



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

E & O Claims: Recent Trends/Developments in Canadian cases

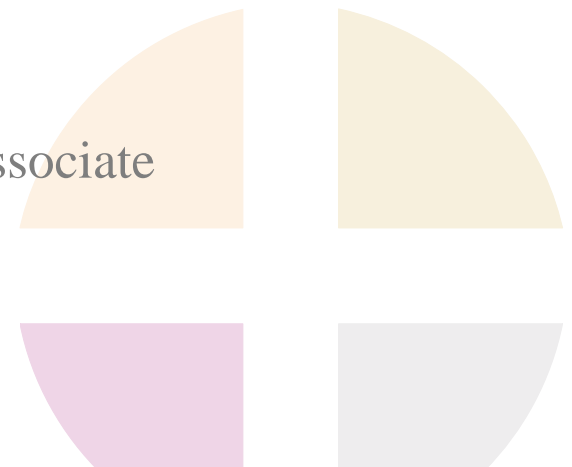
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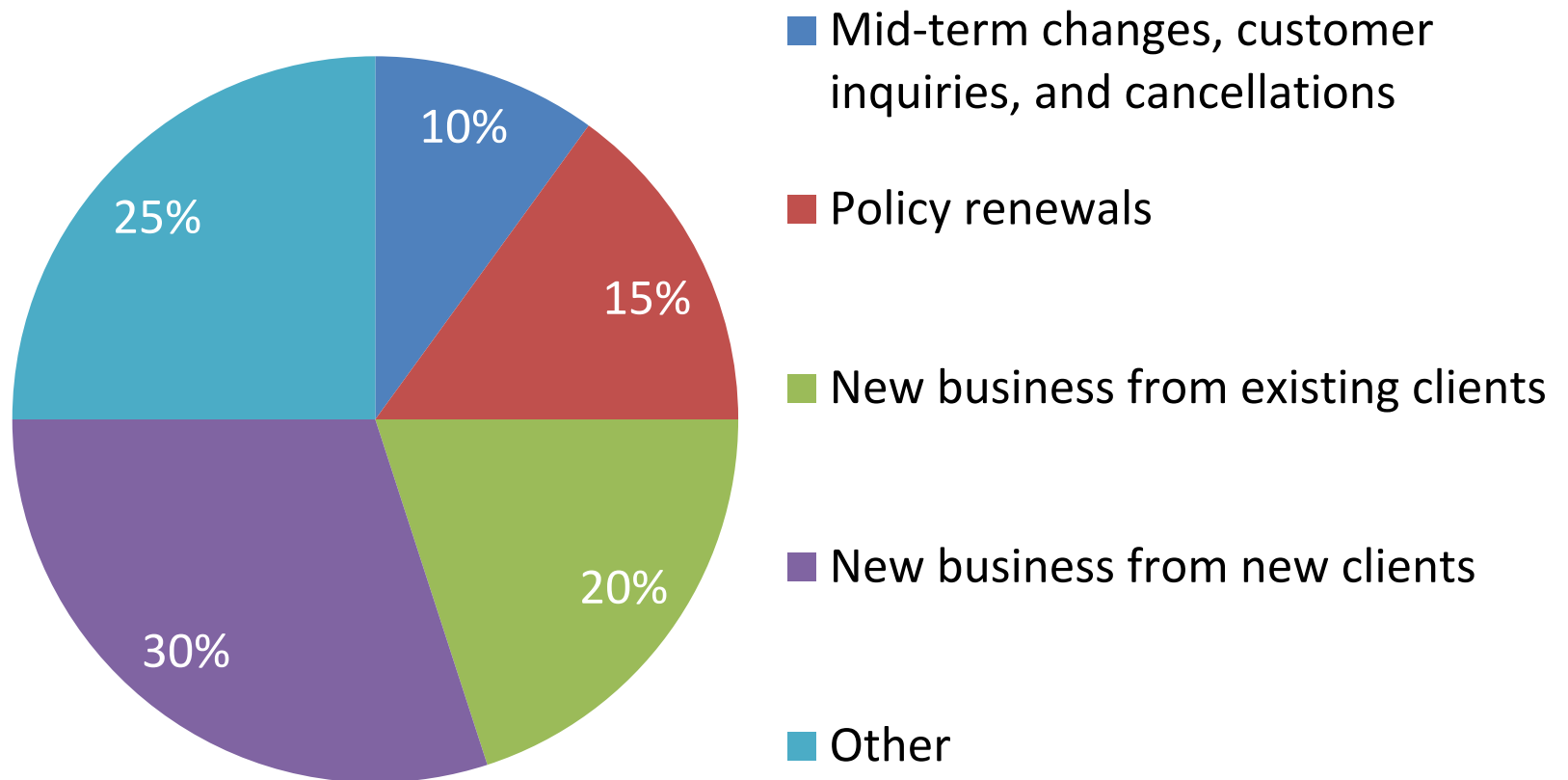
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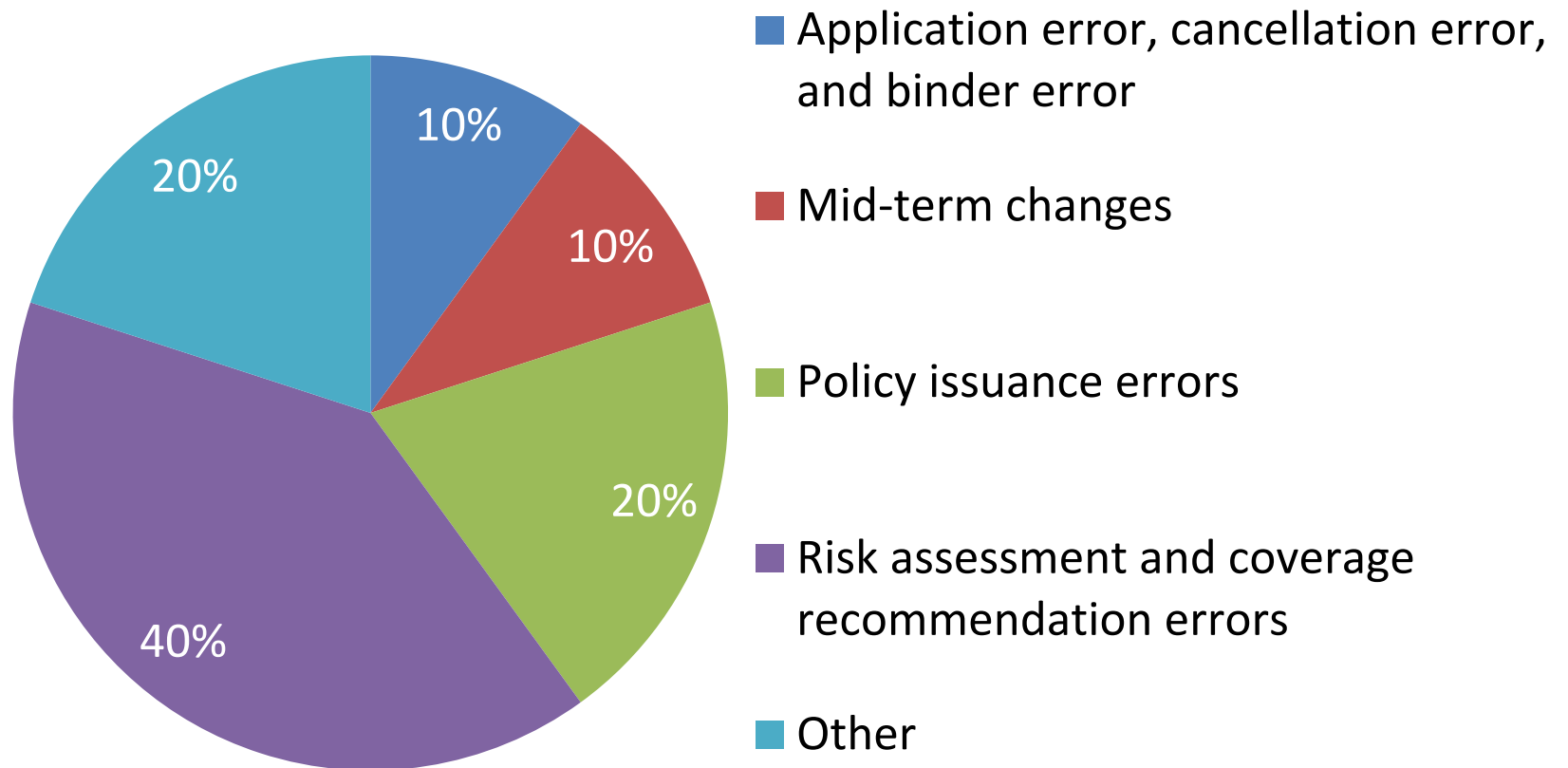
E & O Insurance Policies

- Brokers require professional liability insurance also known as Errors and Omissions (E & O) policies
- Claims-based policies
- Liability of brokers follow the rules of negligence:
 - Standard of care
 - Causation
 - Remoteness

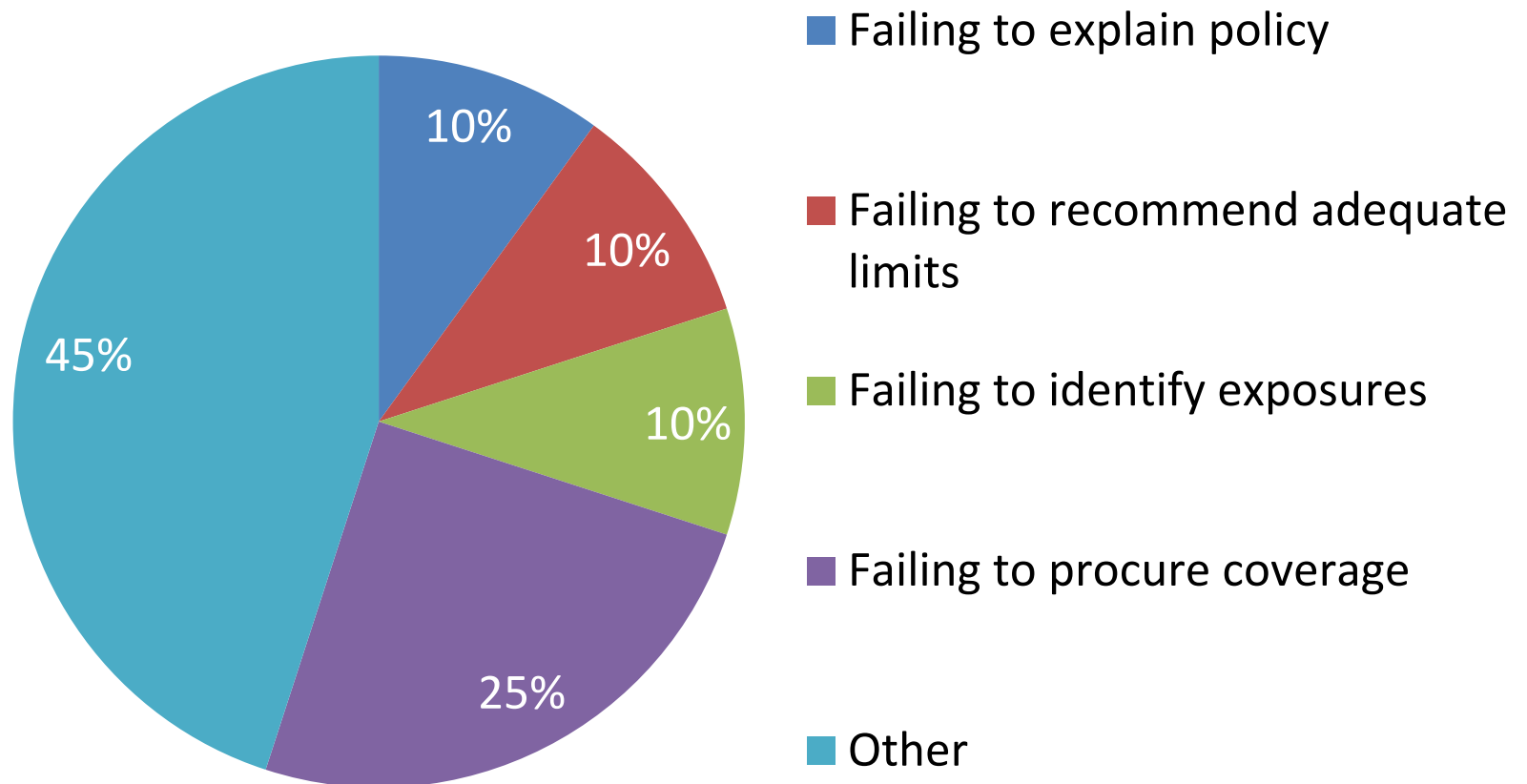
- When claims arise



- Types of errors



- Examples of negligence



- *Fine's Flowers Ltd. v. General Accident* (1977), 17 O.R. (2d) 529 (C.A.), approved by Supreme Court of Canada in *Fletcher v. MPIC*, [1990] 3 S.C.R. 191
- Brokers have special expertise; not mere salespeople
- Take reasonable steps to acquire that which has been requested
- Service the policy with vigilance
- Promptly advise of gaps in coverage so client can take steps to minimize risks



E & O Claim Categories

- Failing to appreciate the insured's exposure
- Failing to ask questions to assess exposure after a change in circumstances
- Failing to advise given a change in circumstances
- Failing to provide the requested coverage
- Failing to report a material change in risk to insurer
- Breach of fiduciary duty



Failing to appreciate the insured's exposure

- *Bronfman v. BFL Canada (2013) Ont.*
- \$2.3 million claim against broker for not securing proper amount of coverage
- \$20,000 coverage limit for jewellery
- Jewellery was stolen
- Insurer paid coverage limit



Failing to appreciate the insured's exposure

- Insureds were well off
- Had previous policies with another broker
- Changed to broker who had handled insureds' corporate insurance
- Broker did "bare minimum" when renewing policies
- No meeting or home visit
- Relied on prior policies



Failing to appreciate the insured's exposure

- Expert at trial:
 - Unjustified assumptions
 - Failed to meet with the insureds
 - Failed to attend at the insureds' home
 - Failed to advise the insureds of gaps in coverage
 - Failed to advise of additional insurance



Failing to appreciate the insured's exposure

- Court found causal link between breach and harm
 - the broker has a duty to make such investigations that would have permitted him to discover an obvious coverage gap and to provide the insureds with recommendations to remedy it
- No contributory negligence argument
- Awarded value of jewellery (\$2.3 million)



Failing to appreciate the insured's exposure

- Lessons from *Bronfman*:
 - Brokers are the insurance experts
 - Form letters may be too complicated
 - Do not blindly rely on previous coverage
 - Meet with the insured to assess appropriate coverage
 - Conduct periodic reviews of insurance
 - Document the insured's decision to reject recommendations
 - Your promotional materials may haunt you



Failing to assess exposure after a change in circumstances

- *McIntosh v. Royal Sun Alliance (2007) Fed.Ct (Ont)*
- Insured retired and bought a boat
- Contacted broker for possible coverage for commercial use
- Broker unable to secure a policy; suggested he limit personal use
- Insured aware policy prohibited commercial use
- Broker aware of Insured's business plans but never informed RSA



Failing to assess exposure after a change in circumstances

- Boat was subsequently stolen and destroyed
- Claim denied on basis of policy breach
- Court found Insured had used boat for commercial purposes
- Insurer held not liable for the loss



Failing to assess exposure after a change in circumstances

- Broker failed to meet standard of care
- Failed to ask the necessary questions at renewal (insured's business plans)
- Obligation to assess risks that should be insured against, assess foreseeable risks and insure client against them
- No causal link
- Insured knowingly breached policy



Failing to assess exposure after a change in circumstances

- Lessons from *McIntosh*:
 - Brokers owe a duty to place proper coverage
 - Involves asking the necessary questions and having the necessary discussions to ascertain exposure
 - Failing to have these discussions = failing to meet the standard of care of a prudent insurance broker



Failing to advise after a change in circumstances

- *Beck (Estate) v. Johnston, Meier Insurance Agencies (2010) BCSC (aff'd 2011 BCCA)*
- Homeowners' policy in both spouses' names
- Excluded intentional acts of a named insured
- Wife separated from her husband and moved out
- Broker was informed on three separate occasions
- Broker did not question or provide advice about husband (as co-insured) intentional acts or options regarding tenant's insurance



Failing to advise after a change in circumstances

- Wife murdered by ex-husband who then burned down house and killed himself
- Insurer settled for 50% of the claim; estate sued broker for balance for improper advice
- Negligence for failing to advise of intentional act exclusion and provide coverage options
- Causation found: insured would have followed advice
- Foreseeable that there was a gap in coverage in the event of an intentional act



Failing to advise after a change in circumstances

- Lessons from *Beck (Estate)*
 - Be proactive when faced with a change in circumstances
 - Ask questions
 - Satisfy yourself that the existing coverage is viable, or discuss appropriate options for changes to coverage
 - Let the insured know all options (there may be non-insurance remedies)



PLUS

Failing to provide the requested coverage

- *CIA Inspection Inc. v. Dan Lawrie Brokers (2010) Ont.*
- Insured inspected oil refinery coke drums with sensors
- Sensor damaged on site
- Claim denied: only covered sensors in-transit
- Insured sued broker for failing to ensure proper coverage



PLUS

Failing to provide the requested coverage

- Insured told broker it wanted to replicate previous coverage
- Previous insurance made no distinction between use **on site** and **in transit** coverage
- Broker was confused and unaware of coverage gap
- Broker unable to obtain policy itself (cover note for policy which excluded on site coverage)
- Broker's services were "perfunctory"



PLUS

Failing to provide the requested coverage

- Insured 33% contributory negligent
- Should have taken control over his own fate
- Did not press harder for answers
- Was not proactive enough to get policy
- Reckless in dealing with broker
- Did not act prudently in managing his affairs



PLUS

Failing to provide the requested coverage

- Lessons from *CIA Inspection Inc.*
 - Ensure coverage requested is in fact issued
 - Obtain the policy from the insurer and provide it
 - Insureds must be proactive as well
 - Know who you are dealing with in the market



Failing to report a material change in risk to the insurer

- *Keizer v. Portage LaPrairie* (2013) NS
- Insured had homeowner policy with disclosed wood stove in garage for heating
- Retired and set up woodworking shop in garage
- Working outside garage for Home Depot but also advised broker of work being done in garage
- Broker did not inform insurer of woodworking shop

*



Failing to report a material change in risk to the insurer

- At renewal, insurer sent broker a questionnaire
- Broker did not review questionnaire with the insured and simply filled out the form on his own
- Fire damaged garage and tools
- Insured denied coverage for material change in risk
- Claim against insurer dismissed



Failing to report a material change in risk to the insurer

- Broker was found negligent:
 - Home based woodworking shop was a material change in risk; and
 - Full extent of the business activities were not reported
- Insurer would not have written policy had it known of risks
- Broker obliged to identify risks and match with coverage
- Duty to advise the insured of circumstances that would result in a loss of coverage
- Once broker was advised of change in business activity it was obligated to make further inquiries and not take short cuts



Failing to report a material change in risk to the insurer

- Lessons from *Keizer*
 - Once broker finds a material change in risk, inform insurer
 - Determine if change affects coverage
 - Advise the insured
 - Contact insured to ascertain the currency of their activities
 - Provide insurer with accurate information
 - Short cuts are never the right answer



Breach of fiduciary duty

- *National Crane Services Inc. v. AON (2007) Sask.*
- Insured operated crane rental business with on-the-hook rider with \$50,000 limits
- Insured contracted to move a printing press of \$250,000 value and sought to increase rider for the job
- Rider excluded consequential loss (b.i.) of which broker was unaware
- Press was damaged
- Insured's customer sued for \$420,000 including business interruption



Breach of fiduciary duty

- Negotiated settlement:
 - Insurer paid limit of \$250,000
 - Insured paid an additional \$35,000 toward the b.i. claim and sued broker for this amount plus interest and costs
- Court found broker liable for not knowing the exclusion given that a b.i. loss was foreseeable and thus there was a coverage gap (although no coverage available for such a loss)
- Had broker advised Insured he could have made alternate arrangements to limit risks (non-insurance)



Breach of fiduciary duty

- Lessons from *National Crane*
 - Brokers owe their insureds a fiduciary duty
 - Requires reading policy exclusions and advising insureds
 - Failing to contemplate a foreseeable risk does not discharge the obligation to obtain appropriate coverage



Top ten best practices

1. Use questionnaires and lists
2. Keep current
3. Remember you are being relied on to provide advice
4. Document files for every action (CYA)
5. Ask questions and have discussions to ascertain exposures
6. Conduct initial and periodic reviews



Top ten best practices

6. Be proactive when a change in circumstances
7. Recognize material changes in risk
9. Obtain the coverage requested
10. Act in the insured's best interest



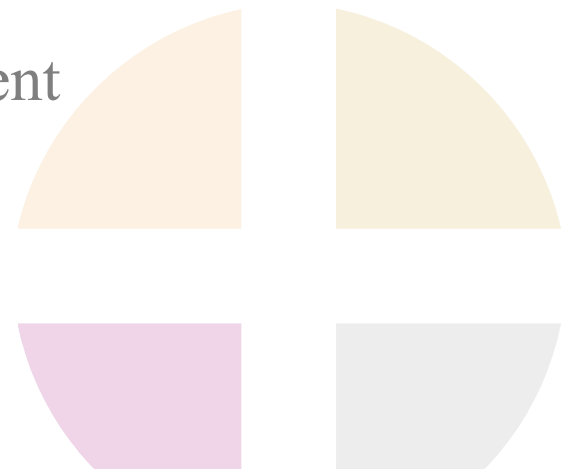
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Broker E&O Claims

An Insurer's perspective

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Overview

- E&O Insurance is mandatory – without it a broker cannot operate
- E&O Premium is a significant expense for a brokerage
- The environment in which brokers operate continues to change
- Broker E&O Insurance is a volatile line of business



Claim Exposure - Current State

- Insurer / Broker relationships
- Broker Duty of Care and Client Relationships
- Policy Holder expectations
- Strength of the Plaintiffs bar
- Complexity of the environment in which Brokers operate

- Limits
 - Insurance to value (Commercial Property)
 - Liability Limit (Automobile & GL)
- Exposure Assessment
 - Business Interruption, Professional Liability
 - Building by-laws, Change in exposure
- Binding Authority
- Processing Error



Claim Frequency

- About one in eight brokers are expected to incur an E&O claim each year
- Recommendation error 16%
- Exposure assessment error 21%
- Policy issuance/renewal error 28%
- Personal Lines 40%

- Industry Consolidation – Insurers and Brokers
- Broker's need for efficiency
- Climate Change
- Regulatory
- Emerging exposures
- New Insurance Products

- The environment in which brokers operate is becoming much more complex
- The premium volume to cover losses is shrinking
- Implementation and adherence to industry best practices and robust office procedures is essential