

There then follow several appendices with useful documentation of Acts of Parliament etc.

The book would be useful to anyone setting up an Insurance Broking business, or anyone wanting a thumbnail sketch of the Insurance Broking Industry and the legislation applying to it.

On the downside, the information, especially with regards to legislation and market practices could soon be out of date, and a loose-leaf format may have been more appropriate. More information about the Lloyd's market would have been interesting.

It is a pity that such a useful book, and at the price of £25.00, should be printed on such poor quality paper.

KMD

NON-MARINE DISPUTES

What Code of Conduct?

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The application of various statements of practice and codes of conduct to common types of insurance dispute that I have come across in 40 years in the industry and of late as an expert witness is of increasing interest to me, not least because of the apparent variety. To explore this let us first identify the insurance codes, introduced as a measure of self-regulation following Law Reform Committee (Fifth Report) and Law Commission (Report 104 [1980]) recommendations.

1. **ABI General Insurance Business Code of Practice** (Revised Nov 1988) applicable to all intermediaries (including employees of insurance companies) other than Registered Insurance Brokers.
2. **IBRC Code of Conduct** for Registered Insurance Brokers (1977) presently under review (Insurance Brokers (Registration) Act 1977, s.10).
3. **ABI Members' Statement of General Insurance Practice** (Jan 1986) applicable to policies effected by UK residents in their private capacity.

4. Code of Practice for Lloyd's brokers 1.11.1988.

These are the codes to which I refer in some detail below and which concern non-marine matters. For completeness it should be noted that there are three bodies concerned with the conduct of long-term (life) assurance and investments. They are:

ABI (Statement of Long-Term Insurance Practice - revised 1986); FIM-BRA; and LAUTRO.

The differences in the codes may be illustrated by a number of common causes of dispute.

1. Uninsured Peril.

"I thought I was covered for everything".

The IBRC code of conduct states "Insurance brokers shall at all times conduct their business with utmost good faith and integrity..." and "do everything possible to satisfy the insurance requirements of their clients before all other considerations". Lloyd's brokers are expected to comply with the IBRC code and para 11 requires provision of "Any relevant service requested". The ABI General Insurance Business Code of Practice for all intermediaries (including employees of insurance companies) states under General Rules Principles 1 (iii) "Ensure as far as possible that the policy proposed is suitable to the needs and resources of the prospective policyholder". He should also "explain the essential provisions of the cover..." (B (ii)) which would include in my opinion explaining the extent of the perils covered by the policy.

Shaw and Cockerell (Insurance Brokers and Agents : Law and Practice) sum up the position as follows:

"The insurance broker has a continuing duty to ensure that all policy wordings are suitable to the insured's needs as far as the broker has had an opportunity to learn those needs".

2. Policy not in force at the time of loss.

"I never received the renewal notice and therefore believed the policy was still in force".

Very little if anything is said in the various codes on the subject of duties at renewal, a surprising omission. The IBRC code does not mention the subject. Apart from the Lloyd's code the only reference is in the ABI Statement of General Insurance Practice (which relates to insurers). They are required to include warnings in renewal notices concerning non disclosure and the need to advise insurers of any changes affecting the policy which have occurred since inception or last renewal date. Renewal notices also have to include a warning that the proposer shall keep a record (including copies of letters) of all information supplied to an insurer for the purpose of the renewal of the contract.

Lloyd's code does make it necessary for the client to be made aware of the date of expiry of the policy and the broker is expected to seek instructions from his client concerning renewal and to remind the client of the duties of good faith and disclosure. No mention is made to indicate if one reminder is sufficient. P/I insurers settled in a recent case where the broker only sent out one renewal notice which the client stated he had not received, and the broker continued to service outstanding claims as if nothing had happened, the policy having lapsed. There was seen to be an obligation for the broker to see what had happened to the insurance that he handled, rather than walk away from the renewal.

A more difficult situation arises with personal insurances where the premiums could be quite small but a reminder would seem to be the minimum action that an intermediary or broker should take.

“There is a clear duty on brokers to advise clients of policies expiring and to seek renewal instructions, but there is no similar duty on insurers” (UK Retail Insurance Brokers Handbook, Ron Peters (1989), page 18).

3. Non-disclosure of material information.

“The broker completed the proposal form - I only signed it! How did I know underwriters would have considered my district undesirable if they had known about all the recent fires in the area?”

Here the codes are more specific. IBRC states that the broker should “make it clear that the answers and statements are the client's own responsibility”. Clients should be asked to check details and told that inclusion of incorrect information may result in a claim being repudiated; the ABI code is similar. Lloyd's brokers are clearly told that only in exceptional circumstances should the proposal form be completed on behalf of the client.

And what about making certain that the insured retains a copy of the proposal form so that he can refer to it at next renewal to see if it is necessary to advise insurers of any changes? Here ABI members' proposal forms (but only in relation to private insurances) require a statement on the form in a prominent position that a copy of the form (ABI Statement of General Insurance Practice):-

- a) is automatically provided for retention at the time of completion.
- b) will be supplied as part of the insurer's normal practice.
- c) will be supplied on request within a period of three months after its completion.

The above procedure might well apply to commercial insurances. I believe the rules of non-disclosure as applied to proposal forms might benefit from the practice in some continental countries where the insurer is presumed to have waived enquiry to any matter (other than fraud) which is not dealt with by a question on the proposal form. In Australian law (Insurance Contracts Act 1984) a material fact is one that a reasonable person could be expected to know was relevant. The ABI Statement of General Insurance Practice states a similar position, that a claim should not be repudiated for non-disclosure of a material fact which a policyholder could not reasonably be expected to disclose. There is no reference to the prudent insurer.

4. Misrepresentation

"I stated on the proposal form that the car was registered in my name and that I was the sole owner. In fact it was registered in my husband's name. I did not believe this was important."

The ABI code states that "liability should not be repudiated unless it is a deliberate or negligent misrepresentation of a material fact". The man on the Clapham omnibus might benefit from a better explanation than this broad statement. What matters is whether the misrepresentation would have had an effect on the insurers' decision in a particular case had the full facts been known. If they would have had no effect it is difficult to see why the claim should not be paid in full.

5. Breach of Warranty or Condition of the Policy.

"I did not know the warranty was in the policy. I relied totally on the broker to tell me about such things".

Restrictions, exclusions and warranties receive different treatment in each code.

IBRC have the unusual expression "on request" the broker should "explain the differences in and relative costs of the principal types of insurance" as if there is no duty to explain them in the first place.

ABI requires non-registered intermediaries and company employees to "explain all the essential provisions of the cover" which in my view would certainly include warranties. Lloyd's endorse the IBRC provisions and state that if the full wording is not included with the confirmation that the insurance has been effected, the full wording should be forwarded as soon as possible.

What is the duty of the broker? Shaw and Cockerell note that some brokers go through the wording on a line by line basis but in their opinion failure to do so does not necessarily involve negligence.

6. Late advice of loss.

"I did not know the extent of the loss so did not tell my insurers/brokers immediately the loss occurred".

There is little in the codes apart from Lloyd's to establish the registered insurance broker's obligation concerning claims. ABI are specific, stating that the unregistered intermediary or company employee should "...inform the insurance company of any loss without delay and within 3 working days advise the policyholder of the company's requirements re. information to establish the nature and extent of the loss and then to pass information to the company as soon as possible". One would assume that this applied to registered insurance brokers but IBRC are completely silent on the subject.

Lloyd's gives no less than eight paragraphs to the subject of claims, dealing with conflict of interest, payment and fraud etc. They state "Lloyd's brokers are required to give prompt advice to the client regarding insurers requirements". However the Lloyd's code rightly suggests the broker should consider withdrawing should he have reason to believe that the notification of the facts of a claim by a client is not true.

ABI in their Statement of General Insurance Practice have much to say on the subject of enforcing warranties and quite rightly state that a breach of a warranty should not result in the claim being refused where the breach was unconnected with the loss.

7. General professionalism

“I never saw the broker and when I rang up all I got was some girl in the office. I expected them to tell me about all the types of policy that would protect my business against loss”.

Clearly if a broker or intermediary is to behave professionally he should avoid advising on matters beyond his competence.

There are some who would argue that the general statements regarding professional practice are all that is needed for intermediaries, registered and Lloyd's insurance brokers and insurers and their employees. I believe this is not sufficient and the public at large is entitled to be made aware of what the industry believes these standards mean in practice. However, a clear procedure for the handling of complaints should be available to the insured along with other information concerning facilities for alternative dispute resolutions. Lloyd's code of conduct does not require disputes to be handled at a senior level. As Lloyd's brokers will be registered the IBRC code will apply, whereby members must display a notice concerning the Code of Conduct and IBRC complaints.

8. Poor advice.

“It was not explained to me what was meant by “value” in the policy and I was surprised when I found the buildings were underinsured.”

It is quite clear that an insured should expect to receive from his broker / intermediary advice of a minimum standard as laid down in the codes with regard to the competence of staff. No specific reference is made to sums insured but a prudent broker would be wise to explain what is meant by value particularly if reinstatement conditions apply and that the insured should seek professional advice to establish insurance values of property and contents. A similar situation arises over stock and work in progress.

In conclusion, whilst the current codes of practice are important in raising the professional standards of all intermediaries and insurers, if they are to be fully effective there must be greater uniformity and in my view they must cover the principal areas where disputes recur. One of the greatest problems is establishing exactly what took place between the parties when the insurance was arranged or at subsequent renewals or other meetings with the client. It is important for the broker to keep a record of his discussions with the client particularly if certain risks were

examined and in the end self-insured. At least Lloyd's brokers in their code of practice are recommended to keep records and confirm instructions in writing including reference to self-insured risks (1.3 of the code). Brokers and other intermediaries otherwise may run the risk of the courts quite rightly in my view preferring the client's version of events in these circumstances.

THE INSURANCE OMBUDSMAN ANNUAL REPORT 1989

In his first Annual Report as Insurance Ombudsman Dr Julian Farrand confirmed 63% of insurers' decisions referred to him by dissatisfied policyholders. This compared with a rate of confirmation of about 80% of cases referred to his predecessor. The number of cases referred to him last year rose by 25% to 1,883.

Whilst starting with the legal position, he is not restricted to it and can consider the principles of good insurance practice. The mediaeval maxims of equity are, we are told, a useful guide to the exercise of discretion and moral judgment. Each case is resolved as far as possible according to its own peculiar merits.

Developments in the courts nonetheless affect the outcome of applications to the Bureau. *Sofi v Prudential Insurance Company* illustrates this: the Ombudsman could not resist the conclusion that the judiciary accept as reasonable a significantly lower standard of care than insurers, or indeed the Ombudsman, hitherto had.

The application of proportionality in cases of non-fraudulent non-disclosure shows the Ombudsman stepping beyond the confines of the legal position. By applying a proportional approach, the claim is met in the same proportion to the total claim as is the premium paid to the appropriate premium which would have been paid given full disclosure.

The Ombudsman's report contains much else of interest. It is available from the Insurance Ombudsman Bureau, 31 Southampton Row, London WC1B 5HJ at £2.50 per copy.

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