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How it can Arise and How to Prevent it

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Résumé de l'article

Cet article traite de la responsabilité des agents et des courtiers sur la base des règles de la Common Law, notamment, le bris des obligations contractuelles, la négligence dans la conduire des mandats et le bris des devoirs fiduciaires. Certains aspects tels que les recours collectifs, la législation ontarienne et la Loi canadienne sur la concurrence y sont étudiés. Finalement, les auteurs ne manquent pas de suggérer quelques règles de conduite pour éviter la poursuite.

Agent's and Broker's Liability

How It can Arise and How to Prevent It*

by

William G. Horton

and

Diane L. Evans**

Cet article traite de la responsabilité des agents et des courtiers sur la base des règles de la Common Law, notamment, le bris des obligations contractuelles, la négligence dans la conduite des mandats et le bris des devoirs fiduciaires.

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This paper is intended to provide an overview of the scope of agents' and brokers' liability in Canada, as well as touching upon some of the emerging areas of exposure for agents and brokers, and indeed insurers, and what steps an agent can be taken to protect oneself from liability.

Triggers for Liability

The courts in Ontario and in the other provinces of Canada have exhibited a willingness to scrutinize the conduct of insurance agents and brokers when such conduct has resulted in

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* Allocution prononcée dans le cadre d'une conférence organisée par L'Institut Canadien, les 13 et 14 juin 1994, à Toronto. Le thème de cette conférence était intitulé comme suit: *Promoting and Marketing Insurance*.

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loss or damage to a client. The courts have not hesitated to find that the conduct of an agent or broker, in the appropriate circumstances, will attract liability for loss or damage suffered by the client if the conduct caused or contributed to the loss or damage suffered by the insured. Agents, brokers and insurers should be aware of the type of conduct which can attract liability, and should take appropriate steps to protect themselves, both to prevent claims and in the event that a claim should arise.

Typically, a claim against an agent or broker will fall under
456 one of three main categories:

(*a*) a breach of a contractual obligation to the client;

(*b*) a breach of a duty owed to the client (also known as a claim in negligence);

(*c*) a breach of a fiduciary obligation owed to the client.

Breach of Contract

The claim for breach of a contractual obligation will most commonly arise in circumstances where the client has made a claim under a policy of insurance which the agent obtained for the client, where the claim has been denied, or where the client discovers that a specific risk is not covered by the policy of insurance procured by the agent. If the agent agreed to obtain a policy of insurance which would provide specific coverage, or would insure against a specific risk, and failed to provide the insurance coverage he agreed to provide, the client would have a claim against the agent for breach of its contractual obligation to obtain that coverage for the client.

Negligence

The claim for breach of duty or negligence on the part of the agent or broker usually arises out of the same type of factual situation which gives rise to a claim for breach of contract. However, any claim that an agent or broker breached its duty to the client or was negligent in performing his obligations to the client will be determined having regard to what the agent knew

or should have known about the client's insurance needs and risks, what steps the agent took to protect those needs and risks, and the level of disclosure provided to the client with respect to the coverage provided under the policy of insurance procured and any exclusions contained in the policy. If the agent or broker did not act reasonably in his dealings with the client, or did not take reasonable steps to protect the client from risk or harm, the agent may be liable.

Breach of Fiduciary Duty

The third area which may give rise to liability for agents and brokers occurs when the agent is found to be in a position of a fiduciary, and is alleged to have breached fiduciary obligations to the client. A fiduciary, in general terms, is a person who is placed in a position of confidence or trust in respect of another, and has the ability to act on knowledge or information gained from the position of trust and confidence. In these circumstances, a person is said to be in a fiduciary relationship with another, and has the obligation to use any knowledge or information gained in that position only for the benefit of the other person. In the context of an agent and client, the ambit of potential liability can only be determined with respect to the circumstance of each individual case. However, it is safe to say that if the client places reliance upon you to protect his needs, you must take special care to ensure the client is fully and completely informed about any insurance coverage you ultimately obtain for him. For example, if you have special knowledge about the circumstances of the business of the client which may have a material effect on the coverage available or the coverage provided, you are obligated to disclose any risks to your client, particularly those that may not be readily apparent to the ordinary person but which may arise because of the particular circumstances of the client. The type of action on the part of agents which might give rise to a claim for breach of fiduciary duty could include:

- failing to disclose material risks for which no coverage has been provided;

- failing to disclose an exclusion under the policy;
- acting in any manner which may not be in the best interests of the client, including:
    - attempting to sell the client more coverage than is required;
    - proposing that the insured accept less coverage than is required;
    - misrepresenting the terms and conditions of a policy or the obligations of the insured or insurer thereunder to sell the policy;
    - making representations based upon forecasts which may or may not be accurate, without disclosing the limitations of the forecast.

This is not of course an exhaustive list. It is perhaps sufficient to state that a fiduciary relationship can arise in many situations, and it is important to recognize the liability which can flow from when a client places their trust or reliance upon the agent to act on their behalf in obtaining insurance coverage.

The Decision in Fine's Flowers

The leading case dealing with the liability of agents and brokers with which many of you may be familiar, is the Ontario Court of Appeal decision in *Fine's Flowers Ltd., et al* v. *General Accident Assurance Co. of Canada, et al*[1]. This was a decision of the Ontario Court of Appeal upholding the Judgment at trial in which liability was assessed against an insurance agency for failure to obtain insurance coverage for certain risks in the plaintiff's business and for failing to advise the plaintiff that no coverage for these risks had been obtained.

The historical relationship between the plaintiff in that action and the insurance agent is significant in respect of the

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[1] *Fine's Flowers Ltd., et al* v. *General Accident Asssurance Co. of Canada, et al* (1977), 81 D.L.R. (3d) 139 (Ont. C.A.).

judgment which was ultimately rendered. The plaintiff, Fine's Flowers Ltd. ("Fines Flowers") operated an extensive horticultural business. Part of that business included the operation of a large greenhouse in the Ottawa area. It is the failure of one of the pumps which formed part of the heating system in some of those greenhouses and the resulting damage to the crops in the greenhouse which gave rise to the litigation.

Mr. Fine ("Fine") owned and operated Fine's Flowers. Fine had maintained a relationship with the insurance agency of Ault, Kinney, Campbell and Galligan Limited ("Ault") for many years prior to the loss which occurred and the evidence indicated it was apparent that Fine placed all of his insurance through Mr. Campbell ("Campbell") at Ault. Fine had asked Campbell to acquire and maintain "full insurance coverage" for the property and equipment used by Fine's Flowers in its business.

The insurance policy under which the claim was made was a boiler and machinery policy issued by General Accident Assurance Company ("GAA") (the "Policy"). The Policy replaced an earlier policy from another carrier which provided substantially the same coverage. The pumps and motors which formed part of the heating system were not expressly covered by the Policy. The Policy covered loss from, among other things, accident as defined in the Policy. The definition in the Policy of the types of accidents for which coverage was provided contained an express exception for loss resulting from wear and tear. The plaintiff was under the impression that the boiler and machinery policy covered risk of loss due to failure of the pumps. Neither GAA nor Ault advised Fine of the limitation in coverage.

Evidence was led at trial to show that during the term of the previous insurance policy issued to Fine's Flowers, the former insurance carrier had provided a quotation for insurance coverage on the pumps and motors which operated in conjunction with the boilers. The letter itself was never acknowledged or responded to by Ault. Furthermore, the quotation for insurance coverage for the pumps and motors was

never brought to Fine's attention by Ault. The contents of the letter from the previous insurance carrier made it clear that Ault must have been aware of the existence of the pumps and the fact that the lack of coverage on these pumps could give rise to a loss for Fine. The terms of the letter from the previous insurer made it abundantly clear that neither the pumps nor the motors were covered under the terms of the old policy, notwithstanding the fact that they operated in conjunction with the boilers.

460 The loss occurred when the heating system in the greenhouses failed as a result of a bearing in the electric motor on one of the pumps burning out, causing the pump to cease operating and the resulting short circuit tripped the circuit breakers and cut off the electricity supply to both service pumps.

As soon as the loss occurred, Fine immediately contacted his insurance agent, Campbell to report the loss and make a claim under the Policy.

At trial, the plaintiff pleaded that by failing to obtain coverage for Fine's Flowers for the loss which occurred, Ault was in breach of its contractual obligations to Fine's Flowers to obtain "full coverage". An allegation was also made that Ault was negligent in failing to obtain insurance coverage for Fine's Flowers to insure against the particular loss which occurred, pleading that the loss which occurred was a loss which could have been readily anticipated as a possible occurrence in the plaintiff's business. A claim was also made against GAA for coverage under the Policy. The action against GAA was dismissed as it was found that the loss was not covered by the Policy. However, judgment was granted to the plaintiff against the defendant, Ault, for breach of contract and for negligence.

Breach of Contract

The Ontario Court of Appeal relied upon the findings of fact and credibility made by the trial judge in arriving at its determination that the appeal of Ault should be dismissed. The trial judge found that: "there was a close and continuing relationship between Fine and Ault and in particular between Mr.

Fine and Mr. Campbell, and that Mr. Fine relied on Mr. Campbell 'to see that he was adequately covered with insurance'. He found further that, although Mr. Fine was an astute and successful businessman, he was not particularly well informed on the subject of insurance. Because of this he did not give specific instructions to Mr. Campbell as to what insurance he wanted; he simply said he wanted 'everything covered' and left the rest up to Mr. Campbell".[2] The trial judge ultimately accepted as fact Fine's assertion that Ault had agreed to provide complete insurance coverage for his business and by failing to insure Fine's company against the loss which occurred, Ault was in breach of its contractual obligations to Fine to ensure that coverage had been provided.

The Court of Appeal considered this issue carefully. The majority of the Court considered the issue of what full coverage meant in the context of the agent's contractual obligations. The Court ultimately concluded as follows:

> "Full coverage" meant coverage against all foreseeable insurable risks of the plaintiff's business and the risk which Mr. Campbell failed to protect the plaintiff against was both foreseeable and insurable.[3]

The Court determined that Ault was therefore liable to the plaintiff for failing to secure the necessary coverage, in breach of its contractual obligations to do so.

Breach of Duty

However, the trial judge also made a finding that the relationship between Fine and Ault imposed a duty of care on Ault when advising Fine on the insurance coverage obtained, and a duty of care when obtaining insurance coverage for Fine, and he breached that duty in failing to obtain the necessary coverage. Interestingly enough, there was no evidence led to establish that

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[2] *Fine's Flowers Ltd., et al.* supra, at p. 148, per Wilson, J.A., quoting from the judgment of Mr. Justice Fraser at trial (5 O.R. (2d) 137).

[3] *Fine's Flowers*, supra at p. 153.

coverage for damage arising out of wear and tear of the machinery was even available in the marketplace. The reason that the agent was found liable was the fact that he had not properly advised Fine of the fact that coverage for this occurrence, which was foreseeable in the circumstances, was not provided.

Wilson, J. A., identified the obligations of an agent in his decision on the appeal:

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> In many instances, an insurance agent will be asked to obtain a specific type of coverage and his duty in those circumstances will be to use a reasonable degree of skill and care in doing so or, if he is unable to do so, "to inform the principal promptly in order to prevent him from suffering loss through relying upon the successful completion of the transaction by the agent": Ivamy, *General Principles of Insurance Law*, 2nd ed. (1970), at p. 464.
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> But there are other cases, and in my view this is one of them, in which the client gives no such specific instructions but rather relies upon his agent to see that he is protected, and if the agent agrees to do business with him on those terms, then he cannot afterwards, when an uninsured loss arises, shrug off the responsibility he has assumed. If this requires him to inform himself about his client's business in order to assess the foreseeable risks and insure his client against them, then this he must do. It goes without saying that an agent who does not have the requisite skills to understand the nature of his client's business and assess the risks that should be insured against should not be offering this kind of service. As Mr. Justice Haines said in *Lahey* v. *Hartford Fire Ins. Co.*, [1968] 1 O.R. 727 at p. 729, 67 D.L.R. (2d) 506 at p. 508; varied [1969] 2 O.R. 883, 7 D.L.R. (3d) 315:
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> > The solution lies in the intelligent insurance agent who inspects the risks when he insures them, knows what his insurer is providing, discovers the areas that may give rise to dispute

> and either arranges for the coverage or makes certain the purchaser is aware of the exclusion.[4]
>
> I do not think this is too high a standard to impose upon an agent who knows that his client is relying upon him to see that he is protected against all foreseeable, insurable risks.

The basis for imposing liability upon the agent was the fact that Campbell knew or ought to have been aware of the fact that Fine was relying upon him to obtain complete insurance coverage for all risks. Accordingly, the Court determined that Campbell had an obligation to ensure that either the insurance coverage provided to Fine did in fact insure against all risks which one might reasonably foresee might occur in the business in which Fine was operating, or, alternatively, that Fine was advised that certain risks were not covered.

The Court determined that an agent's obligations in these circumstances were both contractual obligations and duties owed by the agent to the client. The trial judge found, and the majority of the Court of Appeal agreed with that finding, that Ault had agreed to "keep the plaintiff covered for all foreseeable, insurable and normal risks to the property used in connection with the business". No coverage had been obtained for the pumps, nor had coverage been obtained for damage which might result from wear and tear. The Court found that it should have been apparent to Campbell (and Ault) that a failure of the pump engine could occur, which could cause damage to Fine's business, and should also have been aware that such a potential loss would have been of importance to Fine. Accordingly, Campbell and Ault should have arranged for insurance coverage for the pumps, or, alternatively, should have advised Fine of the fact that coverage for wear and tear on the pumps under the Policy was not provided.

At least in that way, Fine would have had the opportunity of finding alternate insurance coverage or obtaining a different mechanical system for heating the greenhouses which would

[4]Fine's Flowers, supra, p. 149 per Wilson J.A.

have been less prone to failure. The agent's failure to either procure the necessary insurance coverage for Fine in respect of the pumps, or advise him of the fact that damage arising from a failure of the pumps due to wear and tear was not covered, resulted in liability.

Importance of Decision

The importance to the agent of a finding of contractual liability in these circumstances is the fact that an agent must, in
464 light of this decision, determine whether or not the agent entered into a contract with the client to obtain certain coverage. If the terms of instruction from the client are general in nature, it is possible that a greater obligation may be imputed to the agent to investigate and explore the client's requirements with respect to insurance coverage.

The way in which to determine whether or not you may be liable for contractual obligation to obtain specific coverage is to consider whether or not you agreed to obtain a certain policy or specific coverage for your client, or whether or not you simply agreed to obtain a policy which affords the client the best or most appropriate coverage in the circumstances. If you agreed to the former, you may be liable to the client for breach of contract if you fail to obtain the specified policy or coverage. If you agreed to the latter, you will be required to demonstrate that you took reasonable steps to obtain the appropriate coverage in order to satisfy your obligations.

When considering an agent's or broker's duty of care to a client, one must bear in mind that the obligations owed to a client will depend, to some degree, on the particular circumstances. In general terms, the agent has an obligation to carry out the client's instructions, and demonstrate the appropriate degree of skill and experience in doing so. In the insurance context, this would require you to:

1) ascertain the needs of your client;

2) explain the policy obtained and the insurance coverage actually provided;

3) accurately state the coverage provided and the availability of both the coverage provided and the additional coverage to your client;

4) accurately and fully disclose any risks to the insurer;

5) obtain coverage for your client with due dispatch.[5]

The decision in this case is of importance to agents and to brokers because it places the obligation on the agent or broker to take positive steps to:

(*a*) ensure that the instructions they receive from the client are specific so that both the agent and the client are aware of the specific types of coverage that are to be provided; or if specific instructions are not provided,

(*b*) make further inquiries to determine the nature of the business and the types of loss which might be reasonably foreseeable and obtain the necessary coverage for the client, or advise the client of the fact that either coverage is not available or has not been provided to allow the client to make their own determination as to whether or not to maintain the insurance coverage provided or make other arrangements.

Liability of Insurers

In many instances, the circumstances which give rise to liability for the agent may also create liability for the insurer. If an agent makes representations to an insured regarding the policy or coverage which ultimately prove to be incorrect or untrue, it

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[5]Neo J. Tuytel, *Agents' and Brokers' Liability: Taking Stock a Dozen Years after Fine's Flowers*, Canadian Insurance Law Review, Vol. 3, p. 1 at p. 120; citing E.R. Ivamy, *General Principles of Insurance Law*, 4th ed. (Wellington: Butterworths of New Zealand, 1979) at 549-555; E.J. MacGillivray and M. Parkington, *Insurance Law*, 8th ed. (London: Sweet & Maxwell, 1981) at 150-154; R. E. Shibley, "Actions against Agents and Brokers" in *Claims under Insurance Policies* (Special Lectures of the Law Society of Canada, 1962) at 244-253.

may result in liability for the insurer as well. Similarly, if representations are made to an insurer about an insured, it is possible that the agent will be seen to be the agent of the client in those circumstances. This depends on who is considered to be the agent's principal in the circumstances giving rise to a claim.

However, any representations an agent makes to a client about a policy or product will often be seen by the courts to have been made on behalf of the insurer and the insurer may be liable for any misstatements by the agent. This will not relieve the
466 agent of any obligation to the client, particularly in situations where the representations made by the agent were not expressly authorized by the insurer. While an insurer will be bound by the actions of its agent, this will not prevent the company from claiming against the agent for indemnity. It has become increasingly apparent in recent years that insurers are willing to seek recourse against their agents in situations where agents have made representations which were not authorized or condoned by the insurer.

The above analysis is less applicable to brokers who are almost always viewed as agents of the insured.

Recent U.S. Experience

In the United States, the circumstances under which liability will be attributed to an agent or broker are similar to those outlined above and which are available in Canada.

The Metropolitan Life Action

Recent litigation in the United States involving Metropolitan Life Insurance Company and 87 agents is attracting attention throughout the United States, and in Canada, as it arises out of the sales activities of 87 agents, whose actions were allegedly condoned and encouraged by the manager of Metropolitan Life's Tampa, Florida office. Legal action arose as a result of an investigation initiated by the Florida State Insurance Department to examine the sales practices of Metropolitan Life and, in particular, the activities of its Tampa,

Florida office. It was discovered that a manager at Metropolitan Life had developed and implemented a deceptive scheme designed to sell a particular life insurance policy to nurses and other health professionals.

The Tampa office of Metropolitan Life was selling a life insurance policy, but referred to it as a "Nurses Guaranteed Retirement Savings Plan". The life insurance was referred to as an investment, and premiums were referred to as deposits. These terms were used in what were referred to as "preapproach letters". The insurance agents themselves were apparently encouraged to continue to use these terms in their subsequent sales approach. The agents themselves did not refer to themselves as insurance agents, but as "nursing representatives". The agents working under Rick Urso, the manager of the Tampa office, were apparently instructed on the representations to be made with respect to the life insurance policy in question, and indeed were alleged to have been required to memorize the sales pitch to be utilized. Urso, along with other managers, is alleged to have coerced agents to participate in the scheme, and allegedly terminated agents who refused to participate in the sales approach.

Investigations were subsequently initiated in more than forty states as the Tampa office was employing this marketing scheme nationwide. As a result of these investigations, 86 agents, in addition to Urso himself, are now facing individual prosecution for fraud and misrepresentation as a result of their activities in marketing the policy in the manner described, notwithstanding the fact that the agents acted on the instructions of Urso. This is apparently the largest collective action ever taken by the Insurance Commission involving deceptive sales practices.

In addition to the charges laid against the agents, disciplinary proceedings were contemplated against Metropolitan Life. In settlement of the investigations and proposed disciplinary proceedings against the company, Metropolitan Life

has reportedly agreed to pay twenty million dollars in fines, one of the biggest fines ever paid involving an insurer.

Class Action Suit

In addition, a class action suit was commenced in Florida on behalf of the policyholders. Metropolitan Life was named as a defendant in the action. Metropolitan Life is alleged to have been aware of the deceptive marketing practices engaged in by Urso and the agents who worked under him as early as 1990, yet did
468 nothing about it.

The class action suit has resulted in a substantial settlement with over sixty thousand Metropolitan Life policyholders. Each and every policyholder affected by the settlement will be entitled to accept one of three options available:

(*a*) keep the life insurance policy in force;

(*b*) obtain a full refund from Metropolitan Life for the policy; or

(*c*) convert their life insurance policy into an annuity.

This could result in payment by Metropolitan Life of as much as seventy-six million dollars in refunds to policyholders.

The implications of the settlement of the class action suit in Florida, the payment of the twenty million dollar fine by Metropolitan Life to the State Insurance Commissioners and the prosecution of the 87 agents is far reaching. Clearly, an agent will not be protected from liability for making misleading representations to policyholders by pleading that the agent was instructed by the insurer or a representative of the insurer to make certain representations with respect to a policy, coverage, or benefits. Furthermore, such instruction will not preclude prosecution of that agent for fraud or misrepresentation. Finally, it would appear that an insurer may be sued and prosecuted and exposed to liability for representations made by an agent, whether or not those representations were condoned by the insurer.

The failure of Metropolitan Life to promptly respond to the concerns raised with respect to the misleading advertising practices engaged in by its agents has resulted in tremendous adverse publicity for both the company and for its agents.

The Canadian Context

The circumstances which gave rise to the Metropolitan Life proceedings in the United States raise the question of whether such a situation could happen in Canada. The answer appears to be yes. While the particular statutory guidelines which govern the actions of agents will differ, the underlying legal basis for a determination of whether the agents and the insurer would be found liable remain the same. In the situation raised by the Metropolitan Life case, the true nature of the product was not disclosed to potential purchasers by the agents and the ramifications of the purchase of the life insurance policy were not disclosed to the purchasers. As noted earlier, an agent has a clear obligation to properly and adequately disclose the nature of the insurance being purchased, the type of coverage provided, and any exclusions with respect to coverage, particularly in circumstances where the exclusions may be relevant or material to the client. These obligations exist in Canada, not only as a result of the decision in *Fine's Flowers,* but also pursuant to statutory authority.

The Insurance Act

The provisions of the *Insurance Act* of Ontario govern the conduct of insurers, agents and brokers in the province. In general terms, agents are prohibited under the *Insurance Act* from engaging in unfair or deceptive practices, making false or misleading statements or comparisons, or coercing a client to purchase a life insurance contract.

Specific statutory provisions govern an agent's conduct in making fraudulent representations. Section 395 of the *Insurance Act* of Ontario provides:

395. An agent or broker who knowingly procures, by fraudulent representations, payment or the obligation for payment of any premium on an insurance policy is guilty of an offence. R.S.O. 1980, c.218, s. 352.

Section 439 of that Act governs unfair or deceptive practices which might not fall into the category of fraudulent conduct. The section stipulates that "no person shall engage in any unfair or deceptive act or practice". Unfair or deceptive practices are defined in Section 438 of the Act to include:

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(*a*) any illustration, circular, memorandum or statement that misrepresents, or by omission is so incomplete that it misrepresents, the terms, benefits or advantages of any policy or contract of insurance issued or to be issued;

(*b*) any false or misleading statement as to the terms, benefits or advantages of any contract or policy of insurance issued or to be issued;

(*c*) any incomplete comparison of any policy or contract of insurance with that of another insurer for the purpose of inducing, or intending to induce, an insured to lapse, forfeit or surrender a policy or contract; and

(*d*) any payment, allowance or gift, or any offer to pay, allow or give any money or thing of value as an inducement to any prospective insured to insure.

Section 404 makes specific reference to the prohibition against twisting.

The section states that:

404. (1) Any person who induces or attempts to induce directly or indirectly, an insured to,

(*a*) lapse;

(*b*) surrender for cash paid up or extended insurance, or other valuable consideration; or

(*c*) subject to substantial borrowing whether in a single loan or over a period of time;

any contract with one insurer of life insurance that contains provision for cash surrender and paid up values for the purpose of effecting a contract of life insurance with another insurer is guilty of an offense.

This section also provides that:

(2) A person licensed as an agent for life insurance who,

(*a*) makes a false and misleading statement or representation in the solicitation or registration of insurance; or

(*b*) makes or delivers any incomplete comparison of any policy or contract of insurance with that of any other insurer in the solicitation or registration of insurance; or

(*c*) coerces or proposes, directly or indirectly, to coerce a prospective buyer of life insurance through the influence of a professional or a business relationship or otherwise to give a preference with respect to the policy of life insurance that would not otherwise be given on the effecting of a life insurance contract,

is guilty of an offence.

In circumstances akin to those raised in the Metropolitan Life case, it would be no defence in Canada to simply rely upon the fact that the agent was instructed to make the statements or representations complained of. If the representations made by the agent concerning the policy prove to be incorrect, inaccurate or misleading, the agent could be liable to the client for any damages which the client may suffer as a result. The agent may also be subject to prosecution for breach of s.395 of the *Insurance Act*.

While an agent may be able to make a claim against the insurer for indemnity if the insurer or its representative instructed

the agent to make the representations for which the agent is found liable, that would only afford relief to the agent in a civil action. It would not protect the agent from prosecution under the *Insurance Act*. The best course of action for the agent is to avoid making any representations which the agent knows or believes to be inaccurate.

In addition to civil action against the agent, the agent may also be subject to sanctions or prosecution under the *Insurance Act*. The *Insurance Act* provides that the Superintendent of
472 Insurance may make a determination that a person has committed an unfair or deceptive practice, and the Superintendent may order that person to cease such conduct, to cease engaging in the business of insurance or to take whatever action the Superintendent deems necessary to remedy the problem.

It is also an offence under the *Insurance Act* to contravene any provision of that Act or the Regulations passed under that Act and on conviction, a person may be liable to a fine not exceeding $100,000.00 for each first conviction, and for each subsequent conviction, to a fine of not more than $200,000.00. A Court may, in addition to the payment of a fine, order that the person make restitution.

Bill 134

This Bill, which has passed second reading and is expected to be law before the end of the year, proposes what could be far reaching changes to the standards of conduct expected of agents. Bill 134 contemplates that Regulations may be passed under the *Insurance Act* which would prescribe standards of practice and duties of agents, including prescribing a code of ethics. The draft legislation also contemplates Regulations which will require insurers to establish and maintain a system of screening agents and supervising the activities of its agents. The Ontario Legislature has not yet disclosed the standard of practice and duties of agents which may be prescribed by the Regulations. Similarly, the obligations of an insurer in screening and

supervising agents have not been clearly outlined by the Ontario Legislature. Accordingly, it is difficult to determine at this time the extent to which the Ontario Legislature is or will be seeking to place new obligations on agents in respect of their standards of practice and their duties, or the degree to which the Ontario Legislature envisions that insurers will have responsibility to actually control the actions of their agents.

If the legislation is passed, the Regulations contemplated could well have an enormous impact on agents' and insurers' exposure to liability, as the regulations will not only require agents to conform to a standard of conduct prescribed by law (although the standards to which they will be held are not yet known) but also be subjected to the supervision of their activities by the insurer. The insurer in turn will have a positive obligation to monitor the agents' activities. If the insurer fails to adequately screen prospective agents or otherwise supervise the agents' activities and thereby breaches its obligations under the Regulations (and query what level of supervision will be required), the insurer could well be liable for any actions taken by the agent.

Competition Act

This Act is intended to maintain and encourage competition in Canada. The provisions of the Act are enforceable nationwide.

This Act prohibits certain forms of false or misleading representations or advertising and makes it an offence to contravene the provisions of the Act relating to such activity.

Section 52 states:

> Section 52. Misleading Advertising
>
> (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(*a*) make a representation to the public that is false or misleading in a material respect;

(*b*) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representations;

(*c*) make a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out; or

(*d*) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold, and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

If the provisions of section 52(1) are contravened, the Act contemplates prosecution. Sections 52(4) and (5) provide:

(4) *General impression to be considered.* - In any prosecution for a contravention of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in

determining whether or not the representation is false or misleading in a material respect.

(5) *Offence and punishment.* - Any person who contravenes subsection (1) is guilty of an offence and liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

(*b*) on summary conviction, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding one year or to both.

It is important to bear these provisions in mind, particularly when contemplating any nationwide marketing schemes.

Québec Civil Code

The new *Quebec Civil Code* contains provisions which govern the enforceability of consumer contracts, and will govern whether or not a provision, particularly if not specifically disclosed to the consumer, will be enforced. The Code provides:

1434. A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law.

1435. An external clause referred to in a contract is binding on the parties.

In a consumer contract or a contract of adhesion, however, an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it.

1436. In a consumer contract or a contract of adhesion, a clause which is illegible or incomprehensible to a

reasonable person is null if the consumer or the adhering party suffers injury therefrom, unless the other party proves that an adequate explanation of the nature and scope of the clause was given to the consumer or adhering party.

1437. An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced.

An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause.

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Class Action Proceedings

Is an action such as the class action suit commenced against Metropolitan Life in Florida available in Ontario? The new *Class Proceedings Act* which became law June 25, 1992 in Ontario could provide prospective claimants with a mechanism by which to pursue similar litigation in Canada. The provisions of the *Class Proceedings Act* provide that a class proceeding may be certified by the Court provided that:

(1) the pleadings disclose a cause of action;

(2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(3) the claims or defences of the class members raise common issues;

(4) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(5) there is a representative plaintiff who would fairly represent the interests of the class.

In circumstances where there may be a number of individuals affected by an agent's actions, the actions of an insurer, or the actions of a broker, whether it be claims of misrepresentation, high pressure sales tactics, or misleading advertising, particularly as they relate to a specific policy or product, as in the Metropolitan Life case, a class action may well afford a remedy for a large group of claimants against the agent or insurer (or both). Under the Class Proceedings legislation, the Court will determine the procedure under which individual claims need to be proven. In so doing, the Court may authorize the use of standardized proof of claim forms, the use of affidavit or other documentary evidence and auditing of claims on a sampling or other basis. Although the Act contemplates the possibility of seeking discovery from each party, there may be limits imposed on discovery of each class member or claimant, which could severely restrict a defendant's right to determine if the agent's actions complained or did in fact cause the loss alleged.

The Court may determine the aggregate liability of a particular defendant to class members and give judgment accordingly. However, the *Class Proceedings Act* allows for the possibility that the litigation could be reopened in the future by new litigants who were not made aware of the action at the outset. Where the Court can set a time limit within which each individual class member may make a claim, this would not prohibit a claim from being advanced at a later date, providing the claimant seeks leave of the Court. Such a procedure, of course, would leave open the possibility that even after a judgment has been granted, it could be amended at a later date and additional liability could be assessed against the agent or the insurer.

The *Class Proceedings Act* contemplates the possibility that a lawyer may act on behalf of a class and agree to accept payment only in the event that the action is successful. While contingency fees are common in the Unites States and in other jurisdictions in Canada, they are prohibited, but for this exception, in Ontario. However, the *Class Proceedings Act*

contemplates that payment of the lawyer under such a contingency arrangement could only be made to the lawyer on approval by the Court, and will be based on an hourly fee and the number of hours worked, although may be increased in the discretion of the Court. However, contingency type remuneration as found in U.S. style litigation, based on a percentage of the recovery made, is not contemplated by the legislation.

Reducing the Risk

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1. Know your client and your client's needs. This cannot be stressed too strongly. In order for you to give appropriate advice to a prospective client, it is necessary that the agent understand the client's situation and the type of insurance that will provide full and complete coverage to the client. Be aware of the fact that if the client provides general instructions as to the type of insurance that it require, such as "full coverage" as requested by Fine in the *Fine's Flowers* case, a duty will be placed upon the agent to make additional inquiries of the client as to the client's specific needs and requirements.

2. Discuss the client's needs with him and endeavour to obtain instructions to obtain specific coverage whenever possible. The more the client understands about the product being purchased, the risks for which insurance coverage is being obtained, and the risks which are not covered by the policy, the less likely the agent will be found to be in a fiduciary relationship with the client, as the necessary degree of reliance on the agent's skill and knowledge will not be established. Furthermore, the more information the

client has about the product purchased, the more likely the client will be to understand and accept any limitations under the policy, should a loss occur for which the insurer will not provide coverage.

3. Understand the product being sold. It is no defence for an agent to state that he was not aware of exclusions or limitations contained in the policy. As it is imperative that the agent make full disclosure to the client of the coverage which is being provided and any exclusions or limitations in the policy, it is important that the agent is fully familiar with the policy.

4. Do not give assurances to clients which you have no authority to make. Statements or representations concerning a prospective insurer's solvency, a statement or representation to the effect that the policy provides full coverage or other sweeping generalizations will likely lead to trouble.

5. Provide the client promptly with a copy of the policy and a covering letter which draws to the client's attention all of the relevant policy terms and limitations.

Conclusion

An agent or broker has onerous duties and responsibilities, both to the insured and the insurer, and these obligations may well increase if the regulations proposed become law. The best way to protect yourself against possible claims and to satisfy clients is to be fair and honest about the product that you are selling and what it can reasonably be expected to deliver to the insured. By providing a full and complete explanation of all exceptions and limitations as well as the benefits and costs of the policy, the agent not only creates a situation where the agent is less likely to be exposed to liability should a situation arise which is not covered by the policy, but, in turn, the agent creates an "informed consumer" of insurance products.