

Duty of disclosure and due care

Trine-Lise Wilhelmsen

Outline

- o Introduction
- o The relationship with ICA
- o Duty of disclosure
- o Alteration of risk
- o Safety regulation
- o Casualties caused by the assured
- o Notification and salvage measures
- o Identification

1. Introduction

- o Subjective (duty) vs objective (scope) rules
- o The conflict of interest
- o Two different kinds of duties
- o The sanctioning system

Scope vs Duties

- o Scope:
 - o Definition of perils insured
 - o Definition of insured event - casualty
- o Duties
 - o Connecting sanctions to acts or omissions
 - o Focus on
 - o Degree of fault/negligence
 - o Burden of proof in regard to causation
 - o Sanctioning system

The conflict of interest



The insurer wants:

Full information to calculate premium

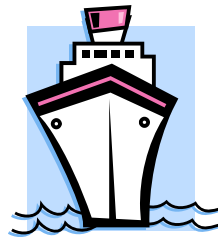
Control of risk

The shipowner wants:

Low premium

Full financial security in case of casualty

Regardless of negligence



Spring14

Marine insurance

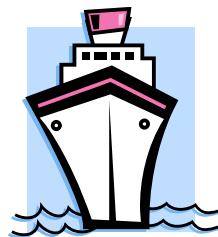
5

Two different kind of duties



During negotiations

Duty of disclosure



During the insurance period

Risk connected:

Alteration of risk

Duty connected:

Safety regulation

Causation of loss

Notification/salvage

Spring14

Marine insurance

6

Sanction Provision	Not binding	No liability	Cancellation
Duty of disclosure	Fraud Negligence/int If not acceptable	Negligence/ Intent if acceptable	Fraud Negligence Good faith
Alteration of risk		Caused/agreed/ Not notified, +/- causation	Caused/agreed Not notified
Safety regulation		If negligence and causation	Not in compliance .. Material rule
Causation of loss	Fraud (no claim)	Gross negligence	Intent (all policies) Gross negligence
Spring14		Marine insurance	7

2 The relationship with ICA

- o NP:
 - o Departs from ICA 1989
 - o Follows previous NMIP/ICA 1930
 - o But:
 - o Warranty approach (classification)
 - o Concept of unseaworthiness deleted (2007)

3. Duty of disclosure

- o The extent of the duty of disclosure
- o The time of the duty of disclosure
- o Who has the duty of disclosure
- o The sanctioning system

3.1 The extent of the duty of disclosure

- o NP Cl. 3-1: All relevant information
 - o = Active duty of disclosure
 - o # Passive duty of disclosure
 - o The difference
 - o The concept of relevant information

3.2 The time of the duty of disclosure

- o NP Cl. 3-1
- o Concerns
 - o Time of the factual circumstances
 - o Time of good faith
- o Factual circumstances: When the contract is entered into
- o Good faith: Duty to make corrections

Spring14

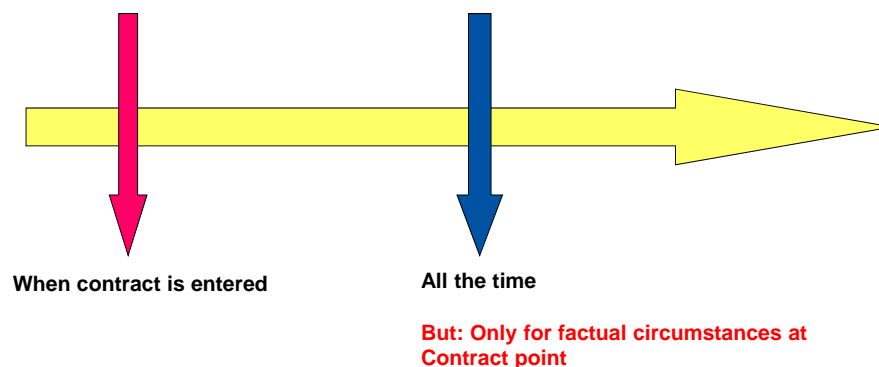
Marine insurance

11

Time of the duty of disclosure

Factual circumstances

Good faith



Spring14

Marine insurance

12

3.3 Who has a duty of disclosure

- o Starting point:
 - o The person effecting the insurance, NP Cl. 3-1,1
 - o No general duty for the assured
- o NP Cl. 8-2: Special rule for the assured
- o Identification with agents/ brokers

3.4 The sanctioning system

- o Complicated system:
 - o Different sanctions:
 - o Contract not binding
 - o No liability for damage
 - o Cancellation
 - o Depending on the degree of fault:
 - o Fraud
 - o Negligence
 - o Innocent breach

3.4 The sanctioning system

- o Fraud; NP Cl 3-2.
 - o The contract is not binding
 - o Right to cancel all other contracts
- o Negligent or intentional breaches, § 3-3:
 - o Ins. would not have been accepted - not binding
 - o Otherwise:
 - o No liability if causation
 - o cancellation
- o Innocent breach, Cl 3-4
 - o Cancellation

3.4 Conditions to invoke sanctions

- o NP Cl. 3-5
 - o No knowledge
 - o Decisive risk factor
- o NP Cl. 3-6
 - o Notification

Duty of disclosure, question

When shipowner A effected hull insurance with AS Insurance he told the insurer that the ship Unlucky was registered in NIS, but not that Unlucky sailed with Cypriotic crew.

The insurer did not accept Cypriotic crew
Is this a breach of the duty of disclosure?

If yes: what would the sanction be?

Duty of disclosure, question

Unlucky was on bare boat charter and the owner A - who effected the insurance - did not know about the nationality of the crew.

Would this be a breach of the duty of disclosure?

If yes: what sanction

What if the charterer was co-insured?

4 Alteration of risk

- o Characteristic features
 - o Extension of duty of disclosure
 - o Correspond to "bristende forutsetninger"
- o Two sets of rules
 - o General regulation
 - o Special regulation

4.1 NP: general regulation

- o NP Cl. 3-8 to 3-13
- o The concept of alteration of risk, NP Cl. 3-8, 1
- o Shall be deemed as alteration of risk, NP Cl. 3-8, 2 - Change of
 - o State of registration
 - o Technical/maritime operator
 - o Classification society

4.1 NP: general regulation

- o Alteration of risk caused/agreed to by the assured:
 - o No liability, Cl. 3-9
 - o Cancellation, Cl. 3-10
- o Alteration of risk not caused/agreed to by the assured;
 - o Notification, Cl. 3-11
 - o If not, Cl. 3-9 applies
 - o + Cancellation, Cl. 3-11

Alteration of risk, question

A vessel was insured registered in NIS but with Norwegian captain and first mate. This was informed to the insurer. During the insurance period the assured changed to Cypriotic captain and first mate.

Is this an alteration of risk?

If yes; what is the sanction?

4.3 NP: The special regulation

- o Classification
- o Change of ownership
- o Illegal activities
- o Trading limits

4.3.1 Classification, NP Cl. 3-14

- o Expressed as a warranty:
- o The ship shall be classified when the insurance commences
- o Loss of class = the insurance terminates regardless of
 - o causation
 - o fault
- o Similar regulation in many other countries

Question

- o The ship Classy was insured with AS No Way and classed in DNV. The owner requested the class to be cancelled in order to transfer the class til Lloyds. Now Way was not notified. After cancellation, but before the new classification was final, Classy sustained a casualty.
- o Is No Way liable for the casualty?
- o The assured claimed that No Way knew of the transfer. Is this relevant?

Spring14

Marine insurance

25

4.3.2 Change of ownership

- o NP Cl. 3-21
- o The insurance terminates immediately
- o Reason: the importance of ownership
- o Change of ownership ≠ change of shareholder structure

Spring14

Marine insurance

26

4.3.3 Illegal activities

- o Starting point: No liability for losses caused by illegal activities unless the assured in good faith, NP Cl. 3-16 , 1
- o If the ship is used primarily for illegal activities, the insurance terminates, Cl. 3-16, 3.

Question

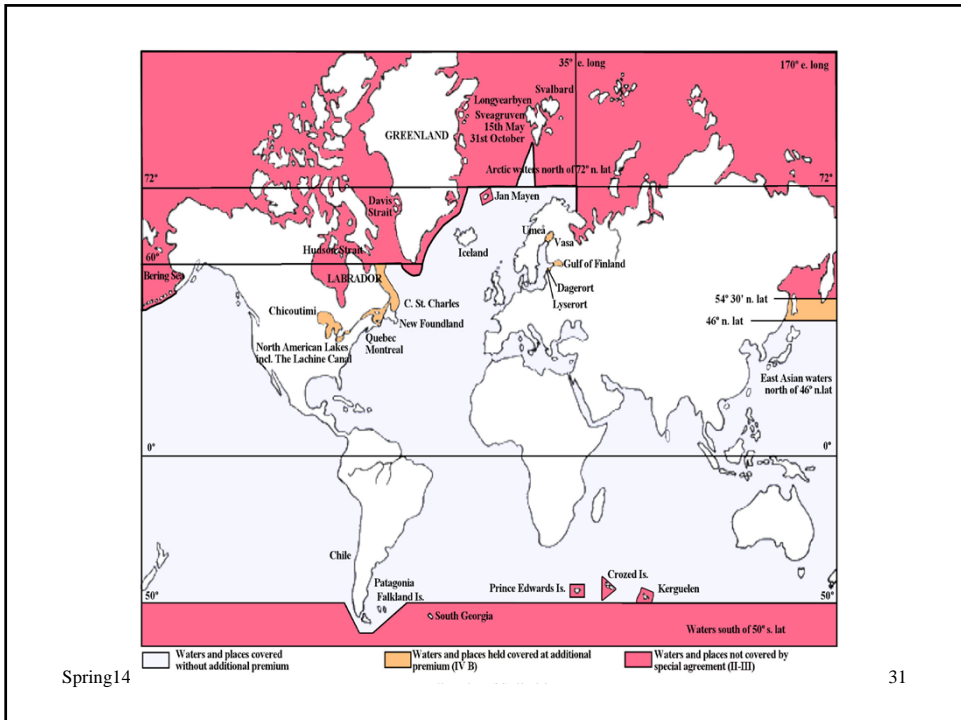
- o The crew onboard the ship New Venture smuggled opium from Malaysia to Norway without the assured's knowledge. During the voyage, New Venture grounded due to heavy weather.
- o Is the insurer liable for the damage?
- o Would it matter if the smuggling had taken place for a period of 1 year before the casualty?

4.3.4 Trading limits

- o NP Cl. 3-15;
 - o Ordinary areas,
 - o conditional areas and
 - o excluded areas
- o The areas defined in enclosure to the Plan

4.3.4 Trading limits, Cl. 13-15

- o Ordinary trading areas, (1)
- o Conditional areas, (2);
 - o sailing subject to additional premium.
 - o Sanction extra deductible
- o Excluded areas (3);
 - o Insurance ceases to be in effect
 - o until the ship leaves the excluded area



Sanction / Rule	No liability	Termination	Suspension	Extra Premium	Cancel
Classification		No class Loss of class			
Trading Limits			Excluded Trading Area	Cond Trading Area	
Illegal Activities	Causation Negligence	Primarily Illegal Purposes			Assured Fail to intervene
Change of Owner		By sale or Any manner			

Spring14

Marine insurance

32

Safety regulations



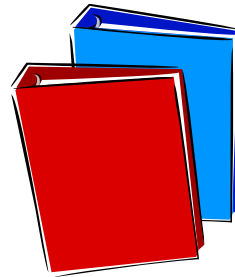
Spring14

Marine insurance

33

5. Safety regulation

- o Overview
- o The concept: What and by who
- o Sanctions
- o Ships laid up



Spring14

Marine insurance

34

5.1 Overview

- o Scandinavian invention
- o Not used in other systems
- o Anglo American parallel: warranties
- o Powerful weapon for insurer
- o The traditional system: seaworthiness and safety regulations as parallel rules

5.2 The concept, Cl. 3-22

- o What: Measures for the prevention of loss
- o May be issued by
 - o public authorities,
 - o the insurer
 - o the classification society.
- o Includes
 - o periodic surveys
 - o Ice class regulation prescribed by the class

5.2 Sanction, Cl. 3-25

- o Sanction 1; No liability Cl. 3-25
 - o Negligence, Cl. 3-25 (1)
 - o Causation, Cl. 3-25 (1)
 - o Burden of proof shifted, Cl. 3-25 (3)
 - o Breach of special safety regulation results in extended identification, Cl. 3-25 (2)

5.3 Sanction, Cl. 3-27

- o Sanction 2; Cancellation, Cl. 3-27
- o 14 days notice
 - o (a): Not in compliance with a technical or operational safety regulation
 - o (b) safety regulation of material significance

Safety regulation, question 1

A vessel was captured by pirates 200 nautical miles outside the coast of Somalia. IMO has established guiding lines advising that all vessel sails more than 400 nautical miles off the coast of Somalia.

Is this a breach of a safety regulation?

If yes, what is the sanction?

Spring14

Marine insurance

39

Safety regulation, question 2

A vessel grounded whilst sailing in shallow waters. It was established that the ISM certificate had been withdrawn because of failures in the safety management system for the ship.

Is this a breach of a safety regulation?

If yes, what is the sanction?

Spring14

Marine insurance

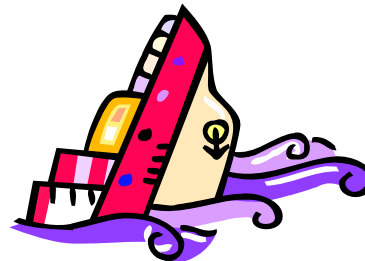
40

5.3 NP: Ships laid up

- o NP Cl. 3-26: Laid up plan required
- o The rules on breach of safety regulation applies if:
 - o No lay up plan drawn up
 - o laid up plan not followed

6 Casualties caused by the assured

- o The concept: the casualty is caused by an act or omission by the assured
- o Distinction between degree of fault:
 - o Intent
 - o Gross negligence
 - o Ordinary negligence



6.1 Intent, Cl. 3-32 and 3-34

- o The concept of "intent"
- o Sanction 1: No claim, Cl. 3-32
- o Sanction 2:
 - o Termination of this contract without notice, Cl. 3-34, 1.
 - o Termination of other contracts by giving 14 days notice, Cl. 3-34, 2

6.2 Negligence

- o Gross negligence:
 - o Sanction 1; Cl. 3-33: 0-100 % liability according to
 - o the degree of fault and
 - o other circumstances,
 - o Sanction 2; Cl. 3-34, 1, 2:
 - o Termination,
 - o 14 days notice
- o Ordinary negligence: No sanction

Casualties caused, question

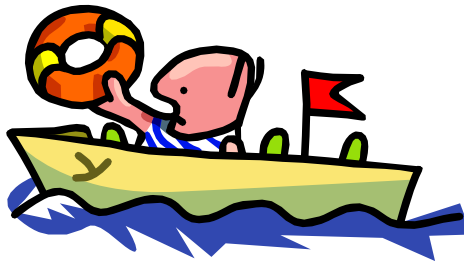
A vessel was captured by pirates. The master had failed to follow Best Management Practises in regard to lookout before the attack and therefore was not able to take preventive measures or call for help.

Is this gross negligence?

If so - what is the sanction?

7 Notification and salvage measures

- o Duty to notify
- o Duty to salvage
- o Sanction



7.1 Duty to notify Cl. 3-29

- o if loss has occurred or threatens to occur
- o without undue delay/promptly
- o keep informed
- o + notify of maritime inquiry/surveys

Spring14

Marine insurance

47

7.2 Duty to salvage, Cl. 3-31

- o Reasonable measures to avert/minimize a loss
- o Follow insurer's instructions



Spring14

Marine insurance

48

7.3 The sanction, Cl. 3-31

- o No liability
 - o if fault (intent or gross negligence) and
 - o only for losses that would otherwise not have been incurred



Spring14

Marine insurance

49

8 Identification, Overview

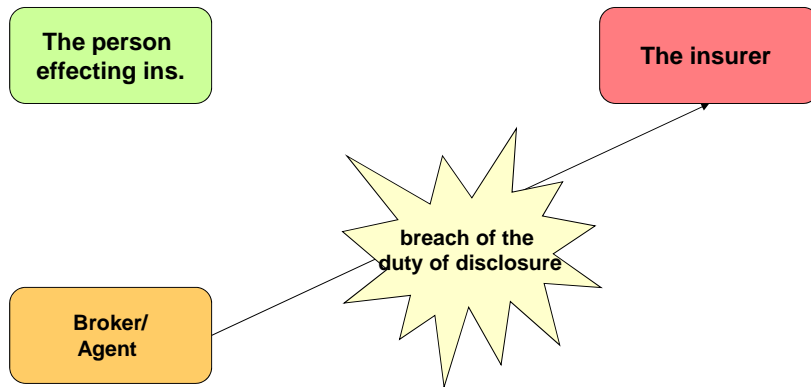
- o The need for rules
- o The problems:
 - o the person effecting insurance and his helpers
 - o the assured and his helpers
 - o the assured and the person effecting the insurance
 - o the assured and co-insured/co-owners
issue of identification

Spring14

Marine insurance

50

Identification between person effecting the insurance and his helpers

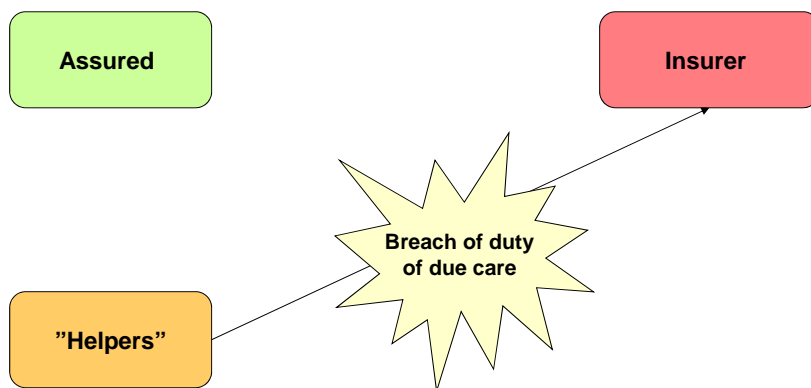


Spring14

Marine insurance

51

IDENTIFICATION BETWEEN THE ASSURED AND HIS HELPERS

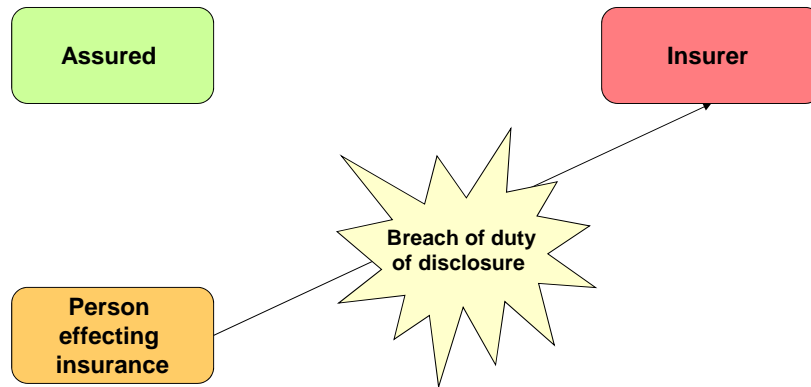


Spring14

Marine insurance

52

Identification between the assured and the person effecting the insurance

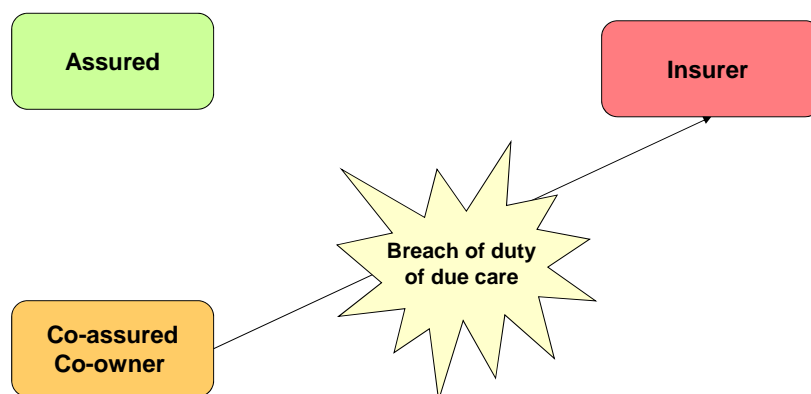


Spring14

Marine insurance

53

Identification between assured and co assured/co owner



Spring14

Marine insurance

54

8.1 Person effecting the insurance and his helpers

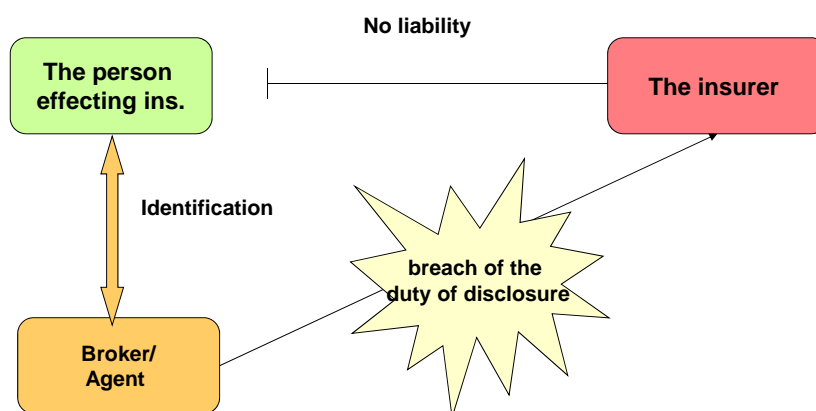
- o Full identification
- o No express provision in the conditions.
- o Follows from ordinary contract law

Spring14

Marine insurance

55

Identification between person effecting the insurance and his helpers



Spring14

Marine insurance

56

8.2 The assured and his helpers

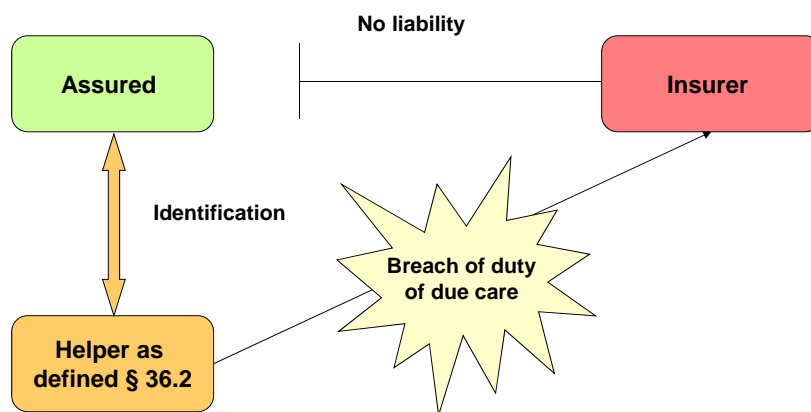
- o Starting point, Cl. 3-36, 2: Identification if helper is
 - o An individual/organization
 - o With authority delegated from the assured
 - o Concerning functions of material significance for the insurance
 - o And made a mistake under the performance of these functions
- o If the master/crew should be in the mentioned position, the same holds for these

Spring14

Marine insurance

57

BETWEEN THE ASSURED AND HIS HELPERS



Spring14

Marine insurance

58

8.2 Between the assured and his helpers

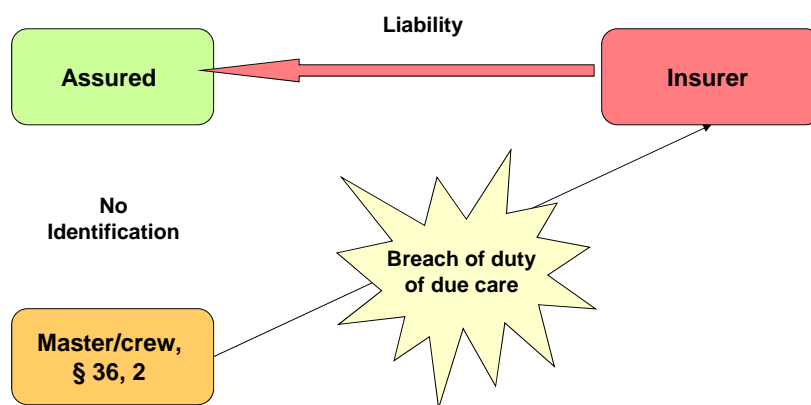
- o No identification in other circumstances
- o Includes master/crew in connection with their service as seamen, Cl. 3-36, 1
- o However: Specific provisions, i.e. in Cl. 3-25,2

Spring14

Marine insurance

59

THE ASSURED AND HIS HELPERS



Spring14

Marine insurance

60

8.3 The assured and the person effecting

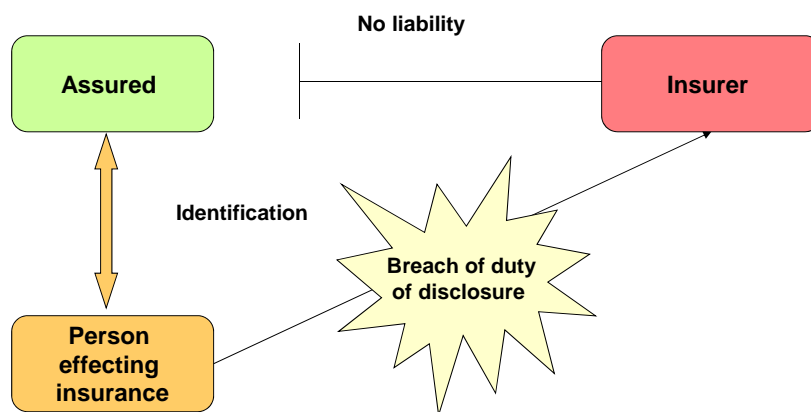
- o Cl. 3-38: Full identification
- o Holds also if the person effecting the insurance uses a helper;
- o i.e. Identification in two steps

Spring14

Marine insurance

61

the assured and the person effecting insurance

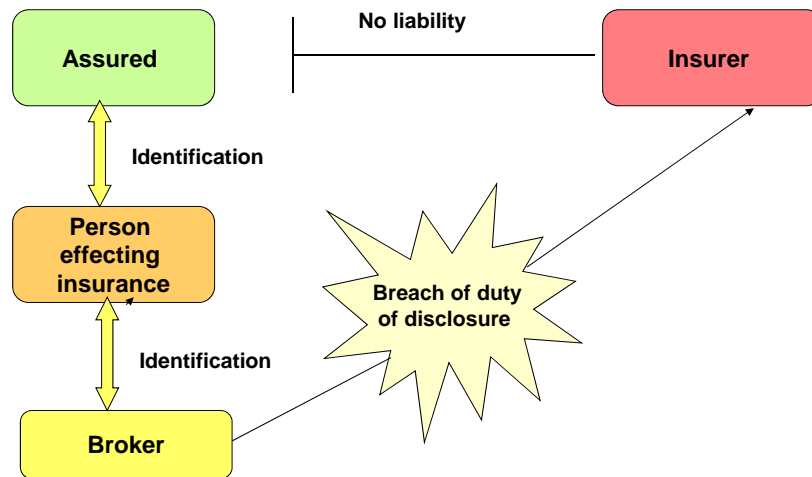


Spring14

Marine insurance

62

Assured/person effecting/ the broker



Spring14

Marine insurance

63

8.4 Assured + co-insured/co-owner

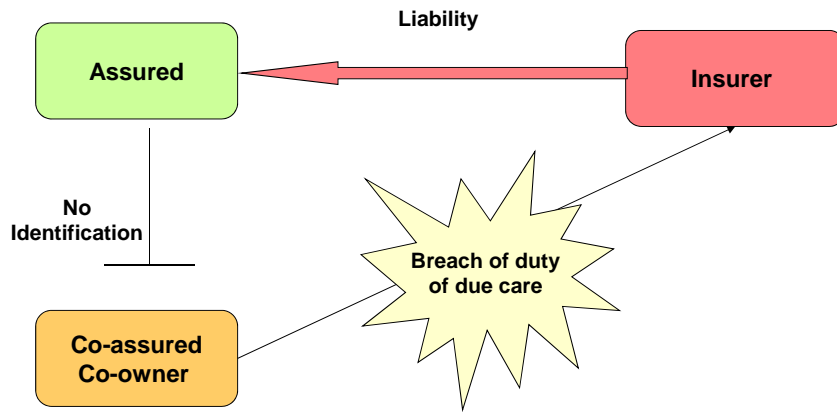
- o Cl. 3-37:
 - o Starting point: No identification
 - o Exception if the co-insured/co-owner has overall decision authority for the operation of the ship

Spring14

Marine insurance

64

Assured and co assured/co owner

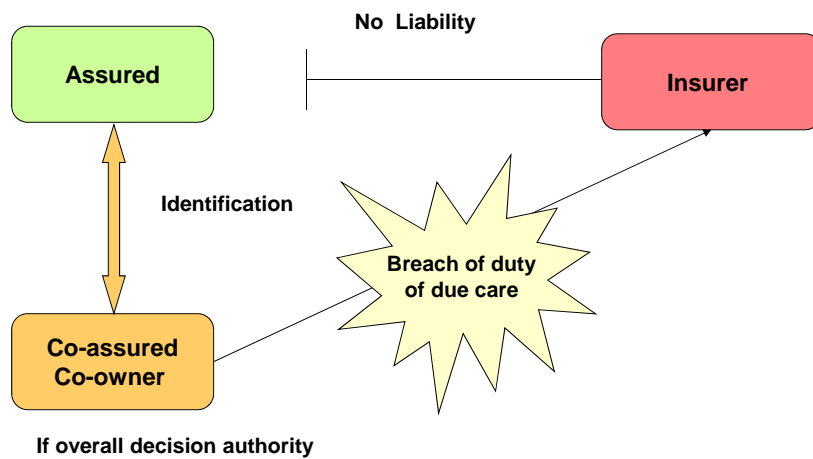


Spring14

Marine insurance

65

Assured and co assured/co owner



Spring14

Marine insurance

66

Thank you for your attention!



Spring14

Marine insurance

67