

Policy Bulletin 7

Agency Relationships

This bulletin outlines the approach of the Financial Co-operative Dispute Resolution Scheme (FCDRS) to a dispute involving the determination of whether a broker is acting as the agent of a financial services provider (FSP).

This office has refined its approach to this issue in response to the trend in the financial services industry to delegate greater responsibility to mortgage brokers for tasks that were previously performed in-house.

Problems arise where a broker has engaged in deceptive or misleading conduct and the consumer is unable to recover any losses from the broker. As a result, the central issue becomes whether the broker was acting within its authority as an agent of the FSP.

FSPs will be liable for acts or omissions of their agents. An agency relationship can be established where the agent was given actual authority, or apparent or ostensible authority (i.e although not expressly stated it might be implied from what has been said or written)

Actual Authority

Actual authority will be established if the FSP and broker have reached a mutual agreement by express or implied words that the broker shall act as an agent. Actual authority may be express (written or oral) or implied from the terms of the agreement and arrangements between the parties.

The FCDRS will look to the construction of the whole agreement to determine if an agency agreement exists. Express words such as *the broker will not be an agent of the FSP for any purpose* are important but are considered in the light of any conflicting provisions that clearly indicate an agency relationship between the parties. Generally the greater the delegation of authority, the less weight such express provisions will carry.

Relevant factors in determining liability on the basis of an agent's actual authority

This office will identify the express authority given to the broker for the loan approval process eg was the broker responsible for attracting clients, completing the application forms with or for the consumer, and gaining approval for the loan?

An agency relationship is indicated if the broker was required to follow the FSP directions and internal procedures. Relevant factors can include:

- broker was permitted use of the company's logo in correspondence
- broker was given access to the internal systems of the FSP to determine the progress of the application
- broker was required to follow certain procedures in distributing documents produced by the FSP
- broker was required to follow the company's internal procedures such as codes of conduct. It will be more persuasive if brokers have been trained in the FSP's practices and this is part of their performance review.

This office will also consider the degree of contact between the FSP and the client. An agency relationship is indicated if the FSP directed all the client's enquiries through the broker and/or refused to answer the client's questions about loan products and services when it was clearly able to provide answers.

Indemnity clauses and commission provisions will also be considered. However, they will not be enough to establish liability alone and will need to be supported by other factors.

Apparent or Ostensible Authority

Apparent or ostensible authority will be established where the FSP has indicated to the consumer through either words or conduct that the broker is an agent. This can be established even where the agent has limited or nil authority.

Such authority acts to prevent the FSP from acting inconsistently with the representation. Therefore the FSP cannot assert the broker is not an agent and refuse to bear liability.

Ostensible authority can be established in two circumstances. Firstly, where the FSP has held out to consumers the broker has authority to act on its behalf. Secondly, where the FSP is aware (i.e. has knowledge) the broker is holding itself out to have unlimited authority and does not act on it. In both circumstances it must be proven the consumer acted in reliance on the authority.

Apparent or ostensible authority will not need to be considered if actual authority has been established. Liability will be determined on the facts of the dispute on a case by case basis.

Relevant factors determining apparent or ostensible authority

This office will examine the following factors in determining whether the FSP held the broker out as its agent:

- whether the FSP clearly distinguished to clients the limits of the broker's authority. This element is more conclusive where the broker is given power over stages of the sale and approval of loans or other processes traditionally associated with an FSP
- how closely the FSP associated itself with the broker eg whether it permitted the broker to use a title commonly associated with an agent; whether it allowed the broker to use the company's logo on documents; and whether it authorised the broker to use the FSP's internal systems in the presence of the client to determine the loan's progress
- whether the FSP directed all contact to the broker and refused to answer questions it had the capacity to answer and
- payment of commission (although this will indicate an agency relationship, it must be combined with other factors).

An acknowledgement signed by the consumer stating that the broker is not an agent of the FSP will not preclude a finding of an agency relationship. It will be considered in light of the representations made to the consumer and agreements made between the FSP and broker.

An FSP will automatically be bound by any contract it later endorses even where the broker did not have authority to enter into the contract.

If the FSP became aware the broker was misrepresenting its scope of power, this office will examine the steps it took to correctly inform clients of the extent of the broker's power.

FSPs can prove there was no authority if they establish the consumer was aware the broker had limited or nil authority or there was no representation made by either the broker or FSP

If you require further information regarding details of this policy bulletin please call the Case Manager on 1300 139 220.