THE OMBUDSMAN'S BRIEF CASE.

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(Newsletter of the Ombudsman for Short-Term Insurance)

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DEVELOPMENTS IN THE OFFICE

OMBUDSMANS ADVICE

1. INSURER MISUNDERSTANDING FACTS

The insured's house was burgled and after she lodged a claim the insurer repudiated liability on the grounds that there was a breach of the policy condition in that not all opening windows were burglar-barred and more specifically, the fanlight windows were not burglar-barred.
The Ombudsman pointed out to the insurer that the insured had stated that the fanlight windows were not burglar-barred as they had been torch welded, and as such were not able to be opened. Furthermore, the burglars did not enter the premises through the fanlight, but through a window that was burglar-barred. After one letter from the Ombudsman, the insured's claim was admitted in full and R15 000 was paid.

2. WHO IS A MEMBER OF THE HOUSEHOLD?

The insured's house was burgled and although the insurer had paid him his loss, a brand new camera and jewellery were excluded because they belonged to the insured's partner. The insurer stated that the insured had no financial interest in any of the items of his girlfriend and that he had advised in his application for insurance that only he and his family were residents in the house in question.
The Ombudsman pointed out to the insurer that the parties had been living together as husband and wife for five years and that they had jointly taken transfer of an immovable property a year before the burglary. They had also jointly registered a mortgage bond for R330 000. Furthermore, in terms of the policy, the proposal form defined the insured as the person in whose name the policy is issued and "members of his family normally residing with him". The insurer was referred to the decision of *Farr versus Mutual & Federal Insurance Company Limited SALR 2000 (3) SA 684 C.* On the Ombudsman's interpretation of the law and the factual scenario of the insured and his girlfriend, it was our view that the girlfriend is to be regarded as a member of the family of the insured.
The insurer agreed to pay the claim in the amount of R30 000.

3. INSURABLE INTEREST

The insured, a resident of Dainfern, advised the insurer during May 2001 that the Toyota Corolla which his wife had been driving up to that stage, would henceforth be driven by his daughter.
The vehicle continued to be registered in the insured's name.
The insured's daughter, on completing her studies, decided to develop her skills in Christian Youth Counseling and she worked at a church as a youth organiser. The church paid her an amount of R2 500 per month, which was matched by her father, who also paid for her cellphone, provided the car, maintained it, and also paid for petrol. He provided his daughter with free accommodation until she moved into a townhouse at the end of February 2002, which he bought for her. He only charged his daughter an affordable rate of interest. A month later, while she was visiting a friend that she had visited before whilst staying with her parents, the Toyota was stolen.

The insurer repudiated the claim on three grounds:

1. The daughter was independent, living at another address and generating her own income.
2. The vehicle was used for a purpose other than the relevant condition of use.
3. The daughter was no longer financially dependent upon the insured.

The Ombudsman pointed out to the insurer that the mere fact that the daughter was living at another address was of an academic interest, because the vehicle was not stolen from the new risk address, but whilst visiting a friend, whom she had visited on previous occasions whilst residing with her parents. Furthermore, it was patently clear that the daughter was not financially independent. Following negotiation by the Ombudsman, the insurer agreed to admit the claim and also pay interest from the date the claim should have been accepted until settlement was made.

4. INSURER RELYING UPON SIGNATURE OF RELEASE TO DENY VALID CLAIM

The insured installed an immobiliser VESA Code 3A to his Microbus. The vehicle was stolen and although the insurer admitted the claim, it applied an additional R2 500 excess because the immobiliser did not comply with all VESA requirements. Reluctantly, the insured signed the release. He

subsequently did his homework and came across a certificate of insurance issued by the insurer prior to the loss, which contained the words *"security systems in the vehicles accepted".* The insured then referred the insurer to the aforesaid certificate, but the insurer contended that inasmuch as the insured had signed a release, he was precluded from claiming an additional amount.
The Ombudsman pointed out to the insurer that it had, prior to the theft, clearly stated to the insured that it was satisfied with the security requirements provided, and that in drawing the release the insurer mistakenly added R2 500 to the excess on the wrong assumption that the insured had not complied with the security requirements. Furthermore, the insurer, by refusing to pay the amount of R2 500, was benefiting from its own mistake. Following the Ombudsman's intervention the insurer conceded to repay the insured the said amount.

5. INSURABLE INTEREST AND RISK AREA

The insured purchased a pre-used Volkswagen Chico 1300, and when he insured it he made it clear to the underwriting manager/broker that he was the owner but that the regular driver would be his stepson, who was at that time resident with him. The insured was resident in Springs and his stepson worked in Alberton, but decided to move to Alberton. Two months *after* he moved the Golf was stolen whilst he was visiting his girlfriend in Springs, whom he had visited before his move to Alberton.

· *The insurer repudiated liability on four grounds:*
- The risk area was not disclosed.
- The stepson was no longer financially dependent upon the insured.
- The stepson was the regular driver (this reason was almost laughable because it was fully disclosed by the insured).
- There was no insurable interest.
-

· *The Ombudsman pointed out*:
- Whilst the insurer had grounds to decline the claim on the basis of nondisclosure of the change of address to a higher risk one, it conceded that the vehicle was stolen from an address in Springs where it had previously been frequently parked.
- Proof was submitted to the insurer that the stepson was in fact still financially dependent upon his stepfather.
- The insured clearly still had a financial interest in the vehicle and contributed to his stepson's maintenance. He therefore did have an insurable interest in the Golf. The insurer was ultimately persuaded to admit the claim.

6. INSURER REPUDIATED CLAIM BECAUSE OF FAILURE TO HAVE VEHICLE INSPECTED

The insured purchased a vehicle on 12 June 2002, which was damaged in a collision six months later. His insurer repudiated liability on the ground that the insured had not taken his vehicle for inspection and that he had been driving the vehicle under the influence of alcohol.
The Ombudsman pointed out to the insurer that the inspection requirement is usually done to ensure that the vehicle is not a 'paper' vehicle, but in this case there is clear proof that the vehicle, at all times, existed and was in good condition. With regard to the allegation of driving under the influence of alcohol, the Ombudsman highlighted that the onus will rest upon the insurer to prove on a balance of probabilities that this was the case. In the absence of clear proof, the insurer will not be able to discharge the onus resting upon it and gave the insured the benefit of the doubt.
The insurer then admitted the claim.

7. BETTERMENT

The insured's son, who was the named driver of her vehicle, swerved to avoid a dog in the road and the car mounted the pavement.
Unbeknown to the driver, damage to the sump occurred and it leaked oil. Prior to the aforesaid accident, the car had completed some 131 771 kin, and the engine was repaired at the cost of R11 462,29. The insurer applied a 35% betterment amounting to R4 011,80 *"in view of the fact that the engine of the vehicle has been renewed".* The expected life span of the particular engine is in the region of 250 000 km and the insurer calculated that the vehicle had completed 53% of its expected

life span.
The insurer conceded that the reconditioned engine did not have an influence on the market value of the vehicle.
The Ombudsman agreed with the insurer that the insured cannot make a profit out of her loss. A factor which is of overriding importance to the Ombudsman is that the vehicle was the insured item, i.e. not the engine. Inasmuch as its market value had not been increased as a result of repairs to the engine, the Ombudsman called upon the insurer to forego the claim in respect of betterment. It was persuaded to do this and paid to the insured R4 200, i.e. almost R200 above the betterment initially claimed.

8. LATE NOTIFICATION OF CLAIM (1)

At 3:00 on a public holiday, the insured's geyser burst. On the first business day subsequent to the public holiday, he telephoned his insurer to enquire if he had a valid claim. The insurer gave the insured to understand that the only claim he had was in respect of damage
caused by water from the geyser and not the geyser itself. On the same day, the geyser was replaced for the insured's own account. A year later, the insured learnt that his brother-in-law had successfully claimed from his insurer for a burst geyser. The insured then formally claimed from his insurer, who repudiated the claim on the grounds of late notification.
The Ombudsman referred the insurer to the decision *Snodgrass versus Hart (Santam Limited) 2002 (1) SA 851 (SE)* and stated that the telephonic communication made by the insured on 10 August 2001, was similar to the communication given in the Snodgrass case. The insurer then immediately conceded that an error had occurred and paid the claim.

9. LATE NOTIFICATION OF CLAIM (2)

The insured travelled to Namibia for three weeks. During his first week, on the way to Luderitz, he encountered a sandstorm. Because of poor visibility, he drove at a speed of approximately 60 km per hour. When he returned to South Africa two weeks later, he contacted his broker on the first business day to enquire whether he was covered for the damage to his Jeep caused by the sandstorm. Because the damage was only to the bodywork and not to the functioning of the vehicle, he contemplated repairing the vehicle himself. Being a mathematics lecturer at Rand Afrikaans University, he had a busy programme and the first free time he had was on 2 May when he took the Jeep to a panelbeater. To his surprise, he was informed that the damage amounted to R30 938,41. On 6 May his claim form was completed and the following day was telefaxed to the insurer, which repudiated liability because of late notification of the claim.

The Ombudsman pointed out that the majority of claims are reported through brokers and not directly to the insurer. The 'late' reporting did not, in any way, increase the insurer's liability and it had not suffered any prejudice. The insurer was persuaded to admit the claim.

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FEEDBACK ON OUR RECENT INITIATIVES

SHARECALL

Months	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Number of calls	0	2	35	99	59	53	73	64	53	57	60	29

WEBSITE

Months	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Visitors	421	629	586	713	715	714	739	789	758

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THE FUNCTIONING OF THE OMBUDSMAN FOR SHORT-TERM INSURANCE

OTHER OMBUDSMAN WITH WHOM WE INTERACT ARE:

- Ø Long-Term Ombudsman, Judge Peet Nienaber. He is appointed for five years.
- Ø Banking Adjudicator/Ombudsman, Advocate Neville Melville — five years
- Ø Pension Funds Adjudicator, Professor John Murphy, was the Adjudicator on a three-year contract, and he left the end of May 2003 and since then Sue Myrdol, his deputy, has run the show awaiting the appointment of a new Adjudicator.
- Ø FAIS Ombud, Charles Pillai, he is appointed for three years.

STATUTORY OPPOSED TO VOLUNTARY

Three Ombudsmen are Voluntary, i.e. Short-Term, Long-Term and Banking Adjudicator/Ombudsman. The Pension Funds Adjudicator and the FAIS Ombud are Statutory Ombudsmen.

WHAT IS THE EFFECT OF BEING A VOLUNTARY OMBUDSMAN AS OPPOSED TO A STATUTORY OMBUDSMAN

- Ø A Voluntary Ombudsman can make its own rules and regulations and they can be amended with little difficulty.
- Ø A Voluntary Ombudsman can by agreement determine jurisdictions and give authorities which are far greater than that given to Statutory Ombudsmen.
- Ø The Statutory Ombudsman's jurisdiction and powers are limited and circumscribed by an Act of Parliament.

WHAT IS OUR OFFICE JURISDICTION

Only Personal Lines claims up to R500,000 per claim (this amount can by agreement be increased). All Commercial claims accordingly fall outside my jurisdiction. There is a debate that the jurisdiction of the Short-Term Ombudsman should be expanded to include business claims.

HOW BIG IS OUR OFFICE

There are a total of five Complaints Handlers and eleven other support staff, i.e. a total of sixteen.

HOW IS OUR OFFICE FUNDED

Our entire budget is funded by debiting an Insurer a fee per complaint filed with the company. The volume of complaints has increased phenomenally over the past two years and together with curtailing expenses, the office has for the second year reduced the amount charged per complaint.

HOW DO WE DEAL WITH COMPLAINTS

We require a written Application form to be completed. The written complaint is submitted to the Insurance Company, and very often because a more senior person who interacts with our office on a regular basis, looks at the claim and it is admitted there and then. We may, depending upon the response, get further information from the Insured, or immediately advise the Insurance Company that it is incorrect in its approach. We also meet with Insurers on a regular basis and most of the disputes are resolved by negotiation. We try to keep the relationship a cordial and friendly one. The essence is to build up mutual trust. There are occasions however where you have to make a ruling or threaten to make a ruling.

HOW LONG DOES IT TAKE TO FINALISE A CLAIM

We have to report to our Council how many claims are unresolved after six months. The reason for this requirement is that one of the basic principles of an Ombudsman's office is that there must be a speedy resolution of disputes. At our very first Council Meeting in 2001, we recorded that there were

656 claims outstanding for more than six months. To put this into perspective, this was out of approximately 2,500 complaints received. Notwithstanding the fact that we received a considerable increase in the volume of complaints, we have succeeded in reducing the six-month list to 38 at the end of 2003. The average time for finalising a matter has been brought down to just over three months per claim.

WHAT ARE THE MOST COMMON COMPLAINTS

The claims are divided as follows,

64% Motor

19% Contents

12% Building

5% Cellphone, Travel, Disability

WHAT ABOUT PRESCRIPTION OF A COMPLAINT

By agreement, time-barring does not run against a complainant whilst the complaint is being dealt with in my office. A number of Attorneys are unaware of this agreement concluded with the Insurance Companies. This is a very important arrangement because an Attorney does not have to arrange for the service of a Summons to interrupt prescription, because this option is still open to the Attorney / complainant at a later stage. The complainant accordingly had two opportunities to pursue his claim, i.e. with the Ombudsman's office and secondly, in Court, which could include the Small Claims Court which has a jurisdiction of R3,000.

HOW SUCCESSFUL ARE WE

Since 2002 we have kept statistics of how much money we have recovered on behalf of complainants. In 2003 we recovered R22 million for private individual complainants. Most of these people would not have been able to afford Attorneys. This represents a 22.5 % success rate.

WHAT ABOUT BROKERS / INTERMEDIARIES

Our office only deals with Insurers and in respect of claims repudiated by Insurers. Complaints against Brokers arising from mis-selling, negligence, etc. do not fall under our office jurisdiction. These complaints would be dealt with by the FAIS Ombud, Charles Pillay.

WHAT IS THE EFFECT OF THE FINANCIAL SERVICES OMBUD SCHEMES BILL

This is known as the FSOS Bill, which will give formal (statutory) recognition to Voluntary Ombudsman Schemes. This Bill provides for a Council, which will ultimately give approval to the various applications for recognition. This Bill was initially scheduled for enactment for 2003, but it is hoped that it will be enacted in 2004.

WHAT ADVICE CAN I GIVE TO THE INDIVIDUAL

- Ø Read your Policy.
- Ø Check the type of Insurance cover you require.
- Ø You pay for what you get.
- Ø If any detail of the risk changes, the Insurer should be advised prior to the change taking place.

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THE NEW SECTION 53(1) OF THE SHORT-TERM INSURANCE ACT 53 OF 1998

Misrepresentation is an ubiquitous word in the insurance industry and is often used by claims personnel clerks in their repudiation letters. Historically an insurance claim could only be successfully rejected if the insured misrepresented a material fact or facts when proposing to take out the insurance contract (thus at the pre contractual stage).

English law however developed a concept called warranties where the insurer requires the proposer for insurance to warrant that certain statements made by the proposer are true, correct and material. These terms were thus seen as going to the heart of the contract of insurance, or as being the basis of the contract.

The concept of warranties entitled the insurer to reject a claim due to an innocent and even immaterial misrepresentation made by the proposer. The advantage to the insurer being obvious in that all it has to do is prove a breach of the warranty without having to prove materiality. This foreign concept was introduced into South African law due to our reliance on the English Insurance law when we developed our local insurance jurisprudence.

This unjust state of affairs caught the attention of the legislature subsequent to the case of Jordan v New Zealand Ins Co. The insurer in that case had successfully repudiated a claim because of a warranted misrepresentation by the proposer. The unjustness of the warranty concept was illustrated by the fact that the incorrect statement made by the proposer in no way prejudiced the insurer, in fact it actually worked in favour of the insurer by representing a higher risk than what was the real state of affairs.

A provision was then inserted into the Insurance Act of 1947 that required a misrepresentation, even if warranted, to be material to the assessment of the risk before an insurer could validly reject a subsequent claim.

The wording was basically left unaltered when the new Short-Term Insurance Act 53 of 1998 came into being. Suddenly however, quite a few cases came to court where this wording was criticized. Conflicting judgements were also given resulting in legal uncertainty.

The main problem was that the wording of sec 53(1) did not make it clear what test should be applied to ascertain whether a specific misrepresentation would have materially affected the assessment of the risk.

Some courts held that a reasonable man test should apply whereas another court applied the reasonable insurer test. To add to the confusion the Supreme Court of Appeal gave different views on whether the section applied to positive misrepresentations only, or to non-disclosures (misrepresentation by omission) also.

Section 53(1) was amended by sec 35 of Act 17 of 2003 to address some of the issues. The section is effective from 1 August 2003.

The amended section will now be briefly discussed. The new section can be said to have changed the existing legal position in two ways. Firstly it clarified the previous uncertainty regarding the applicability of the section 53 to non-disclosures by stating that the section will also apply to a failure to disclose information. This is in line with academic criticism of court decisions that sought to distinguish artificially a positive misrepresentation from a negative one, and is a welcome amendment to our law.

More troublesome is the second change where the legislature attempted to clarify what test should be applied to determine whether a misrepresentation would have materially affected the assessment of the risk.

The section reads as follows" The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk."

The "reasonable man" test derives from the common law and normally denotes the average prudent person. It is thus not immediately clear what a reasonable prudent person is and if it differs in any respect from the common law test. It has been suggested, probably correctly, that the courts would treat the new test in the same way as they used to treat the common law test. This is of course still not very clear, as different insurers would regard the same information as either material or not. Furthermore, the insured public is notoriously ill informed about insurance matters. It can be argued that in most cases it should be patently clear whether a specific misrepresentation would be deemed to be material. Perusing law reports however, reveal that quite often Solomon's wisdom is required to protect the interests of all parties concerned.

The amended legislation also has not clarified uncertainties regarding the applicability of the section to promissory warranties as well as other misrepresentations. The stated objective of removing / reducing the uncertainty in this area of our law would in our view thus not be achieved by implementation of this amendment. Lastly it has be noted that the Ombudsman's office would in any event also refer to principles of equity and sound insurance practice when deciding any issue before it. More specifically this office will investigate whether there is a causal nexus between the breach complained of and the circumstances of loss.

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FORMAL RULINGS

FORMAL RULING NO. 12

(Ombudsman's Reference V137/00V)

The complainant lodged a complaint with this office following difficulties he experienced in pursuing a claim in terms of a Travel Insurance Policy.

The complainant never received a Master Policy wording, only a brochure. The brochure advised the complainant that if he purchased an airline ticket with his Credit Card, he would receive automatic Travel Insurance including cover for flight delays. The brochure makes no mention of a 24-hour period that should lapse before the benefits become payable. A copy of the Master Policy wording was never sent to the complainant, despite the Provisions of Section 47 of the Short-Term Insurance Act No. 53 of 1998.

As a result of a delayed flight, the complainant forfeited five theatre tickets for a Show in London. The complainant also had to take a taxi which would otherwise not have been necessary, as The Travel Agent would have met the complainant at the Airport.

Repeated attempts were made to resolve the matter amicably with the Insurer, but to no avail.

A ruling was therefore made in terms of Schedule 5 of the Association Agreement, that the claim be settled.

FORMAL RULING NO. 13

(Ombudsman's Reference S208/00V)

The complainant lodged a complaint with this office following difficulties he experienced in pursuing a claim in terms of a Travel Insurance Policy.

The complainant was in France on a scholarship when he was informed of his mother's death in South Africa. He telephoned Insurers in Johannesburg and enquired whether he would be covered should he wish to return to South Africa for the funeral with his family, consisting of his wife and two children,

He was led to believe that he would be covered. He duly flew to South Africa with his wife and two children. Whilst in South Africa he again telephoned Insurers to obtain clarification whether he would be covered should he take his whole family back to France with him. Again he was advised that this expense would be covered under the Travel Policy.

Notwithstanding the Provisions of Section 47 of the Short-Term Insurance Act No. 53 of 1998, the complainant was never given a copy of the full Policy document. Repeated attempts were made to resolve the complainant's claim.

A ruling was therefore made in terms of Schedule 5 of the Association Agreement that the complainant's claim, being the cost of four one-way tickets from France to South Africa, be settled.

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