



Insurance broker's liability and the insured's contributory negligence



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The Norwegian Supreme Court ruled in a decision 28 September 2023 in HR-2023-1796-A that an insurance broker's liability for damages due to insufficient advice should not be reduced because of the insured's alleged contributory negligence. Although the decision is based on a specific analysis of the broker's assignment and the parties' conduct, certain lessons can be learned.

A recap of the background

Following a fire at an insured woodworking factory's premises equipment, machines and other items located in the building were damaged. The insured had insurances in place, including an insurance for machines, inventory and chattels. However, the amounts insured were too low to cover all losses and the building insurance did not cover permanently installed machines as the insured had assumed.

The insured had been assisted by an insurance broker in entering the insurance policies. The insured successfully argued that the broker was liable for the losses not coverable under the policies due to negligent advice in relation to scope of cover and clarification as to what the different policies were to cover.

The question before the Supreme Court was whether the broker's liability for the losses not coverable under the policies should be reduced due to the insured's alleged contributory negligence. The Appeal Court had decided that it should be reduced by approximately one third as the insured had not reviewed the insurance conditions. The Supreme Court did not agree and held the broker fully liable.

The Supreme Court's assessment

The question before the Supreme Court was whether there was basis for reduction of the broker's liability for damages pursuant to Section 5-1 of the Compensation Act. More precisely the question was whether the insured could have reduced or eliminated the risk for damage had the insurance conditions been reviewed.

The Supreme Court did not find that the broker's professional liability equals a higher threshold for reduction due to contributory negligence. The Supreme Court noted however that whether the insured can be blamed must be based on an assessment of the expectations that is reasonable to expect from the insured. The expectations will differ depending on whether an insurance broker is engaged or not.

In the assessment of whether there was basis for reduction, both the broker's and the insured's conduct when entering the insurance policies were considered.

It was established following a reference to the Appeal Court's decision that the broker's negligence was based on not fulfilling the core obligations of the broker: to identify the insured's insurance needs and map the risk areas that could fall outside the scope of cover.

It was not disputed that the insured had not reviewed the insurance conditions. Although the broker alleged that it had explicitly requested the insured to read the terms before signing, the Supreme Court did not find this to be the case. Further, the Supreme Court stated that it was challenging for an ordinary insured to find the relevant terms in the insurances. There were around 160 pages in total. It was also pointed out that it is difficult for an ordinary insured to get an overview of how the various covers correspond to each other.

The fact that the insurance conditions may be complicated was pointed out as a reason as to why an insured would be willing to pay for a broker's expertise. It was emphasized that the broker as insurance expert was best placed to prevent errors. Although the insured was a professional party, it was a middle-sized company without expertise within insurance. Further, the broker had through several years cooperation good knowledge about the insured's business.

Lessons learned

Although an insurance broker's negligence for insufficient insurance cover and the insured's contributory negligence to the same will have to be considered case-by-case on the specific merits, the Supreme Court judgement shows that a lot of the burden related to providing sufficient insurance cover lies on the insurance broker as the expert. Hence, we would suggest that:

- Brokers carefully consider capacity before undertaking assignments as it normally requires time and resources to identify and map the insured's insurance needs to ensure sufficient insurance cover.
- All material risks are highlighted with a clear request for the insured to review relevant parts of the conditions, so that the insured is able to consider whether the insurance policy(-ies) can be accepted.

