

A DISCUSSION PAPER FOR: INSURANCE BROKERS

The Independent Brokers' Role and Responsibility
within Changing Demographics and Emergent Risk.

INTRODUCTION

This paper was created for you, the independent Insurance Broker. It identifies a new and significant liability exposure that exists for many of your clients, and the important risk management and communication role you play in managing this risk. It also outlines how this emerging risk is creating a new insurance marketplace and an important and sustainable sales opportunity for you, one that also means a significant *new* E&O risk that you haven't dealt with before.

Changes to the social fabric encouraged by family law legislation, volatility within the financial and real estate markets, and changes in the expectations of everyone about everything as a result of virtually unlimited access to information has opened up a Pandora's Box of liability upon many of your clients that will be involved as Executors in the administration of family estates.

Estimated at some \$1 Trillion in Canada by 2050, this transfer of baby boomer wealth within families represents an emerging risk exposure for your clients that are, or will be, involved in managing this process. Beneficiaries, the recipients of this wealth are also your clients, and they are keenly interested in this topic, too.



ERAssure® is the exclusive Preferred Supplier of Executor Insurance for Canadian Bar Association members.

EXECUTOR RISK: BACKGROUND

In the majority of estates, when someone dies, an executor or estate trustee, depending on your province, is typically responsible to manage the estate and then to distribute the assets to the beneficiaries. The range of duties that can be assumed in managing an estate can be a great deal more challenging than running your own household. It may involve temporarily operating a small business, preparing sophisticated tax returns or managing financial investments that require special knowledge and capability.

Most non-professional executors are not formally trained for the role, nor conversant with the laws that govern their conduct.

Most people that act as executors have no idea that they are actually liable to the beneficiaries for their actions, much less understand that their homeowners' insurance doesn't cover them, either.

EXECUTOR RISK: WHAT IS IT?

A person is either named in a Will or appointed by a court to act as executor, or estate trustee, or administrator for the estate of a deceased person. It is often a family member or close personal friend that the deceased person trusted as someone impartial, fair and reasonable to manage their final wishes. Many people are flattered to be afforded such respect by the other person that they held in high regard.

An executor is legally responsible to locate, preserve and manage the estate assets. They are required to determine the appropriate value, manage the securities and financial instruments, advertise to creditors and pay legitimate debts, and distribute the proceeds of the estate to the beneficiaries as directed by the Will or in the absence of a Will, in accordance with applicable law.

In the past, when estates were modest in value, investments simple and the nuclear family was the norm, Courts were inclined to offset executor fees (the small fee that executors can typically charge the estate for their services) as a means of paying the beneficiaries for executor wrongdoing.

The challenge for your client when acting as an executor is that they are personally liable for the decisions they make, or don't make, and the beneficiaries are keenly interested in their every decision.

Legal actions brought by beneficiaries and even creditors are common and growing; litigation has significant financial implication to both the executor of the estate and the beneficiaries.

Today, however, estates are larger, investments more complex and volatile, family structures are much different considering the frequency of divorce and remarriage, and people are far more litigious than in the past. Most importantly however, the Internet has provided beneficiaries with information - tools to benchmark the performance of executors and create expectations from how much money to expect, to how quickly it will arrive, regardless of the realities of the actual estate being administered.

The executor's liability for estate matters often survives the distribution of the proceeds of the estate to the beneficiaries; just because the estate money is gone, doesn't mean the executor's liability is gone too.

The Courts are far more amenable to awarding legal costs and damages today. Why? **Because the dollar amounts at risk are large, even a minor error in asset administration can produce a significant loss for the estate.** And even after the estate is distributed, liabilities of the estate can follow the executor until statutory limitation periods expire.

WHAT CAN GO WRONG?

Estates typically go off side because the executor and one or more of the beneficiaries are unable to communicate effectively. Expectations are not managed well or perhaps not at all . . . and at the worst possible time - when a loved one has died, emotions are elevated and even worse, money and greed may be involved.

While lawyers are often involved in administration, advice and probate, the bulk of the practical and communication chores are performed by the executor.

Here are some examples of common things that go wrong during estate administration that can result in significant damages and legal expense for the estate and the executor despite best efforts and good legal advice:

- The executor postpones the liquidation of a stock portfolio and sustains a significant reduction in the value of the estate when one of the major investments plunges. The beneficiaries sue the executor for negligence in the estate administration to recover the value of the portfolio prior to the investment crash plus legal expenses.
- The executor fails to properly value household assets which are subsequently sold privately in a garage sale. One of the assets is later discovered to have been a valuable work of Canadian art sold at public auction for \$100,000. The beneficiaries sue the executor for negligence in the estate administration for the net proceeds that would have been achieved at auction plus legal expenses.
- The executor fails to investigate one beneficiary's claim of a debt due to them from the estate. The executor distributes the proceeds of the estate to each of the beneficiaries without provision for the claimed debt. An aggrieved beneficiary sues the executor successfully for the debt and legal expenses, which the executor is now obligated to pay out-of-pocket, after an attempt to recover the incorrect distribution from the other beneficiaries is unsuccessful.
- The executor distributes cash from the estate to the beneficiaries immediately following probate. A claim is then brought under applicable family law provisions by the child of a former female friend of the deceased. The estate has been distributed and the executor is now responsible to defend and settle the action personally.

- The executor sells the estate home privately to avoid paying real estate commissions. The purchaser successfully sues the estate for the cost of correcting serious structural deficiencies that existed, which the executor knew about, but failed to disclose to the purchaser. However, the estate assets had already been distributed to the beneficiaries. The executor is now responsible to the purchasers for the award of damages, since there are no estate assets available to the executor.

These are issues of the executor not the estate and the cost to the executor to defend can be significant, let alone the cost to indemnify if found responsible.

ERAssure[®] EXECUTOR PROTECTION

For the first time there is a product available for your clients to provide protection for them as estate executors and make the risk manageable. ERAssure, from program manager Estate Risk Protection Plan Inc., covers executors for the cost of defense and indemnity for damages awarded against them that arise out of negligence committed during the administration of an estate.

Importantly, by insuring the estate value against common types of executor negligence, ERAssure offers beneficiaries contingent protection for their own inheritance.

ERAssure coverage is underwritten by Economical Insurance, one of Canada's largest and most progressive property casualty insurers and it is available for estates of any size. Policy premiums depend upon a number of factors such as the estimated size and complexity of the estate, type of assets, number and qualification of executors, and the amount of coverage. For a typical estate valued at less than \$1 Million the approximate premium would be under \$2,000 for the three year term suitable for most typical administrations.

“The cost of an ERAssure policy would barely cover the photocopies in a legal defense.”¹

IAN M. HULL,
HULL & HULL LLP

WHY IS THIS IMPORTANT TO YOU?

First, this is a new sales opportunity with a new product line that generates meaningful policy premium in an environment where independent brokers continue to fight the good fight against a seemingly endless number of new competitors hungry for personal lines business. Although the policies are generally non-renewable, they are issued for three-year terms and some may require extension.

If there are legal questions that arise, ERAssure staff are trained and knowledgeable in many aspects of estate law; they are available to make the necessary inquiries with the estate lawyer on your behalf to assist you in effecting coverage without you needing to become an expert in estate law.

Showcase your capabilities as an independent broker in an environment where the direct market call center has neither the product availability, nor risk area knowledge to service this area of personal lines exposure. And be a resource expert for your peers and centers of influence, be they accountants, lawyers, financial planners or other professionals who may be involved in estate work and whose clients need your expertise.

Next, estate lawyers are aware of this form of insurance. ERAssure is the accredited exclusive supplier of this product line to the Canadian Bar Association, and has met with most provincial Bar Associations, and regional Wills and Estates law practice groups over the course of the last year. Lawyers are well aware of executor risk, supportive of the insurance product, and are normally prepared to assist their clients in the completion of any law-related questions that may arise in the course of completing an application.

The estate lawyer also achieves a reduction in their own errors and omissions exposure when an executor client obtains ERAssure protection - the likelihood of the lawyer being sued for bad advice by the executor following an executor negligence lawsuit is substantially reduced when a client has ERAssure coverage. This is particularly important to solo practitioners that practice in many areas of law, but do not specialize in estate law, which is generally accepted by most lawyers as the most difficult practice area and a growth area for E&O claims.

Finally, and perhaps most importantly, this exposure area is being advertised in various consumer publications, including national newspapers, electronic media and through extensive social media channels, as well as with professionals that are involved in estate planning and administration.

SUMMARY

Clearly, this risk exposure applies to virtually all brokerage operations:

Some 240,000 people die each year in Canada; some 300,000 ordinary people are named as Executors or Estate Trustees in Wills or appointed by Courts; perhaps 1,000,000 or more people become beneficiaries of Estates. That's **every year**.

This is big business with a lot more money at stake than any other time in history. Estate litigation has been called "the new legal frontier" and a key practice growth area for lawyers given the aging demographic of our population.

Insurance Brokers should be prepared to respond to questions from consumers and ERAAssure now offers you a means of participating in the solution; lawyers and other professionals are quickly becoming acquainted with the recent availability of insurance-based risk solutions for this otherwise uninsured area of risk for their clientele and will also be engaging with you in the coming months and years.

ERAssure[®] RESOURCES

Webinars:

ERAssure offers a free 1 hour CPD accredited webinar on the issue of estate administration and executor risk and how a new insurance product can help reduce that risk.

We can arrange informational sessions (sponsored by your brokerage) for your clients to highlight Executor risk. Contact us at 1-855-636-3777 for more details.

Materials and Resources:

Visit our resources page at

<http://www.erassure.com/resources-for-insurance-brokers> or call our ERAssure resource team at 1-855-636-3777 for more information on:

- Communicating with your clients
- A step by step Marketing Guide
- Background Papers
- Outreach letters
- A Practical Guide to Inheritance Planning
- Executor Guide
- A comprehensive review on the Emerging Client Risk of Estate Administration Liability for Non-Professional Executors
- Executor Liability Insurance application form
- Policy Wording

END NOTES

1. Hull, Ian M. Hull & Hull LLP.

ESTATE RISK PROFILE

The following are some of the key themes that contribute to estate challenges. Read each group of questions and circle the appropriate answer that best reflects your response to the questions, and total your score.

Family Dynamics	YES	MAYBE	NO
Are there any family dynamics such as a second marriage, blended family, a history of acrimony between family members OR spouses; are any beneficiaries (or their children) experiencing financial duress, is there any health or drug related concerns?	2	1	0
Has there been any unique handling of family members such as unequal cash or property distributions or access to heirlooms; any potential 'black sheep' in the family OR extended family; have any beneficiaries held a disproportionate care-giving role that might now be looking for recognition for their efforts?	2	1	0

Executor Specific

Are there multiple Executors involved; is there any disagreement in how best to involve the use of professionals for legal, tax, accounting, investments and real estate; are any of the Executors or service providers to the estate seen as potentially having personal conflict; was the Executor(s) also a Power of Attorney?	2	1	0
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Investments

Are there any significant financial assets of the estate that might be complex in nature; are there debts of the estate; are there any charitable groups listed as beneficiary?	2	1	0
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Directives of the Will

Is the will handwritten or done by do-it yourself methods; are any instructions within the will unclear; have any family members been left out, or is there disproportionate allotment of any of the estate assets?	2	1	0
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Real Estate

Is there a seasonal property; have any of the beneficiaries or extended family been using estate assets as their primary residence; any foreign or rental properties?	2	1	0
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Non-Real Estate Assets

Is there a family business or other business assets that require management or sale; is there ownership in any private or foreign companies; any family owned assets; any antiques or heirlooms that have significant emotional value?	2	1	0
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TOTAL SCORE:

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A moderate to significant profile score would suggest that Executor Liability Insurance protection would be advisable for the benefit of the estate and executors.

Score: **0** = low risk;
1-3 = moderate risk;
4 or over = significant risk

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