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Notat

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From: Jens Peter Fabricius

DISCLOSURE DUTIES IN INSURANCE

1. The Insured's Pre-Contractual Disclosure Duty

a. Does your National Law impose a duty to answer questions put to the applicant/insured by the insurer?

The law does not impose a specific duty to answer questions, but the insurer is in general terms free to ask for such information from the applicant which is relevant and non-discriminatory, with the important exception in the Danish Insurance Contracts Act Section 3A, which prohibits insurers from requesting, collecting or receiving and using information that may reveal a natural person's genes and hereditary risk of developing or catching diseases.

If the applicant does not answer the questions, the insurance company is free to refuse to accept the risk, but in accordance with the Danish Insurance Contracts Act Section 3B the company has an obligation to justify their refusal in writing with a brief explanation. Further the applicant has an obligation to answer truthfully as he may otherwise risk that his claim is reduced or that the policy is avoided.

b. Does your National Law impose upon the applicant/insured a duty to disclose information upon the applicant's own initiative? If so - under what circumstances?

In accordance with the Danish Insurance Contracts Act Section 4 and 7, the applicant's concealment of material information can only affect his right under the policy if his non-disclosure is deemed to be fraudulent, or if the insured ought to be aware that the undisclosed circumstance was material to the company, and that his conduct may qualified as gross negligence.

2. Scope of the Applicant's Disclosure Duty – Subjective or Objective? Is the applicant's disclosure duty limited to the applicant's actual knowledge or includes also information which he or she should have been aware of?

The Danish Insurance Contracts Act Section 5 concludes that if the applicant has made a misstatement, but it must be presumed that he neither knew nor ought to have known that an information given by him was false, then the company shall be liable, as if no misstatement were given.

If the applicant has shown negligence in making a false statement, the Danish Insurance Contracts Act Section 6 further holds, that the insurance company shall be exempt from liability, if the it can show that it would have refused the insurance if the true facts had been disclosed. If it must be presumed that the insurance company would have accepted the insurance, although on other terms, the insurance company shall be liable to the extent to which it would have assumed liability at the agreed premium.

If the applicant has shown gross negligence in omitting to obtain and/or share information that the applicant should have been aware of as being of material importance to the insurer, the Danish Insurance Contracts Act Section 7 states that the claim may be reduced or avoided. The burden of proof is on the insurer. In order to avoid such a situation, great care is invested in formulation of the questions asked to the applicant before the risk is accepted.

3. The Insurers' Pre-Contractual Duties

a. Does your law impose on an insurer a pre-contractual duty to investigate the applicant's business in order to obtain the relevant information?

The Danish Insurance Contracts Act Section 9 states that the insurance company cannot plead a misrepresentation, if on the granting of the insurance the company was, or ought to be, aware of the true facts. As most insurances for business is written after the business has been inspected and the risk and need for insurance has been discussed in detail, the insurance company could be cut from pleading a misrepresentation. However, the burden of proof is on the insured, and, to the extent that information is exchanged orally under an inspection of the company, it is difficult for the insured to prove that the insurance company was or ought to be aware of a certain fact.

b. Does your law impose on an insurer a duty to ascertain the insured's understanding of the scope of the insurance, and to draw the insured's attention to exclusions and limitations?

The Danish Insurance Contracts Act Part 1a has rules on information duty and right to withdraw from contracts which implement EU directive 2002/65 concerning the distance marketing of consumer financial services. The Insurance Contracts Act Section 34e, subsection 2 specifies that the information must be clear, apparent and comprehensible and the information must be conveyed in a manner that is suitable considering the communication method used.

While the obligation to inform is substantial and it's clear that exclusions and limitations cannot be "hidden" in any way, it's in my opinion questionable if this has helped to secure that the insured's understanding of the scope of the insurance has improved. The industry invests great

effort in providing information on the Internet, by e-mail, phone and even personal meetings. This clearly gives the insured an opportunity to ask questions and to obtain a better understanding of his or her insurance coverage. Notwithstanding that there is high satisfaction with the information thus provided, in my opinion it's questionable if the insured's actual understanding of the scope of the insurance and in particular the exclusions and limitations (besides quantifiable or easy understood limits and deductions) improves after such a meeting, and it's not being ascertained.

4. The Insured's Post-Contractual Disclosure Duty

a. Does an insured have the duty to notify the insurer of a material change in risk? If so - what is the scope of the duty?

The Danish Insurance Contracts Act Section 45, subsection 1 states that if the insured knowingly alters any hazards specified in the policy in such a manner that the risk of the insurance company is increased in excess of that which the company at the time of the conclusion of the contract may be presumed to have taken into consideration, the company shall be discharged from liability, provided that the company would have refused the insurance, had the conditions caused by the alteration existed at the time when the contract was made.

The Danish Insurance Contracts Act Section 45, subsection 2 further states that if it is presumable that the company would have written the insurance, but on other conditions, it shall be liable in the manner as, against the premium agreed upon, it would have continued the insurance, if the increase of hazard had been known to it.

b. What is defined in your jurisdiction as a material change?

It follows from the above answer that the insurance company must show that it would not have accepted the risk or would have done so on other terms or at another premium. In order to prove this the company must disclose their relevant underwriting procedures at the time when the insurance contract was made.

5. The Insurer's Post Contractual Duty Does your law impose on an insurer disclosure duties after the occurrence of an insured event (such as, the duty to provide coverage position in writing within a limited period, duty to disclose all reasons for declination etc.)?

It's a standard term in Danish insurance policies, that both the insured and the insurance company can terminate the policy with 2 weeks notice after an insurance claim against the company has been filed. The notice of termination must be received by the insured within 14 days from the claim being either paid or rejected by the insurance company.

6. Remedies in Case of Breach of the Insured's Disclosure Duties

a. What is the insurers' remedy in case an insured breached his/her precontractual disclosure duty ("all or nothing" rule or partial discharge)?

The Danish Insurance Contracts Act Section 6, subsection 1 states, that the insurance company shall be exempt from liability, if it can be presumed that the company would have refused the insurance if the true facts had been disclosed.

The Danish Insurance Contracts Act Section 6, subsection 2 further states, that If it must be presumed that the company would have accepted the insurance, although on other terms, it shall be liable to the extent to which it would have assumed liability at the premium agreed upon.

b. What is the insurers' remedy in case an insured breached his/her postcontractual disclosure duty ("all or nothing" rule or partial discharge)?

The Danish Insurance Contracts Act Section 21 and 22 states, that at the occurrence of an insured event the insured has an obligation to give the insurer forthwith notice, and on filing the claim the insured has an obligation to give the company every information available, which are material for estimating the nature of the insured event; for fixing the amount payable by the company; or for the rights of recovery which the company might have against others.

The Danish Insurance Contracts Act Section 21, subsection 2, further states, that If the insured fails to give such notice or information the company shall not be liable to a greater extent than if such notice or information had been given. If it is made probable that through such omission the company has been precluded from establishing the existence of circumstances, which would nullify or limit its liability, it shall be determined under due regard to the circumstances, whether compensation is to be paid, and, if so, by what amount.

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