

# Real Estate Errors and Omissions Insurance Corporation

## No Coverage for Dishonest Appropriation Under the Real Estate Errors and Omissions Insurance Corporation Indemnity Plan

Recently, as a result of a number of misappropriations of trust monies by licensees, the Real Estate Errors and Omissions Insurance Corporation (the “Insurance Corporation”) has received notice of claims which are properly the subject of coverage under the Real Estate Special Compensation Fund (the “Special Compensation Fund”).

We wish to highlight the distinction between the insurance provided by the Insurance Corporation (the “Indemnity Plan”) and the compensation provided by the Special Compensation Fund operated by the Real Estate Compensation Corporation. The Indemnity Plan provides coverage to insureds for liability to third parties arising out of negligent errors or omissions in the provision of real estate services. The compensation provided by the Special Compensation Fund is for loss of funds which are “misappropriated or wrongfully converted,” “intentionally not paid over or accounted for to a person entitled to the money,” or “obtained by fraud.”

Both programs have their legislative authority in the *Real Estate Services Act*, S.B.C. 2004, c. 42 (“RESA”) whose purpose is to regulate the provision of real estate services to the public and to provide protection to the public. Each of the programs is ultimately funded by assessments imposed on real estate licensees. The programs have separate administrative structures and requirements.

The Insurance Corporation had its origins in 1988 when it was created under the then *Real Estate Act*, R.S.B.C. 1996, c. 397, and it was continued in 2004 under RESA. The Special Compensation Fund had its origin in the 2004 legislation. The coverage for defalcation which it provided replaced the former requirement for brokerages to obtain fidelity bonding in the insurance market for this risk.

The limits of coverage for the two programs are different. The Indemnity Plan provides coverage of up to \$1 million per error. The Special Compensation Fund coverage is limited to \$100,000 for a single claimant.

Since 1988, both during the period when defalcations were covered by fidelity bonds, and since the coming into force of RESA in 2005, there has been no occasion when a defalcation loss was paid pursuant to the Indemnity Plan. The argument has recently been made, however, that the Indemnity Plan provides coverage in a case where a managing broker or the brokerage itself is alleged to have been negligent in allowing or failing to prevent a dishonest licensee from misappropriating trust deposit funds. The Insurance Corporation’s position is that this type of claim is not covered by the Indemnity Plan as it is, in substance, a claim in contract or debt, not negligence. The liability to repay is strict and is something that is not covered by a professional liability insurance policy.

To avoid the legal expense arising from attempts to access the higher limits of coverage provided by the Indemnity Plan, the Directors of the Insurance Corporation have decided to further clarify the terms of the Indemnity Plan by adding the underlined words to the definition of **damages**, and exclusions 15, and 16 as follows. It is not expected that these changes will have any practical effect other than for clarification.

## Damages

**Damages** means: any monetary award or settlement, and any prejudgment interest, post-judgment interest and costs awarded against you relating to covered allegations. **Damages** does not include an order for the payment of any sum resulting directly or indirectly from dishonest appropriation of money or other property by any **Insured**, or for an order of set-off or any order for the return or reimbursement of any commission or fee that you received, even if claimed as general damages, or any order for punitive, aggravated or exemplary damages, or any fine, sanction, penalty or disciplinary hearing costs awarded against you.

## Exclusions

This indemnity plan does not apply to:

- ...15. a **claim** relating to or arising out of or connected with a dishonest appropriation of money or other property, whether to the use of the **Individual Insured** or a third party, which was entrusted to and received by the **Individual Insured** or the relevant **brokerage** in their capacity as licensees.
16. a **claim** for any loss, any portion of which would be subject to coverage under the Real Estate Special Compensation Fund established under the **Act**.

These provisions will come into force on August 1, 2014 pursuant to Endorsement #1 to Indemnity Plan RE0314.

This notification is for information purposes only. The terms of the revised Indemnity Plan and the relevant legislation should be consulted for all questions of interpretation.