AIDA - RIO CONGRESS 2018

DISCLOSURE DUTIES IN INSURANCE

General Reporter: Peggy SHARON

Please answer the questions and clarify whether your response is based on legislation, court judgments or directives of any regulatory/supervisory authority.
Finally, your remarks and comments from your point of view will be appreciated.

QUESTIONNAIRE

Answers for: NEW ZEALAND

1. The Insured's Pre-Contractual Disclose Duty

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

No. The insured is not under a duty to answer a question or questions put by the insurer. However, if the insured fails or refuses to answer, the insurer is free to refuse to issue a policy.

If the insured does answer a question put by the insurer pre-contract then the insured is subject to the duty to avoid saying anything false or misleading. Although this is a duty applying in contract law generally, in the insurance context in New Zealand an alleged breach will be assessed against whether the answer was:

(i) substantially incorrect (in the sense that a prudent insurer would see the inaccuracy as significant); and

(ii) material (in the sense the inaccuracy would influence the mind of a prudent insurer in deciding whether and/or on what terms to issue a policy).

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?

Yes. The law imposes a pre-contractual duty on insureds to disclosure information voluntarily. The duty applies where the information in question is:

(i) Known, or deemed to be known, to the insured, with the insured being deemed to know what he, she or it ought to know in the ordinary course of its business or his/her personal affairs; and

(ii) Material, in the sense that it would influence the mind of a prudent insurer in deciding whether and/or on what terms to issue a policy. In the context of pre-contractual disclosure, "influence" is established by showing that a prudent insurer would want to know about and consider the information when deciding whether and/or on what terms to take on the risk (it is not clear in New Zealand if this sense of influence also applies in assessing the materiality of misstatements, as opposed to non-disclosures, but it is very likely to).

As well as satisfying the knowledge and materiality requirements, the insurer must be able to prove that it was induced into issuing the policy and/or fixing the premium in the relevant amount by the insured's non-disclosure(s).

The insured need not disclose certain matters, including information or circumstances:

(i) Which diminish(es) the risk;

(ii) Which is/are known, or presumed to be known, to the insurer (the insurer being presumed to know facts which are notorious or which the insurer ought to know in the ordinary course of its business);

(iii) Disclosure of which has been waived by the insurer.

The pre-contractual duty of disclosure applies *mutatis mutandis* to the insurer as well as to the insured.

The pre-contractual duty of disclosure in marine insurance is provided for by s 18 of the Marine Insurance Act 1908 (NZ), a provision which is taken to be co-extensive with the duty applying at common law in all other classes of insurance.

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?

See above under 1(b). At the pre-contractual stage, the duty is objective. However, the duty of disclosure which applies when the insured makes a claim on the policy (post-contract) is subjective, requiring the insured to make an honest attempt to disclose what he, she or it believes is relevant to the claim.

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?

No (although insurers typically ask questions to illicit information which they see as relevant to the risk).

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?

No. However, the insurer must of course avoid making any material misrepresentations before the terms of the contract are settled. There is limited authority in New Zealand suggesting that the insurer ought to act reasonably, fairly and transparently pre-contract, and to notify the insured about the presence of any unusual terms in the policy. Questions of this kind may be amenable to the provisions of s 9 of the Fair Trading Act 1986 (NZ), which creates a broad prohibition on misleading and deceptive conduct in trade. Furthermore, under the Fair Insurance Code, a guideline produced by the Insurance Council of New Zealand, most insurers in New Zealand commit to giving their customers "…access to your policy wording, which sets out in plain English what is insured, what is not insured and what your obligations are" and to "…tell you about any changes to your policy". The Fair Insurance Code does not carry the force of law but Courts may refer to it when determining the scope of the legal duties owed by the parties to insurance contracts in New Zealand.

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?

Yes. At common law, material changes in the risk must be disclosed and agreed to by the insurer, and if they are not the insurer is discharged from any further liability under the policy. The same is not true, however, for mere increases in risk, which need not be disclosed to the insurer. A policy may attempt to circumvent this by requiring that the insured must notify any increase (or permanent increase) in the risk to the insurer.

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

It will often be very difficult to distinguish between a mere increase in risk and a change in risk. Questions of this kind are decided on a case by case basis, and require careful analysis of the particular terms of the policy which define the risk to be covered. Previous cases with similar facts may be of some assistance. It is difficult to define the difference any further than by saying that there must be a fundamental change.

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.)?

Yes. Until recently this was an unsettled question, however there is now authority (albeit somewhat limited and not at appellate level) that, as a matter of the general duty of utmost good faith, the insurer has a duty of disclosure which applies when the insured makes a claim, and that this is a strict (objective) duty, ie, requiring disclosure not only of what the insurer knows but also what it ought to know.

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 pre-contractual disclosure duty ("all or nothing" rule or partial discharge)?

Unless the policy provides otherwise, the remedy is avoidance of the policy (sometimes described as avoidance *ab initio*) in all classes of insurance.

(Note: this contrasts, to some degree, with the insurer's remedy for a pre-contractual misrepresentation by the insured. In marine insurance cases the remedy for this is avoidance, however in non-marine cases it appears the Contractual Remedies Act 1979 (NZ), as re-enacted by the Contract and Commercial Law Act 2017 (NZ), will dictate that the insurer is limited to cancellation and/or damages as a remedy for pre-contractual misrepresentation.)

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

As above – avoidance of the policy (unless the policy provides otherwise). It is worth reiterating, however, that the insured's post-contractual duty of disclosure is subjective, so a remedy will only become available if the insurer can show that the insured has acted dishonestly in failing to comply (although a higher standard than honesty, for example of accuracy/correctness, may be imposed by the policy).