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Risk Report

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REAL ESTATE ERRORS AND OMISSIONS INSURANCE CORPORATION

FEATURE

Claims Up in 2011

As 2011 draws to a close, indications are that the total number of claims reported during the year will exceed the previous year by approximately 12% *(see Figure 1)*. This is likely due to the increase in sales volume that has occurred since the market downturn in 2008. Historically, the strongest indicator as to the level of claims activity has been the volume of residential real estate. The number of losses (the event or error that eventually leads to a claim being reported) from the years 2000 to 2008 has been on average 3.8 per 1,000 sales *(see Figure 2)*. On reviewing Figure 2, it should be noted that for the most recent years, there have been losses that have not yet been reported as claims. However, if the market continues to remain stable over the next year, expectations are that the number of claims will also likely remain stable.

The Insurance Corporation currently has 564 open claims, 71% of which are in litigation. The most common type of claim, making up 56% of open claim files, continues

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Annual Claims Compared to BC Residential Sales

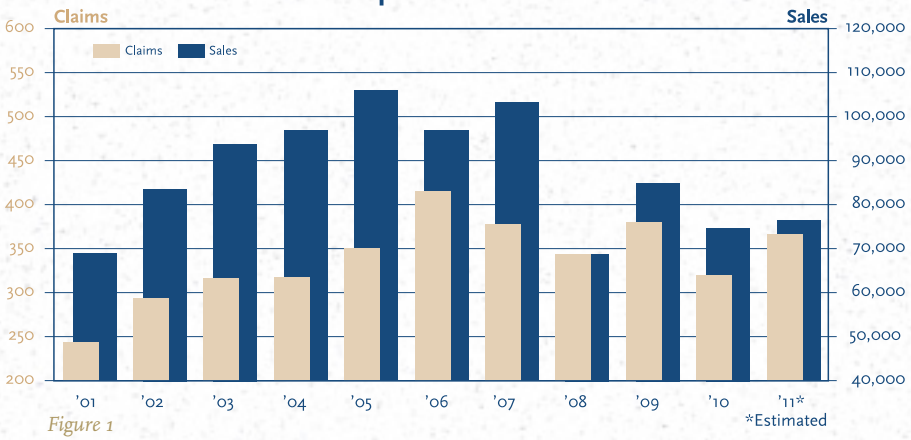
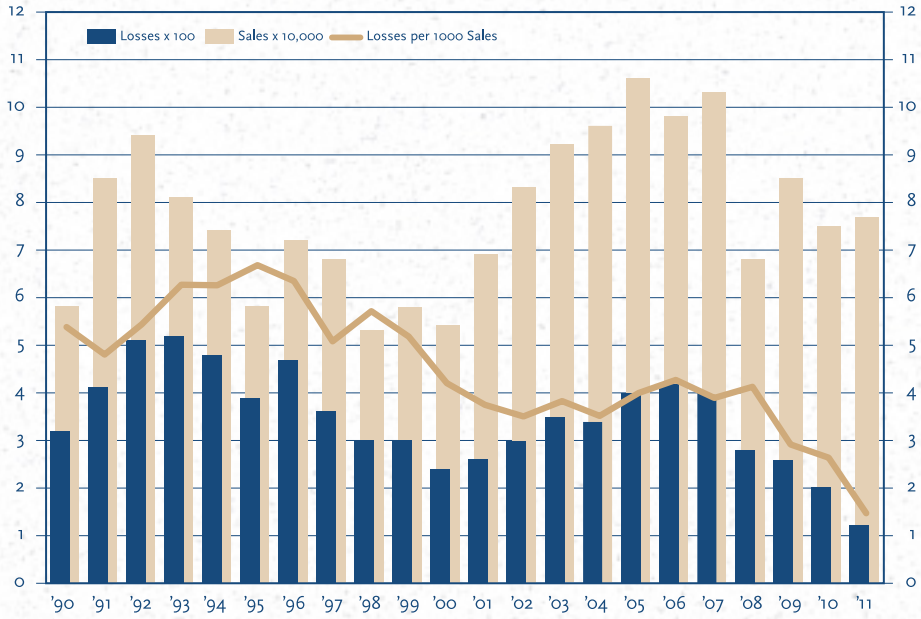


Figure 1

Loss Dates Compared to BC Residential Sales



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to be for misrepresentation or non-disclosure. The most frequent are claims alleging the licensee misrepresented or failed to disclose information about the structure or condition of the building. For example, there are several claims against licensees for failing to discover or disclose that renovations or additions have been done without proper permits. Claims in negligence or negligent drafting make up 29% of claims, with breach of fiduciary duty at 5% and strata or property management claims at 10%.

Three Tips for Smooth Claims Reporting

1. Don't Ignore the Problem —

Part IV: Conditions, section 3.1 of the *Indemnity Plan* requires that you give written notice to the Insurance Corporation "as soon as practicable" after becoming aware of an error or any circumstance which could reasonably be expected to be the basis of a claim, however unmeritorious. Although a claim against you in your professional capacity is a difficult and often stressful event, it may be made worse if you bury your head in the sand. For example, failure to file a response to a lawsuit within the required time limits may result in a default judgment against you. This, in turn, may also result in a denial of insurance coverage for breach of the reporting requirements in the policy. The sooner you notify us of a claim, the sooner we can provide you with advice and assist you in dealing with the problem.

2. Don't Admit Liability —

When you learn of a claim being made against you, it is possible that you may think that the claimant is right and that you did make a mistake. You may even be tempted to tell the claimant this. However, whether or not you made a mistake at law that results in compensation to the claimant is a very complicated matter. The *Indemnity Plan*, Part IV: Conditions, section 4.3, indicates that "you will not, except at your own cost, admit liability...." The ability of the Insurance Corporation to defend you may be prejudiced if you have admitted liability prior to reporting a claim. This could result in a denial of insurance coverage which will not benefit you or the party you think you have wronged. Before making any admissions, it is always best to report the matter to your manager who will help advise you on the situation and decide whether the complaint should be reported to the Insurance Corporation. If the matter is reported, a staff lawyer will help guide you on the best approach to deal with the problem.

3. Help Us to Help You —

When a claim is reported to the Insurance Corporation, we will need information in order to assess the claim being made against you. Be prepared to provide us immediately with your written statement responding to the allegations being made against you and to provide us with all documentation pertaining to the matter. The lawyer handling your file will also likely need to interview you either over the phone or in person. Although all this will require a time commitment on your part, it is crucial for us to know all the facts about a case in order to properly advise and defend you.

2011's Five Most Expensive Claims

1 **Negligence:** seller's agents failed to provide amended Disclosure Statements to pre-sale condo buyers. **Full limit claim: $1 million.**

2 **Negligent Misrepresentation:** limited dual agent negligently misrepresented the development potential and value of a property to a buyer. **Total, including legal costs: $378,000.**

3 **Non-Disclosure:** buyer's agent was alleged to have failed to discover and disclose slope instability which eventually resulted in a landslide. **Total, including legal costs: $236,000.**

4 **Negligence:** seller's agent was alleged to be negligent in handling of transactions involving competing buyers. **Total, including legal costs: $167,000.**

5 **Negligent Misrepresentation:** limited dual agent misrepresented the subdivision costs and failed to properly draft the contract. **Total,including legal costs: $146,000**

E-Mail or Mail – Tell Us Your Preference

If you would prefer receiving the Risk Report and other communications from Real Estate Errors and Omissions Insurance Corporation by email, please let us know by sending your instructions to us at *reception@reeoic.com*

LEGAL UPDATE

A Fiduciary Duty Primer

GREG BLANCHARD, WHITELAW TWINING

Real estate licensees are often described as owing their clients a "fiduciary duty." Being a fiduciary means that your client has put trust and confidence in you to deal with his or her real estate transaction. A fiduciary duty is a duty of utmost good faith which means that a fiduciary is expected to be completely loyal to the person to whom he owes the duty: he must not put his personal interests before the duty, and must not profit from his position as a fiduciary.

It is well established in Canadian law that, in most circumstances, a real estate licensee owes a fiduciary duty to his or her client.

How is a fiduciary relationship determined?

The substance of the relationship must be considered.

In a fiduciary relationship:

1. The fiduciary has the ability to exercise some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion to affect the client's legal or commercial interests;
3. The client is vulnerable to the fiduciary holding the discretion or power.

The sophistication of the client can be an important factor in determining whether a fiduciary relationship exists. An experienced buyer or seller may simply engage the services of a licensee to act as a messenger to deliver offers which are dictated by the client or to advertise and market the seller's property at prices set by the seller. In these types of situations, it is unlikely that a Court would find that the above characteristics exist to establish a fiduciary relationship. This does not mean that a licensee acting for a sophisticated client does not owe that client contractual or other duties established by law.

Canadian Courts will presume that a fiduciary relationship exists between a licensee and his or her client and the onus is on the licensee to overturn this presumption. Evidence may establish that the characteristics described above are not present in the relationship.

When does the duty arise and when does it end?

The fiduciary duty generally comes into existence when the licensee starts providing trading services to a buyer or a seller.

While the inception of the fiduciary duty owed to a client is generally straightforward, it is more difficult to say when the duty comes to an end. This will depend on the circumstances of the transaction. The fiduciary relationship does not end with the formation of a contract of purchase and sale. The fiduciary relationship lasts at least until the listing agreement terminates or the transaction completes.

In the case of *Reidy Motors Ltd. v. Grimm,* a 1996 Alberta decision, the Court found that in circumstances where the licensee purchased and resold his own client's property through a holding company for a profit, the fiduciary duty owing to the client lasted until the closing of the second sale.

Disclosure and confidentiality

A licensee acting in a fiduciary relationship has a duty to disclose all material information to his or her client. It is not up to the licensee to decide what is material or not. Material information is information which would likely influence the conduct of the client in the transaction.

The consequences of the disclosure of the information are not relevant. For example, it is not open for a licensee acting solely for a seller who has entered into an unconditional contract with a buyer to argue that the licensee did not have an obligation to disclose the interest expressed by a second buyer because the seller already had a binding contract in place.

A licensee must keep confidential any information received from a client pertaining to the transaction. Sometimes this duty of confidentiality is obvious. A licensee who represents a seller cannot, without the seller's consent, disclose to a buyer that the seller is prepared to accept a price lower than the listing price for the property. Conversely, a licensee who represents a buyer cannot disclose to a seller that the buyer will pay more than what the buyer has offered for the property. The Real Estate Council of British Columbia has taken the position that the duty of confidentiality remains even after the contractual arrangement between the licensee and the client has ended.

A licensee who acted as a seller's agent pursuant to a listing contract was disciplined by the Council when, long after the expiration of the listing contract, the licensee, at the request of a lawyer who was acting for a buyer in a lawsuit against the seller, provided an Affidavit which disclosed information which had been given by the seller to the licensee in confidence. Absent the consent of the client (preferably in writing), the Council has determined that confidential information can only be disclosed if a Court orders its disclosure or the licensee is subpoenaed to testify as a witness at trial.

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LEGAL UPDATE

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Limited dual agency

The Limited Dual Agency Agreement modifies the duty of full disclosure existing in a fiduciary relationship. It allows a brokerage through one or more of its licensees to act for both the seller and potential buyers in a transaction.

The Limited Dual Agency Agreement "limits" the obligations of disclosure and sets out three areas where the parties agree that the limited dual agents will not have an obligation of disclosure.

The Limited Dual Agency Agreement also modifies the duty of utmost good faith as it would be an impossible conflict for a brokerage and licensee to provide complete loyalty to both the buyer and the seller. The Limited Dual Agency Agreement provides that the buyer and seller agree that the limited dual agent will treat the buyer and the seller "impartially."

Licensees should assume that they are in a fiduciary relationship when acting for a buyer or a seller in a transaction. Accordingly, a prudent licensee will be aware of the duties that the relationship imposes as described in this article. If you are found to be in breach of a fiduciary duty, the Court can order that you give up any commission earned in the transaction. The *Indemnity Plan* does not provide indemnification for the return or reimbursement of any commissions or fees that you received.

REEOIC Welcomes New Staff Lawyers

Following the retirement of Beverly Nelson and Shannon Larter this year, the Corporation welcomed new Staff Lawyers, **Chris Johnston** and **Wanda Simek**. Mr. Johnston was called to the Bar in 2001 and has a background in private practice as a commercial and real estate litigator. Ms. Simek was called to the Bar in 2005 and has experience in commercial litigation including construction and professional liability matters.

Indemnity Plan Responds to Designated Agency

Accompanying this issue of *Risk Report* is *Endorsement #3* to *Indemnity Plan RE0309*. Please insert this endorsement in the back of your *Indemnity Plan* Booklet. This endorsement amends the *Indemnity Plan* effective January 1, 2012 when BCREA introduces Designated Agency with a pilot project in the Victoria Real Estate Board.

The new Designated Agency model allows transactions to be done "in-house" (ie both sides of a transaction are represented by licensees at the same brokerage) yet at the same time the designated agents for each side of the transaction can provide exclusive agency representation to their respective clients. This is similar to the services that are currently provided when licensees from different brokerages act for the opposing sides in a transaction.

In recognition of the positive move to Designated Agency, the Directors of the Insurance Corporation have decided to amend the *Indemnity Plan* to allow for a separate limit of coverage to each side of an in-house designated agency transaction. This is an expansion of coverage as transactions done in-house under a limited dual agency agreement (even when different licensees deal with the parties on the opposite sides of the transaction) attract only one limit of coverage. Claims arising from a limited dual agency transaction in the future will continue to be treated as a single error, thus subject to one limit of coverage only.

RiskReport

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MISSION STATEMENT

Our mission is to provide cost-effective professional liability insurance for the protection of the real estate industry and thereby the public.