.** held that the insurer had to prove such use on more than one isolated instance. Forte J.A. even went so far as to say the insurer would need to prove the uncovered use "was one of the vehicle' normal functions.

3. The cost of Supreme Court litigation and the long period before a final decision could be rendered.

4. The very unsatisfactory quality of the investigating by our private investigators and our police force in respect of the illegal uses of motor vehicles

5. The fact that Jamaican witnesses are chronically "fraid of Court".

and GENERAL ACCIDENT INSURANCE CO. LTD. V SANCHEZ 1968 13 WIR 138, where it was decided that an injured third party was entitled to recover under the ACT a sum in excess of the Statutory minimum. The SANCHEZ decision has been followed with varying degrees of enthusiasm by the Jamaican Court of Appeal in:

1. CENTRAL FIRE AND GENERAL INSURANCE CO. LTD. V SYLVESTER HYLTON S.C.C.A. 84/84 where Carberry J.A. stated that the SANCHEZ decision may be in the future open to question "elsewhere".

2. THE ADMINISTRATOR GENERAL V NEM (see above)

This seeming certainty was disturbed by the Privy Council sitting as a Bermudan Court in the case of **SUTTLE V SIMMONS 1986 37 WIR 133**, where it was held that where section 8 of the Act rendered a policy restriction ineffective,it did so only up to the statutory limit and the policy restriction on liability remained effective in respect of sums in excess of the statutory limit.

The SANCHEZ decision was expressly cited to their Lordships who "doubted" it but expressly stated that they would not be prepared,without hearing fuller argument to hold that the SANCHEZ case was wrongly decided.

The Privy Council has in 1994 considered a third party claimant's rights under the Act in the Trinidadian case of MOTOR AND GENERAL INSURANCE CO. LTD. V JOHN PAVY (PRIVY COUNCIL APPEAL NO. 31 0F 1992) and though neither the SANCHEZ nor SUTTLE decisions were cited, their Lordships consideration of the

On many occasions where there is no good reason to defend the Suit the Attorney may enter an Appearance and file Defence merely to maintain the status quo and prevent a default judgment before he advises his client.

Now, by that action the Attorney has accomplished the goal of the law firm:-

- protect the interest of the client by preventing any deterioration of their legal position,

- bill the file for the preparation of the Defence and for the advice on liability.

Let us ask the question, has the insurance professional accomplished the goals of his organisation by his actions?

I answer a resounding " **NO!!!"** because:

1) the filing of the Defence has postponed the speedy completion of this matter by either negotiation or Assessment of Damages.

2) the legal cost incurred for the filing of the Defence is not justifiable in circumstances where there is no realistic prospect of success at trial.

3) the insurance company may be able to deal as effectively as the law firm with a negotiated settlement by merely utilising the Attorneys advice on quantum.

Even if the task is sent to the legal professional it should be closely monitored as it may be a matter that need not be sent the next time.

The collective performance of the legal professional together with the insurance professional produces far better results for the insurance firm and in the long run:

1) reduces legal costs,
2) improves performance of both professionals,
3) promotes the improved efficiency of the insurance professional.

Where Lawyers advise on the law it is wise to ensure that the advice is formally set out in writing. If there is any misunderstanding as to the advice or how it is applicable to the case in point, a formal question should be put to the Attorney for further consideration and advice.

B. SPEEDY AND EFFECTIVE SETTLEMENT OF CLAIMS

I recommend that the Attorney and the Insurance Professional should by collaboration pay more attention to the speedy and effective settlement of claims. To assist this important aspect of Claims Management, I offer the following pointers that assist me in my practice.

1. REASONABLE PEOPLE CAN DISAGREE

Consider that:

3 HOLD POSITIVE DISCUSSIONS/CORRESPONDENCE WITH THE OTHER SIDE

1) All discussions/correspondence should be expressed to be **"WITHOUT PREJUDICE"** if they in any way admit liability or would otherwise prejudice your insured's position.

2) Discussions/correspondence should be held in the context of reasonable discussions between the reasonable people -- **DON'T USE WORDS LIKE "MADNESS" or "RIDICULOUS".**

3) Avoid long periods of inactivity on file -- use a follow-up system.

4) Where appropriate, initiate compromise proposals leaving yourself room for movement -- telephone calls are very useful, and if productive, should be followed immediately by a letter confirming the conversation and requesting the appropriate action.

5) Once liability is determined, even if only contribution, be quick to request details of claim together with the available documents in support -- **"WITHOUT PREJUDICE**

also try to be the other side -- analyse how they are going to react to your letter and seek to promote the reaction you want -- Remember it's **NOT** you on the other side.

13) Be Paranoid -- every action produces a reaction -- what is the worse that can happen - with that in mind as the worse case consider your intended action -- never be surprised at what the other side does.

14) When concluding a matter make sure all appropriate parties are released -- including all parties who could potentially claim against your client, (see below).

This last bit of advice raises an important legal question in claims management

WHO TO RELEASE ?

Too often Attorneys release only the party that they act for, ignoring the fact that their client while protected against the Plaintiff/Claimant is potentially open to a claim for indemnity/contribution by another tortfeasor against whom a Judgment may later be entered.

It should be noted that the statute of limitations in respect of a claim for indemnity and/or contribution only begins to run from the date of the Judgment on which the claim for an indemnity and/or contribution is based. It does not run from the date of the tort.

In light of the above I recommend that Attorneys either:

1) release all tortfeasors, *or*
2) release only their client but secure from the Plaintiff/Claimant a subrogation release which enables the Insurer of the client to pursue the Plaintiff's claim against the other Defendant(s) in the Plaintiff's name and obliges the Plaintiff to be available to give evidence in return for an indemnity as to any adverse judgment or legal costs.

C. ARBITRATION AND ALTERNATE DISPUTE RESOLUTION

I must confess that I am not a fan of Arbitration because of the following factors:

1) many Attorneys are not familiar with the process and this brings delay,

2) the cost is often prohibitive particularly to an individual,

3) litigation though slower is often the first choice.

I am a great fan of alternative Dispute Resolution but to date I am unaware of any of these mechanisms impacting significantly on the insurance landscape.

The Superintendent of Insurance and the Fair Trading Commission both play a regulatory role but the number of cases conclusively resolved is not significant.