

DELIBERATE OR RECKLESS STATEMENTS – WHEN A CONSUMER POLICY CAN BE AVOIDED

The Consumer Insurance (Disclosure and Representations) Act 2012 (“CIDRA”), which came into force in April 2013, heralded the beginning of some dramatic changes to the disclosure obligations of insureds under the laws of the UK. CIDRA reversed much of the burden of disclosure for consumer insureds and, rather than having to volunteer all material information, consumer insureds now have to answer questions posed by insurers. As long as those questions are answered honestly and accurately, and the insured takes reasonable care not to make a misrepresentation, the duty outlined in CIDRA is discharged. This reflects what had become accepted as industry good practice long before CIDRA came into force and, in effect, codified the approach that had already been adopted by the Financial Ombudsman Service (“FOS”). As Members will know, a new disclosure regime for business insureds was introduced by the Insurance Act 2015 which came into force in August 2016.

There has been little reported case law on the duty of disclosure owed by consumer insureds since CIDRA came into force. However, two recently published cases provide a useful reminder that despite the more consumer friendly regime, a consumer policy can still be avoided if questions are not accurately answered.

TESCO UNDERWRITING LTD v ACHUNCHE

The insured had taken out a motor insurance policy with Tesco (the insurer). Prior to inception, the insurer asked the insured whether he had any previous driving convictions. The insured said that he had not. However, the insured had (in the last five years) been convicted of driving without insurance.

The insurer sought a declaration that it was entitled to avoid the policy. CIDRA required the insurer to show that the non-disclosure/misrepresentation was deliberate or reckless. A careless misrepresentation would have been insufficient. The insured did not offer any explanation to the court for his misrepresentation. In the circumstances, the Judge concluded that the misrepresentation had been deliberate or reckless.

In reaching that conclusion, the Judge relied on section 5 of CIDRA, which provides that a misrepresentation is deliberate or reckless if the consumer:

- (a) knew that it was (or did not care whether or not it was) untrue or misleading; and
- (b) knew that the matter to which it related was (or did not care whether or not it was) relevant to the insurer.

Section 5 of CIDRA also provides for a statutory assumption that the consumer has the knowledge of a reasonable consumer, and that the consumer knows that a matter – about which the insurer asks a clear and specific question – is relevant to the insurer.

The Judge held that the insurer had asked a clear question about the insured’s previous driving convictions, and that therefore there was an assumption that the insured knew that it was relevant to the insurer. As there was no evidence to suggest that the insured thought his answer to the question was true, the judge found that the misrepresentation was deliberate or reckless. Accordingly, the insurer was entitled to avoid the policy.

AGEAS INSURANCE LTD v STOODLEY

In this case, the insured was convicted of causing death by careless driving. The insured had two policies that had the potential to respond to the claims against him. One of those policies had been issued by Ageas which, prior to inception, had asked the insured whether he (or anyone driving the relevant vehicle) had had any accidents or claims during the past five years. In response to that question, the insured failed to disclose an accident for which his wife (who would be driving the relevant vehicle) had previously been deemed responsible.

Ageas sought to avoid its policy on the grounds of deliberate or reckless non-disclosure. Again, the insured did not offer any explanation to the court for the non-disclosure. In the circumstances, the court declared that Ageas was entitled to avoid the policy.

The alternative insurer sought to have the declaration set aside. Although not a party to the action, the insurer argued that it was directly affected by the judgment since it significantly increased its financial liability. The Judge agreed that the insurer was entitled to make the application. The question for the Judge was whether there was a real prospect of the alternative insurer obtaining a different result at trial. The Judge concluded that there was not.

The Judge again referred to section 5 of CIDRA, and the assumption that a reasonable consumer would know that any previous accidents – about which Ageas had asked a clear and specific question – were relevant to the insurer. Given that the insured offered no explanation for the failure to disclose his wife's accident, but had disclosed a separate windscreen accident, the Judge was satisfied that the non-disclosure was deliberate or reckless. As such, the alternative insurer did not have a reasonable prospect of obtaining a different result, and the application to set aside Ageas' policy avoidance was dismissed.

THE RISK MANAGEMENT MESSAGE

Although the consumer disclosure process is simpler and more consumer friendly under CIDRA, these cases provide a stark reminder that insurers will still avoid policies when material information is deliberately or recklessly withheld. In any non-disclosure situation, both intermediaries and MGAs can be subject to a degree of scrutiny and there are a number of ways in which they can ensure that they are protected.

Tips For Intermediaries

Intermediaries should always consider at the outset whether their clients are consumer insureds or business insureds, for the purposes of ensuring that the correct duty of disclosure explanation is applied. It is important to remember that a consumer insured is an individual who buys insurance wholly or mainly for purposes unrelated to their trade, business or profession. Therefore, an insured may still be classified as a consumer even where it might not be an eligible FOS complainant.

Intermediaries have a duty to ensure that consumer clients understand their duties of disclosure to insurers and the need to answer questions accurately. Otherwise they risk the policy being avoided.

The intermediary should ensure that the consumer insured is aware of:

- the duty to take reasonable care not to make a misrepresentation to the insurer;
- when that duty applies – i.e. before a consumer insurance contract is entered into, when the contract is renewed or varied, and possibly (if the wording provides) throughout the duration of the policy period;

- the potential consequences of failing to discharge this duty (i.e. possible avoidance).

The intermediary should ensure the consumer insured understands the above, and that it has reminded its client of the above at all appropriate stages of the placement or renewal process. Keeping a detailed note when oral advice on this point is given is also important. Being able to evidence the advice may be crucial to defend the intermediary if a claim is made that its advice was inadequate.

Where a question posed by an insurer is not answered by a consumer, there is a risk that the answer will be deemed by insurers to be negative. It is therefore important to check that all questions have been answered. Where a client indicates that a question has not been answered because it is unsure of the answer, the intermediary should take additional steps to ensure the client provides an accurate answer. The intermediary should not complete any unanswered questions.

Where the intermediary uses its own standard proposal form, or software to prepare a market presentation, the best approach will be to agree with the insurer in advance the question set which insureds will complete. It will also be important to ensure that the insurer is shown all of the options available to, and answers given by, the insured when completing the form (see Griffin's bulletin on the decision in *Young v. RSA* for further information).

Griffin has issued a number of bulletins on the duty of disclosure, and some recommended standard duty of disclosure warnings, all of which can be found on the website at www.griffin-insurance.co.uk. However, these should only be used as a starting point and the extent of the advice required to be given by the intermediary will always depend on the specific facts of each particular risk being placed.

Tips For MGAs

MGAs should ensure that the questions being asked of consumer insureds, on behalf of insurer principals during the underwriting process, are clear. Where they are, it is more likely that the insurer will be able to rely on the statutory assumption that the consumer insured knows that the questions are relevant to the insurer.

Where MGAs produce questions (to be asked of potential consumer insureds on behalf of their insurer principals) it is also important that the insurer approves those questions. This will reduce the risk of an insurer arguing the questions were not appropriate for the risk being written.

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