



REAL ESTATE COUNCIL OF ONTARIO INSURANCE PROGRAM



REAL ESTATE ERRORS AND OMISSIONS: A Registrant's Guide to the Claims Experience

What should I do if I made a mistake or an error in a trade in real estate? What if someone makes a claim against me? What should I do? Who do I turn to? What does it mean to me – professionally or financially? What does my errors and omissions insurance coverage do for me?

This pamphlet has been prepared for you, a registrant of RECO, as an informal guide to assist you through the process of an insurance claim.

1. What is a Claim or Circumstance?

A claim is an oral or written demand for damages or the filing of a lawsuit seeking damages for an alleged error, omission, negligent act, or personal injury arising out of professional services provided to a client or customer in a trade in real estate.

A circumstance is an incident, situation or event of which you, the registrant, have knowledge of, that has the potential of becoming a claim and that may result in a demand seeking damages arising out of professional services. A circumstance does not involve an oral or written demand but is still significant from an insurance perspective. For example, if you suspect that you may have made an error in a real estate trade, even if no one has threatened you verbally or in writing, then this is a circumstance.

A complaint made to RECO about the conduct of a registrant may also be a claim or circumstance. A registrant should carefully review any complaint to determine whether there is any allegation of negligence or that damages have been suffered by a complainant to determine whether the matter should be reported to the insurer.

Coverage is determined by the terms and conditions of RECO's errors and omissions insurance policy (the policy) as applied to the individual facts of each claim or

circumstance. You can find a copy of the current year's policy on RECO's website at www.reco.on.ca or on the program manager's website at www.reco-claims.ca.

The program is insured by Lloyd's of London (the insurer) and managed by Dion, Durrell + Associates Inc. (the program manager).

2. Reporting a Claim or Circumstance

Timely and accurate reporting of claims and circumstances is critical. Reporting a claim or a circumstance to the insurer protects you if a situation escalates and a lawsuit is commenced against you. While RECO endorses the insurance program, your report to the insurer is treated with the utmost confidentiality and no third party, even RECO, can access this information without your consent or unless required by law. Furthermore, the act of reporting a claim or a circumstance to the insurer does not, in and of itself, have any financial consequences to you. The current deductible under the policy is \$2,500 (subject to change, please consult your policy). Payment of your deductible is not requested by the insurer due to the payment of defence costs. The only time that your deductible will be requested by the insurer, and the only financial circumstance to you under the policy arising out of an errors and omissions claim is if and when a claim payment is made to a claimant on your behalf.

A failure to report a claim or circumstance on a timely basis may leave you without any insurance coverage. The insurer provides this coverage on a "claims made" basis. Every year, the insurer issues a new insurance policy agreeing to provide coverage for claims and circumstances that are reported during *that* policy year. If you have knowledge of a possible circumstance and do not report it by the end of the policy year, your claim may not qualify for coverage.

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In other words, it is better to be safe than to be sorry. Report all claims and/or circumstances immediately. Complete the “Notice of Claim - Errors & Omissions” form and submit your report to the program adjuster.

You can find claim reporting forms and other valuable information on RECO’s website at www.reco.on.ca or on the program manager’s website at www.reco-claims.ca. If you wish to report the claim over the phone, contact the program adjuster at the number provided on the websites.

3. Investigating a Report - the Adjuster

You have an irate customer/client who has sent you a letter alleging you made a mistake in the trade that you were involved in. You have reported the claim to the insurer by completing a claim reporting form and sending it to the adjuster, McLarens Canada (McLarens). What next?

A representative from McLarens will contact you, either in writing or by telephone, to discuss your situation within 48 hours of your report. Make sure that you have maintained and organized all of your trade documents and any notes that you may have taken as this is something that the adjuster will want to review as part of the investigation. You may also be asked to provide a statement to assist the insurer in making a decision about how the claim will be handled. In the event of a lawsuit the statement will be useful to refresh your memory of the details of the event.

McLarens will report the findings of the investigation of your claim to the insurer for a determination of the next steps in managing your claim. They will determine whether to take a “wait and see” approach, send the former customer/client a denial letter, or appoint a program lawyer to defend you.

4. Cooperation

One important pre-condition of coverage under the policy is that you must cooperate with the insurer and its representatives in its investigation and defence of your claim. What is cooperation? Good question.

Cooperation means not admitting you did anything wrong when you are accused of an error or omission. This is called “admitting liability” and can prejudice the insurer’s ability to defend a claim. Admitting liability could result in the insurer denying coverage under the policy.

Cooperation also means providing assistance to the insurer. You must provide the insurer – through the adjuster or its defence lawyer – with all of the facts, documentation materials, and or statements required to properly defend you. It means attending in court examinations and in the event the claim is not or should not be settled, appearing at trial to participate in the defence of your reputation.

Insurance coverage is a two way street. The insurer is prepared to defend you, pay for all of the expenses of defending a claim made against you and, pay a claim settlement on your behalf. In return, you are obligated under the policy, as an insured, to cooperate with the insurer.

5. Defending a Claim

If a claimant commences a lawsuit against you, the insurer will retain a lawyer to defend you. The insurer has a panel of experienced lawyers across the province of Ontario who specialize in the defence of errors and omissions claims against real estate practitioners.

Defending a claim involves a number of steps. The first step is making sure that the defence lawyer has all of the facts necessary to prepare and file a Statement of Defence. This will require a telephone interview or a face to face meeting.

The second step is preparing an Affidavit of Documents. Your defence lawyer needs all of the documentation that was used in the trade – trade record sheets, listing agreements, handwritten notes etc. All documentation becomes part of the sworn Affidavit of Documents which must be disclosed to the claimant and the claimant’s lawyer. The documents will become evidence at trial. Remember that it’s not up to you to determine what is or is not relevant - let the lawyer make that decision. One of the worst nightmares for a defence

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lawyer is when the registrant “finds” documents in the middle of a lawsuit – it makes the job of defending the lawsuit more difficult and expensive.

6. The Court Process

After filing a Statement of Defence and Affidavit of Documents, the court system takes over. There are a number of different stages to a lawsuit as it winds its way through the court system. In a typical lawsuit, the first four stages may occur individually, in combination or in any sequence during the court process.

The first stage in a lawsuit might be the bringing of a motion. Motions generally do not require your attendance. For example, to change the place that a trial is to take place might require a motion to change the venue of the trial. You may be required to swear an affidavit in support of the change in venue. Motions can be argued in front of court officers, known as masters, or in front of judges – depending on where the action was commenced and the purpose of the Motion.

The second stage is the Examination for Discovery. You must attend and answer questions posed by the claimant’s lawyer. Your defence lawyer will attend with you to protect you from being asked any improper questions. This also gives your defence lawyer an opportunity to ask questions of the claimant. Many of the questions arise out of the documents in the Affidavit of Documents. The examination is given under oath and is recorded by a court reporter. Answers should be given in a forthright and honest manner. Most examinations in real estate errors and omissions claims require approximately one-half day to complete.

The third stage, which could take place either before or after the Examination for Discovery is Mediation. Mediation is mandatory in the province of Ontario. A mediation is a non-binding meeting utilizing a trained mediator to determine if a lawsuit can be settled. The discussions are confidential and in most cases, a mediation will require your attendance and participation.

The fourth stage in a lawsuit is a Case Conference. This is where a master or a judge sets the timing of the

different steps in a lawsuit – such as examinations for discovery, mediation, pre-trials, exchanges of experts’ reports, setting a trial date etc. Case conferences do not require your attendance.

The fifth stage in a lawsuit is a Pre-Trial Conference. All pre-trials involve a judge and the lawyers. Pre-trials are really for the lawyers to come to an agreement on the issues, the length of time required for trial, the names of witnesses etc. The pre-trial is often used by the lawyers to “test the waters” with a judge to discuss their respective positions in an effort to determine what the inclination of the court may be in relation to the evidence. Pre-trials rarely require your attendance and participation.

If the case is not resolved by way of negotiation, mediation or as a result of the pre-trial then the parties will get their day in court at the sixth stage – a trial. A trial requires your attendance. All parties and witnesses are questioned under oath and after hearing the evidence the judge (juries are rarely used in these types of cases) renders a decision.

The seventh and last stage, which is rarely reached, in a lawsuit is an appeal. If one party doesn’t like the verdict and there is a valid argument to be made (i.e. the judge has made a mistake in a finding of law or facts) then an appeal of the trial judgment can be made.

Trials and appeals are expensive and time consuming. Most cases settle before going to trial when the parties step back and make a realistic assessment of their anticipated outcome. Less than 5% of all lawsuits actually make it into a courtroom.

7. Consequences of Settling a Claim

Settlements can occur at any time – before a lawsuit is even commenced, at mediation, at a pre-trial or even minutes before a trial starts.

The insurer’s responsibility is to make a realistic assessment of the possibility of a judgment against you. Claims without merit are vigorously defended. Claims that have a chance to succeed because of exposure to an error, omission, negligent act or personal injury that can be settled reasonably will be resolved.

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As the insured, you are kept informed about how the claim progresses. Your consent will be requested before the insurer enters into a settlement. When considering a settlement there are a number of questions that you should ask yourself. If someone else did what I did would I be critical of them? Can I risk a judgment that criticizes my actions? Do I want to go through many days of examinations by a hostile lawyer? How will the lawsuit affect my current workload?

Settlements bring an end to a lawsuit. From a financial standpoint, a settlement will require payment of a deductible. (Consult your policy for the current deductible applicable.)

8. Lessons to be Learned

It is better to be safe than to be sorry. Don't put your head in the sand if someone alleges you've made a mistake and threatens to sue you. Protect your reputation. Report the claim to the insurer and let the professionals assess the risk and, if you are sued, protect your interests. Reporting claims to the insurer promptly will avoid the risk of having no insurance at all to protect you financially.

Your cooperation with the insurer will make the claims handling process much smoother for you. Every effort will be made by the insurer and its representatives to protect your interests and if necessary resolve the claim.

Notice to Reader

The information contained in this bulletin is for the intended use of RECO registrants. Any dissemination, distribution or copying of this communication is strictly prohibited.

This pamphlet is an overview of certain features of the RECO insurance policy which focuses on a particular issue as it relates to you – the registrant. The contents of the pamphlet are not intended to be an exhaustive review of the policy nor is it to be relied upon as such. Please read your policy carefully.

For greater detail or if you have any questions about your insurance coverage please contact the insurance broker, Alternative Risk Services Inc. at 1-866-426-1666 or by email at info@reco-claims.ca

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