

THE ROLE OF THE INDEPENDENT ADJUSTER IN THE SETTLEMENT OF CLAIMS

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There has recently been a great deal of discussion among members of the independent adjusting profession about self-regulation and the need to improve educational and training requirements.¹ It is said that both the independent adjuster and the public will benefit from the adoption of such measures. The result would be an improvement in the quality of people who are licensed as independent adjusters and the quality of the services which are performed. While there is no doubt merit in such proposals being adopted by the various departments of insurance throughout the provinces, it should be noted that the proposed measures relate to the internal management and regulation of the independent adjusting profession itself. They do not deal directly with how an insured is or may be affected by the acts or conduct of members of that profession. Just as the insured's main involvement with the insurer at the time of the issuance of a policy is with his local insurance agent, so too his primary involvement with the insurer at the time a loss occurs is with an adjuster. It is important therefore to focus on the legal relationship which exists between the public and the independent adjuster.

The term "independent" is somewhat misleading, when defining the legal relationship between an adjuster and insurer. The term seems to denote that the adjuster stands in a position somewhere between the insured and the insurer, and that his function is somewhat of a mediator or conciliator. However, this is not the case, as the "independent" label merely means that he is not an employee of the insurer such as a staff adjuster. The "independent" adjuster therefore is one who is in the business of adjusting losses and investigating claims, and who is available to be retained on a fee for service basis by a number of insurers. To suggest that such an adjuster is "independent" from the control of the insurer is false, and therefore, it is submitted, by the use of the label itself, it is conceivable that the public may be misled.

When an insured suffers a loss which appears to have been caused by one of the perils insured against in his policy, he will generally report that loss immediately to the insurance agency from which he purchased his policy. Once the agency is notified of the loss, it will in turn notify the insurer who may either stipulate the adjuster

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1. Convention of the Canadian Independent Adjuster's Conference (Central Region), reported in (July 1978) *Canadian Insurance/Agent & Broker* 47.

that it wishes to retain, or it may leave such an appointment to the discretion of the particular agency. In fact, in many cases, the insurance agent makes the decision as to which adjuster will be appointed to investigate the circumstances of any particular loss. Hence a close relationship has developed between members of the adjusting profession and the numerous insurance agencies. The insured may infer that both the insurance agent and the adjuster are employed by the insurance company. However an adjuster is appointed, the fact remains that the insured's contact in dealing with the circumstances of the loss then shifts from his local insurance agent to the "independent" adjuster. The question then arises as to what, if any, authority the adjuster has in dealing with the insured in connection with the various aspects of the insured's claim.

Members of the adjusting profession will in all likelihood advise that their only authority is to review and investigate the circumstances of the loss, and to report the results of their findings to the insurer. They are also likely to stipulate that they have no authority whatsoever from the insurer to commit the insurer in any way. However, as with any other relationship involving the use of an agent to conduct a principal's business, the question is more properly looked at from the point of view of the third party, in this case the insured.

When a loss occurs which appears to be on account of one of the perils insured against in the policy, and the appointed adjuster comes into contact with the insured; there are many ways in which the legal relationship of, and the requirements on, the insured with respect to the loss can be affected by the conduct of the adjuster.

For example, the adjuster might request the indulgence of the insured in not taking any further action against the insurer until the adjuster has had sufficient time to complete his investigation and to report to the insurer. In the meantime, the applicable limitation date might be approaching, and the insured believes that it is not necessary for him to abide by the limitation period, because the adjuster has requested his indulgence and has yet to complete his investigation. Another circumstance may arise where the adjuster investigating the loss may not request or obtain from the insured the requisite proof of loss forms. The insured may be under the mistaken belief that, since the adjuster is fully aware of his claim, it is not necessary to file such proof of loss forms. Yet in another case, the insured may have obtained estimates for repairs of the insured property and have presented them to the adjuster, who indicates that he would recommend the amount of the repairs to the insurer. On the strength of that representation, the insured may be led into the belief that he is to proceed with the repairs, without having a formal authorization

for same issued by the insurer. It may also happen that in the course of their discussions, the adjuster may embark upon an explanation of the policy coverage or policy limits or, alternatively, may stipulate the basis on which coverage is being denied. This position is then either altered or not adopted by the insurer in any subsequent proceedings brought by the insured to recover under his policy. A final example of a typical problem is where the adjuster obtains a non-waiver agreement from the insured, which may or may not have been adequately explained to the insured prior to signing. This may lead to the mistaken belief on the part of the insured that he is covered for the particular loss in question.

Because the insured in all likelihood has no real knowledge of the true relationship and authority which exists between the insurer and the adjuster, even if explained to him by the adjuster at the time of their first meeting, it is respectfully submitted that a clear statutory enactment should be included in the provincial Insurance Acts, providing in clear express language that the "independent" adjuster is the agent of the insurer, and in no way will any act or omission by the "independent" adjuster be deemed in law to be the act or omission of the insured. By clearly defining the relationship between the insurer and the "independent" adjuster as one of agency, it would then become a question of fact in each case whether the adjuster has acted within his authority in his dealings with the insured. As with any other agent, the normal laws of agency ought to apply, so that so long as the agent is acting within his real (actual) or apparent (ostensible) authority, his actions will be binding in law upon the insurer.²

By including a specific provision in the various Insurance Acts to the effect that the "independent" adjuster is deemed to be the agent of the insurer, it will ensure that the focus in any legal proceeding involving the insurer will be on both the actual relationship which existed between the insurer and the adjuster, and on how the insured viewed the authority which the insurer had given to the adjuster. This approach, it is submitted, has already been adopted by the courts, and therefore the proposed legislative enactment would serve to confirm existing judicial practice.

For example, the British Columbia Supreme Court in *Hadikin Brothers Lumbering Ltd. v. Canadian Surety Co.*³ held that an insurance adjuster has the ostensible authority to bind the insurer to a settlement of a claim under a policy and, consequently, the insurer is bound by that settlement. The defendant insurer in that case had admitted that the adjuster was, at the time in question, its agent;

2. *Fridman's Law of Agency* (4th ed. 1976) 89-93.

3. (1975), 57 D.L.R. (3d) 632 (B.C.S.C.).

however, the defendant contended that the adjuster was not authorized to enter into a binding settlement. As there was no evidence to show that the adjuster had the actual authority to bind the defendant insurer, the question then became whether he had the ostensible authority to do so. In reaching his decision, Mr. Justice Andrews relied on the classic agency case and decision of Diplock, L.J. in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, as follows:

By so doing [putting the agent in a position carrying with it a usual authority] the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into.⁴

Mr. Justice Andrews concluded that "There is no question that an insurance adjuster usually has the authority to bind his principal to a settlement of a claim within the provisions of the policy."⁵

Similarly, the Quebec Superior Court in *Bédard v. Consolidated Fire and Casualty Insurance Co.*⁶ held that the conduct of an adjuster appointed by the defendant insurer constituted a waiver preventing the defendant insurer from asserting at trial that the requisite proof of loss forms were not made in accordance with the statutory conditions.⁷ It is interesting to note that the defendant insurer had contended that the adjuster was not its agent to settle claims. However the Court found by reference to documents used at trial by the defendant insurer that the adjuster had described himself as representing the defendant, and concluded the defendant insurer had thereby impliedly admitted that the adjuster was its agent to adjust the claims of the plaintiff.

The suggestion that the Legislature enact a clear provision, stipulating that the "independent" adjuster works for the insurer rather than for the insured, is not a novel one. Recently, the Ontario Minister of Consumer and Commercial Relations indicated in a public address to the annual convention of the Canadian Independent Adjusters' Conference (Central Region)⁸ that his government had proposed that such a relationship be stated clearly in Part 14 of *The Insurance Act* of Ontario.⁹ It is submitted that such a legislative provision merely reflects the existing approach adopted by the courts in dealing with the acts or conduct of "independent" adjusters, and is in line with the adjusters' own realization that by accepting an ap-

4. [1964] 2 Q.B. 480, at 503-04.

5. *Supra* n. 3, at 637.

6. [1959] I.L.R. 635 (Que. S.C.).

7. *Accord, Malo v. Compagnie d'Assurance contre les Accidents et Incendies du Canada*, [1973] I.L.R. 563 (Que. S.C.).

8. *Supra* n. 1.

9. R.S.O. 1970, c. 224.

pointment from an insurer, they are thereby made the agents of the insurer. By being such an agent, the onus will be put on the adjuster to explain clearly to the insured at the outset the extent of the limited actual authority which has been granted to him. This will preclude any later attempt by the insured to assert that the insurer had led him to believe that the adjuster had far greater authority than he actually had. If the adjuster exceeds his actual authority but is still acting within his apparent or ostensible authority so as to bind the insurer, then the insurer has recourse against the adjuster that it appointed. This potential recourse against the "independent" adjuster is one of the things which members of the adjusting profession have in mind when taking out "errors and omissions" insurance policies of their own.

By enacting this legislative proposal, it is submitted that the public will have a clear definition of the role of the "independent" adjuster in the settlement of claims. Moreover the "independent" adjuster will have identified for him the clear need to, first, explain to the insured the extent of his authority granted by the insurer, and, second, to act at all times within that actual authority.

