

All-Party Parliamentary Group on Insurance and Financial Services

Wednesday 1 December 2010

Consumer Insurance Law Reform

Joint Position Statement

	Age UK has a vision of a world in which older people flourish. We aim to improve later life for everyone through our information and advice, campaigns, products, training and research Contact: Jane Vass – 020 8765 7263, Jane.Vass@ageuk.org.uk
	British Heart Foundation is the nation's leading heart charity. We are fighting against heart and circulatory disease – the UK's biggest killer – and striving to create a world where people do not die prematurely from heart disease. Contact: Katie Chruszcz - 020 7554 0157, chruszczk@bhf.org.uk
	Consumer Focus is the independent champion for consumers in the UK. Consumer Focus gives a strong voice for consumers on the issues that matter to them and works to secure a fair deal on their behalf. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do. Contact: Lola Bello – 020 7799 7984, Lola.Bello@consumerfocus.org.uk
	Macmillan Cancer Support improves the lives of people affected by cancer. We provide practical, medical and financial support and push for better cancer care. Cancer affects us all. We can all help. We are Macmillan. Contact: Mike Hobday - 020 7840 4648, MHobday@macmillan.org.uk
	The MS Society is the UK's largest charity for people living with MS, with approximately 40,000 members and 350 local branches. Our mission is to enable everyone affected by MS to live life to their full potential and secure the care and support they need, until we ultimately find a cure. Contact: Isabel Arthur, 020 8438 0998, iarthur@mssociety.org.uk
	The Trading Standards Institute is a professional membership association formed in 1881. It exists to promote and protect the success of a modern vibrant economy, and to safeguard the health, safety and wellbeing of citizens by enhancing the professionalism of members in support of empowering consumers, encouraging honest business and targeting rogue traders. Contact: Jessica Tangye - 0845 608 9434, jessicat@tsi.org.uk
	Peter Tyldesley is Senior Lecturer in Insurance Law at the University of Bedfordshire. He is a solicitor and has previously been employed by several major insurance companies, as a consultant to the Insurance Ombudsman and as a lawyer at the Law Commission. Contact: Peter Tyldesley - 07973 210210, peter.tyldesley@beds.ac.uk
	Which? is an independent, not-for-profit consumer organisation with over 700,000 members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, online services and books. Contact: Lucy Widenka - 020 7770 7545, Lucy.Widenka@which.co.uk
	UNLOCK, the National Association of Reformed Offenders, is an independent charity led by reformed offenders. We run campaigns, develop projects and provide information and advice to overcome the social exclusion and discrimination which prevents reformed offenders from re-integrating into society. Contact: Chris Stacey - 01634 247350, chris.stacey@unlock.org.uk

Case study 1 - Macmillan Cancer Support recently supported an ovarian cancer patient whose claim under a critical illness policy was rejected for what the insurer alleged was deliberate non-disclosure. After investigation, the Ombudsman found against the insurer, instructing it to pay out £46,000. Payment was eventually received, but not until more than 13 months after the claim was made, compounding the patient's financial problems and adding stress to what was already a very difficult time

Case study 2 - Valerie Cuthbertson made a claim under her critical illness policy when she was diagnosed with multiple sclerosis. The insurer asked for sight of her medical records, promising that they would be given "careful and sympathetic consideration". In court the claims officer admitted that she already had all the information required to establish that Mrs Cuthbertson had multiple sclerosis and that the only purpose of looking at the records was to see if there was some entry which might give the insurer grounds for avoiding or invalidating the policy. (*Cuthbertson v. Friends Provident* 2006 SLT 567)

Case study 3 - Mr F made a claim under his critical illness policy after suffering a heart attack. The insurer avoided the policy and rejected the claim, as when applying for insurance Mr F had failed to disclose unconnected problems with his back and neck. (Financial Ombudsman Service case 61/01)

Case study 4 - UNLOCK recently assisted Michelle Barber, whose house was destroyed in an arson attack by her estranged husband. After reinstating the property at considerable cost, the insurer discovered that Mrs Barber had failed to disclose a fine of £100 relating to the overpayment of benefits. The insurer avoided her policy and demanded repayment of £240,000. This is far in excess of the maximum binding award that can be made by the Ombudsman.

Case study 5 - After his wife was diagnosed with leukaemia Mr C made a claim under the critical illness policy which they jointly held. The insurer avoided the policy and rejected the claim, as Mr C had failed to disclose on the application form that his wife had suffered unrelated ear infections causing some hearing loss. (Financial Ombudsman Service case 27/5)

Case study 6 - Mr M made a claim under his household policy following a burglary. The insurer avoided the policy as Mr M had wrongly described the locks on his door as meeting its requirements. There was no connection between the type of locks and the claim that had occurred. And Mr M's error was understandable as the locks had been fitted by the insurer's own contractors following an earlier loss. (Financial Ombudsman Service case 48/5)

Case study 7 - From the Cornhill Direct Home Insurance online application:

*The information that you provide and the declarations that you make when obtaining a quote **are the basis of the contract** of insurance between you and Allianz Insurance plc.*

1. Summary

- 1.1. We agree that consumer insurance law is in urgent need of reform and urge the early implementation of the Consumer Insurance (Disclosure and Representations) Bill. The current law is archaic and was not developed with consumers in mind. It gives insurers disproportionate remedies for what may be entirely honest and reasonable mistakes made by a consumer.
- 1.2. We are concerned that the current law has the potential to affect adversely the purchaser of any type of consumer insurance — motor, household, life, income protection and so on. The impact on those who are suffering from serious illness may be particularly serious. No-one developing a life-changing condition should be told that although they prudently provided for just such a situation their insurance has been rendered valueless on a legal technicality.
- 1.3. We note that the Law Commissions' proposals will essentially bring the law into line with the existing guidance and practice of the Financial Ombudsman Service ("FOS"). These are tried and tested solutions which are widely recognised as fair – reform will not be a leap in the dark.
- 1.4. We welcome the fact that many insurers refrain from relying on their strict legal rights. Instead they already follow guidance from the FOS. This is commendable. However, insurance is intended to give consumers peace of mind through the effective transfer of risk. It cannot do so whilst fair treatment remains at the discretion of insurers.
- 1.5. We are encouraged by the support given to reform by industry organisations such as the Chartered Insurance Institute, the British Insurance Brokers Association and the British Insurance Law Association.¹ Implementation of the bill will benefit consumers by giving them clear, fair and legally-enforceable rights and benefit the insurance industry by increasing confidence in the products it offers.

2. Non-disclosure

- 2.1. When applying for insurance a consumer is obliged to disclose all material facts. The scope of this duty is very wide. A material fact is one which would have an effect, not necessarily decisive, on the mind of a prudent insurer in assessing the risk or fixing the premium. If an insurer is induced to issue a policy by the non-disclosure of a material fact it may on becoming aware of the true position avoid the contract – that is cancel it from outset. Any claim may then be rejected.
- 2.2. The law is open to five main criticisms:
 - a) There is no requirement in law for the insurer to ask questions, even about matters which are commonly material.
 - b) The duty requires a consumer to look into the mind of a prudent insurer – few will have the expertise to be able to do so accurately.

¹ See for example "Insurance law from Georgian times needs update," letter from Laurence Baxter, CII, and others, Financial Times, 2/3 October 2010

- c) It does not matter whether the non-disclosure is fraudulent, negligent or entirely innocent, the remedy of avoidance is still available.
- d) There is no requirement of a causal link between the non-disclosure and any loss that has occurred.
- e) When an insurer receives a large claim it has a strong financial incentive to look for a non-disclosure, since if it is successful in doing so it may avoid liability for the loss. This leads to what one former Ombudsman termed “underwriting at the claims stage”. The minority of insurers who behave in this way wreak injustice on individual consumers and damage the reputation of the industry as a whole.

2.3. The FOS deals with consumer cases as if no duty of disclosure exists.

The Consumer Insurance (Disclosure and Representations) Bill follows this approach by abolishing the duty of disclosure for consumers.

3. Misrepresentation

- 3.1. Similarly when applying for insurance a consumer must not misrepresent any material fact. If an insurer is induced to issue a policy by the misrepresentation of a material fact it may on becoming aware of the true position avoid the contract – that is cancel it from outset. Any claim may then be rejected. The law is open to the criticisms listed above.

3.2. The FOS tailors the remedy for misrepresentation according to whether the consumer acts or omissions were deliberate or reckless, inadvertent or innocent.

The Consumer Insurance (Disclosure and Representations) Bill follows this approach, though there will be a change in terminology. A deliberate or reckless misrepresentation will entitle the insurer to avoid the policy as at present. For careless misrepresentation, an insurer will be entitled to act as it would have done had it known the true position. For example, if it would have declined cover, it may set the policy aside. If it would have imposed an exclusion, it may treat any claim as if the policy contained such a term. For misrepresentation that was reasonable there will be no remedy – the policy will remain in force and any valid claim will be met.

4. Basis of the contract clauses

- 4.1. Some insurance application forms state that the answers given will form “the basis of the contract”. This opaque wording converts the answers into warranties. Any inaccuracy is a breach of warranty which terminates all cover under the policy immediately and automatically, regardless of whether or not the issue in question is material or not. The result is that unknown at the time to consumer or insurer, cover may simply never commence.
- 4.2. In 1986 the Association of British Insurers (“ABI”) was anxious to deter the then Government from implementing the Law Commission’s 1980 proposals for insurance law reform. As part of the deal to avoid implementation, the ABI agreed that basis of the contract clauses should not be used in consumer insurances. This agreement was reflected in an amendment to the Statement of General Insurance Practice (“SGIP”), a voluntary code.

- 4.3. However, there was no robust system for monitoring compliance with SGIP and the clauses continued to be used. SGIP was later withdrawn with the introduction of statutory conduct of business rules for protection insurance in 2005. A Google search reveals many examples of such clauses currently being used
- 4.4. **The FOS has indicated that it disregards such clauses in consumer cases.**
The Consumer Insurance (Disclosure and Representations) Bill renders basis of the contract clauses of no effect.

Unfair insurance deals

SIR – We urge that the Queen’s Speech should confirm the intention of her Government to reform consumer insurance law.

A joint report on the topic will be published by the English and Scottish Law Commissions this year. Reform is overdue and has been advocated by previous official reports and leading judges.

Insurance law is derived largely from commercial cases and can produce injustice when applied to consumer contracts. Reports published by the Financial Ombudsman Service provide disturbing examples.

The better insurers do not rely on their strict legal rights, but follow guidance from the Ombudsman on what is fair and reasonable. The Law Commissions are in essence expected to recommend that this best practice should be given legal force.

This is a straightforward piece of law reform. The Law Commissions have been working towards their proposals for three years, have consulted widely and issued some impressive interim papers. A short draft Bill will be included in their report.

We hope the proposals will attract all-party support and rapidly pass into law.

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Insurance law from Georgian times needs update

Published: October 2 2010 10:37 | Last updated: October 2 2010 10:37

From Mr Laurence Baxter and others.

Sir, Insurance law needs change. Its current inadequacies are well illustrated by your report ("[Consumer groups urge insurers to back law reform](#)", FT Money, September 25) of the woman denied a critical illness payout for leukaemia following a failure to declare unrelated ear infections.

The same harsh rules apply to all other types of consumer insurance, including motor and household. We therefore urge the government to implement the Law Commissions' proposals for reform.

The present law was developed to govern face-to-face commercial insurance deals in the coffee houses of Georgian London.

It requires consumers to volunteer any facts an insurer would regard as relevant – an unreasonable obligation in a modern mass-market internet world.

If a consumer fails to make full disclosure the insurer may later be entitled to cancel the policy from outset and reject any claim – even if the consumer acted honestly and reasonably and there is no connection between the fact concerned and the loss.

Commendably many insurers do not rely on their legal rights. Instead they follow best practice set out in ombudsman's guidance.

We believe the law should be brought into line with best practice, giving consumers the certainty of legally enforceable rights, and benefiting insurers by increasing confidence in their products and professionalism.

Laurence Baxter, Head of Policy and Research, Chartered Insurance Institute

Lola Bello, Senior Policy Advocate, Consumer Focus

Professor John Birds, University of Manchester

Beatrice Brooke, Policy Manager, British Heart Foundation

Peter Hinchliffe, Former Lead Ombudsman for Insurance

Mike Hobday, Head of Campaigns, Policy and Public Affairs, Macmillan Cancer Support

Martin Lewis, MoneySavingExpert.com

Professor Robert Merkin, Deputy President, British Insurance Law Association

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Christopher Stacey, Unlock, the National Association of Reformed Offenders

Peter J. Staddon, Head of Technical Services, British Insurance Brokers' Association

Peter J Tyldesley, Senior Lecturer, University of Bedfordshire

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Letters to the Editor



Update archaic insurance law

Sir, Students of insurance law must sometimes wonder whether they have strayed into a history lecture. *Carter v Boehm* 1766, the Life Assurance Act 1774 and the Marine Insurance Act 1788 — which applies only to non-marine insurance — are but elements of a delightful hotchpotch of archaic law. Regrettably much of this law has the potential to inflict serious injustice, particularly where consumers are concerned (“Laura Whateley, Troubleshooter, Oct 2”).

When purchasing insurance, for example, consumers are obliged to volunteer all facts that a prudent insurer would regard as material. Failure to do so may later entitle the insurer to cancel the policy and reject any claim. Requiring a prospective policyholder to look into the mind of an insurer made sense at a time when merchants were coming together to share risk, contracting on equal terms in Edward Lloyd’s coffee house. It is absurd to apply the same rule to modern mass-market consumer policies, often purchased over the internet without the benefit of advice and with no knowledge of insurance law or practice.

The better insurers do not rely on their strict legal rights. Instead they follow guidance from the Financial Ombudsman Service, which tellingly declines to enforce the duty of disclosure. A glance through cases reported by the Ombudsman, however, confirms that some insurers continue to rely on bad law.

Unsurprisingly consumers will lose confidence in insurance if equitable treatment is seen to be at the discretion of the insurer. The solution is law reform, giving consumers fair rights and protecting the reputation of insurers. A consumer insurance law reform bill was published by the Law Commission in 2009. It should be implemented without delay, even if the lives of students and lecturers become a little duller.

PETER J. TYLDESLEY
Senior Lecturer in Insurance Law
University of Bedfordshire

Letters to the Editor

Unfair insurers

Sir, Consumer insurance law is out of date, unclear and unfair (letter, Oct 5). It allows insurers to reject claims for spurious reasons. Consumers have no legal guarantee against the possibility of an insurance company rejecting a claim for non-disclosure, even when the undisclosed matter has no bearing whatsoever on the claim. This uncertainty prevents many people from taking out the protection they need, and can also leave individuals unexpectedly being refused an insurance payout at a time when they are most vulnerable.

The law should be brought into line with best practice as soon as possible, to give vulnerable consumers the protection they need.

PETER VICARY-SMITH
Chief Executive, Which?

Letters to the Editor



Health insurance in need of reform

Sir, Macmillan Cancer Support has experience of the best and worst of insurance practice (letters, Oct 5 and 7). There is no doubt that insurance is an invaluable product which can allay financial concerns for patients and their families after a diagnosis of cancer. Most insurers act professionally and abide both by guidance from the Ombudsman and by a voluntary code published by the Association of British Insurers. However, in a minority of cases, the unwarranted rejection of a claim inflicts further stress at what is already a difficult time.

Macmillan recently supported an ovarian cancer patient whose claim under a critical illness policy was rejected for what the insurer alleged was deliberate non-disclosure. After investigation, the Ombudsman found against the insurer, instructing it to pay out £46,000. Payment was eventually received more than 13 months after the claim was made. How much more useful those funds would have been had the claim been settled promptly and fairly.

The Ombudsman is able to assist

because she makes decisions on a "fair and reasonable" basis, meaning that the anachronistic rules of insurance law can be ignored. This is not a complete solution. There is a range of restrictions on the Ombudsman, most notably a limit on awards of £100,000.

Anyone turning to the courts as an alternative — for reasons of speed, or because their claim is caught by a restriction — will face the full harshness of antiquated law.

No one developing a life-changing condition should be told that although they prudently provided for just such a situation their insurance has been rendered valueless on a legal technicality.

MIKE HOBDDAY
Head of Campaigns
Policy and Public Affairs
Macmillan Cancer Support