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

- ***THE FINANCIAL SERVICES OMBUD SCHEMES ACT 37 OF 2004 COMMENCED ON THE 01 APRIL 2005***

OMBUDSMAN'S ADVICE

1. UNLICENSED VEHICLE IS NOT NECESSARILY UNROADWORTHY

The Insured's Land Rover was damaged beyond economical repair in an accident. The Insurer rejected the claim on the ground that the vehicle was ***'not roadworthy at the time of the loss'***. The Land Rover was in fact unlicensed because the Insured had overlooked the renewal of the annual license some four months prior to the accident.

The Ombudsman pointed out that the Land Rover had been regularly serviced and maintained and was in excellent condition immediately prior to the loss. The Insurer agreed that whilst the rejection of the claim accords with the technical dictates of the policy wording, this was one of those instances where the nature of the rejection bears little relationship to the proximate cause of the loss. As the unlicensed status of the vehicle did not contribute to the loss in any way, the Insurer admitted the claim.

2. FAILURE TO ADVISE INSURER OF PREVIOUS CLAIMS HISTORY

The Insured's furniture was stolen from a storage facility. The Insurer rejected the claim on the ground that the Insured had omitted to disclose previous losses. Had these been disclosed, the Insurer would probably not have accepted the risk or, alternatively, accepted the risk on different conditions. The Insurer pointed out that the application form clearly requires the complainant to declare all previous losses in the past five years. The Insured only declared one claim with a previous Insurer for an amount of R20 000, but failed to disclose several claims totalling in excess of R76 000.

The Ombudsman had no hesitation in agreeing with the Insurer that it was entitled to maintain its rejection of the claim.

3. APPLICATION OF BETTERMENT

The Insured's vehicle was damaged due to vandalism and there was some paintwork that needed to be repaired due to scratch marks. Some sections

of the vehicle needed to be re-sprayed totally in order to have the damage repaired properly. The Insurer deducted 25% Betterment on the paintwork done to the vehicle, which amounted to R884,35.

Ombudsman's response

Whilst it is accepted that an Insurer is entitled to ask for an allowance for Betterment, the basis of ascertaining the extent of the Betterment should not be calculated on pure speculation. The Insurer agreed that a fair measure is the increase in the market value of the vehicle as a result of the repairs. In this case there was no evident increase and the Insurer refunded the amount of R884,35 to the Insured.

4. GROSS DISTORTION OF THE CIRCUMSTANCES OF LOSS

The Insured's son, a teacher and "well respected member of the community", initially informed the Insurer that he was going to see a friend in Bedfordview and went via Hillbrow, where the vehicle was hijacked when he stopped at a stop street. The Insured's son later admitted that he was not hijacked but that the vehicle was stolen. It ultimately transpired that he parked the car outside a hotel in Hillbrow, to spend time with a prostitute, when his keys were taken out of his pocket. When he went downstairs and exited the hotel, he discovered that his vehicle was stolen. He alleged that he was too embarrassed to admit the true circumstances, hence his initial version of the hijack. The Insurer rejected the claim on the ground that the failure to provide true and complete information regarding the incident, constituted a material breach of the Insurance Policy.

Ombudsman's response

The Ombudsman agreed with the Insurer that with regard to the theft of a vehicle, it is important that the correct and true facts be disclosed and failure to do so does prejudice the Insurer. In the circumstances, the Ombudsman agreed with the rejection of the claim by the Insurer.

5. FAILURE TO DISCLOSE PREVIOUS LOSS HISTORY

On 21 October 2004, the Policy incepted and within three weeks, i.e. on 6 November 2004, the Insured's property was burgled. The Insurer rejected the claim on the ground that the Insured had omitted to make a full disclosure of two previous losses the Insured had suffered in the twelve months prior to the inception of the Policy, in respect of his motor radio as well as all risks items.

Ombudsman's response

The Insurer demonstrated that in accordance with its underwriting

requirements, the Policy would not have been accepted had the loss history been disclosed. In the circumstances, the Ombudsman had no hesitation in supporting the rejection of the claim.

6. EXCEEDING THE SPEED LIMIT - REASONABLE PRECAUTIONS TO AVOID / MINIMISE A LOSS

The Insured's 19 year old son was travelling along the N3 from Durban. At a point where the road dips down into a circle sweeping right-hand bend, the driver lost control of the vehicle and it was severely damaged. The Insurer rejected the claim on the "Reasonable Precautions" condition as the driver had admitted that he was driving in excess of the speed limit. The particular road has the speed limit at 100 kph reducing to 80 kph and then to 60 kph. It was between the 80 kph and 60 kph stretch that the accident occurred.

Ombudsman's response

The Ombudsman referred to the well-known decision of ***Santam versus CC Designing CC,*** which clarified the onus which rests on the Insurer when relying on the "Reasonable Precautions" condition. The Court held that for an Insurer to succeed it must prove that the Insured / Driver realizes the danger of loss, but disregards the danger because of existence of an Insurance Policy: in fact that the accident was caused by an intentional act. A large number of accidents occur in the circumstances where the Insured / Driver is guilty of being negligent (even gross negligence). The cover afforded by the Motor Policy is virtually on an All Risks basis including the negligent acts of the Insured / Driver.

To uphold the declinature of a claim in the above circumstances, would largely negate the cover with the Insured / Driver constantly being challenged to demonstrate that he / she has in each case, taken "Reasonable Precautions" to avoid / minimize the loss. This would create an untenable situation. The Insurer agreed to settle the claim following amicable negotiations.

7. CELL PHONE INSURANCE

The Insurer lost her cell phone in a motor vehicle accident on 1 August 2003. Her claim for the loss was rejected by the Insurer on the ground that the cell phone insured was a Nokia 6150 whilst the one claimed for by the Insured was a Nokia 6210.

Ombudsman's response

The Ombudsman pointed out that the Insured only had one cell phone and that the Nokia 6150 had been stolen on 20 December 2001.The

replacement cell phone was the Nokia 6210, which was the only Nokia the Insured had until the loss on 1 August 2003. The Insured had admittedly omitted to advise the Insurer of the change of the model from Nokia 6150 to 6210, when the first item was stolen and paid for by the same Insurer, but the fact remained that the Insurer had collected premium on a cell phone which was clearly identifiable. The Insurer was then persuaded to admit the claim.

8. INSURER MISTAKENLY CONCLUDING THAT A PRIVATE DWELLING WAS BEING USED FOR BUSINESS PURPOSES

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On 11 August 2004 the Insured's premises in Welgemoed, Cape Town was burgled and a number of electrical items of property stolen e.g. Hi-fi, Computer, music CDs and a Drill. The Insurer rejected the claim on the basis that the private dwelling was in fact being used to conduct business under the style of Goblin Arts. The Insurer's investigations revealed that the home contained costumes and puppets, and incorrectly assumed that the public visited the premises for business purposes. The Insurer however offered a contribution to the cost of replacing the computer. This offer was on an *ex gratia* basis.

Ombudsman's response

The Ombudsman advised the Insurer that according to the Insured, there was no influx of people and that two family friends had come to visit her at the time when the Loss Adjuster inspected the premises. These were not customers. According to the Insured, most of her business is done on the telephone and in the previous three years she only had two customers who came to the house. She merely stored her items on the premises. The costumes and puppets did not constitute a risk, because the very fact that the burglars stole electrical items and CD's and not any of the props was proof that these items did not constitute an increased risk. The Insurer was then persuaded to meet the entire claim.

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THE HISTORY OF INSURANCE

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Some interesting facts about a mercantile contract that we encounter daily:

1. The earliest authenticated insurance contract **(i.e. That which displays the characteristics of insurance in the sense of a transfer of risk of loss due to a fortuitous uncertain event in lieu of payment of**

consideration / premium), is a marine insurance contract on a ship "The Santa Clara" dated 1347 in Genoa. The policy is in the Italian language and appears in the form a maritime loan to avoid the canon (church) prohibition against usury.

2. The earliest insurance contracts did not appear in the form of a modern insurance contract, but rather was drafted in the form of either a fictional sale or loan, until the insurance contract proper was recognized and accepted.

3. The earliest insurers were merchants underwriting risks for fellow merchants, on a part time basis.

4. Until the 1800-1900's premiums were not determined by statistics kept etc. as in the modern sense, but was often arrived at as a result of haggling.

5. The contract of insurance was not created as a result of judicial or legislative innovation, but by the merchants themselves as a result of commercial expediency and need (Necessity being the mother of invention).

6. Early legislation was passed to counteract fraud or malpractices;

7. It is evident from the implementation of the earliest legislative measures enacted that there was a distinct divergence between the legal position and what occurred in practice;

8. Very few reported cases exist, or legal principles were established by the judiciary on the Continent, until Lord Mansfield C.J. took office in the Highest Court in England. During his tenure in office a large number of cases and principles were established by the eminent judge , many of which today exist unaltered(examples of which would be that insurances contracts are contracts of good faith , the duty of disclosure , the effect of misrepresentation and non-disclosure on the insurance contract , the effect of fraud on the insurance contract , warranties , etc , to name a few) .

9. Due to the fact that insurers were in fact fellow merchants who underwrote risks on a part time basis, with no accurate data or statistics or experience to determine premiums, such "insurers" were clearly in an unequal or weaker bargaining position than the insured's at the time. For this reason a large number of decisions handed down, and principles enunciated were to a large extent for the protection of the insurer.

10. However despite the establishment of corporate insurers and the

advancements made in the determination of risk, statistics, data sharing and collection, experience, and expertise in underwriting risks, many of the early principles have not been adapted to suit modern times or take into account insurers greater bargaining power. This is particularly evident in the instance of the duty of disclosure where **Lord Mansfield CJ** in the seminal case of **Carter V Boehm** explained the duty of disclosure on the part of the Insured as being a duty to disclose facts which were within the own peculiar knowledge of the Insured, and which could not have been reasonably discovered by the insurer by reasonable inquiry or facts which were common knowledge to both the parties to the insurance contract.

11. Those policy wordings have to a large extent, remained unaltered and follow the example of the Lloyds policy wordings which had been created more than 200 years ago. This is particularly evident in the field of marine insurance. Personal lines insurance policy wordings however have been greatly improved and simplified in recent times.

12. Despite insurance being a "contract", the general principles in contract law are not applied, or followed in the insurance context. This is particularly evident when one has regard to the principles relating to misrepresentation, non-disclosure, breach of contract, and the remedies available to the parties. The clearest example of this would be that the remedies available to a party in the law of contract would extend to damages, whereas in the case of the insurance contract the parties would not have the remedy of damages available to them.

Very often one finds that sight is lost of the above when dealing with the insurance contract, and more often than not, a large number of parties who are exposed / involved in dealings / interpreting the insurance contract do not take account of the remarkable background of this contract.

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HOW TO ENSURE THAT A COMPLAINT IS NOT RESOLVED SPEEDILY

The aim of this article is to point out to certain insurers what they may be doing wrong resulting in matters appearing on the 6 month list. Although it is written tongue in cheek, a few truths may strike a familiar cord and stay with the discerning reader.

1. WHAT TO DO WHEN A COMPLAINT IS RECEIVED

a) Do not acknowledge receipt. This will buy you time till you receive a polite enquiry from the Ombudsman. You can then throw your hands in the air and protest that you never received the complaint in the first place.

b) Under no circumstances should you forward the complaint to the relevant business unit. This will lead to unnecessary speedy responses that will frustrate your endeavours. Rather try to put up a weak argument that will keep the Ombudsman off your back for a further few precious weeks.

c) When it is clear from the complaint, and your knowledge of the Ombudsman's thinking, that a decision to reject a specific claim might have been incorrect, under no circumstances concede and instruct the business unit to settle. This will improve your relationship with the Ombudsman causing unnecessary questions about you being too close to the Ombudsman.

2. HOW BEST TO MAKE USE OF UNDERWRITING MANAGERS

The following advice can also be used with reasonable results when dealing with branches and even other departments within the company.

a) When you are cornered by the Ombudsman on why a matter is taking too long, respond by pointing out that you are not to blame as Underwriting Managers/Outsourced Partners etc are involved. Although you are the insurer, you need to make the point that you cannot deal with the matter unless you receive cooperation from the outside party.

b) Do not inform the Underwriting Manager that they should keep you (and thus the Ombudsman) informed of developments on the claim. You will really embarrass the Ombudsman (not to mention extend the life of the complaint) if he is informed by the complainant that the matter under investigation was in fact settled weeks before.

3. WHAT TO DO IF FRAUD IS ALLEGED OR YOU ARE RELYING ON A TECHNICAL EXPERT

a) In the event of a claim that was rejected due to suspected fraud, try to give the Ombudsman as little information as possible. Under no circumstances should you provide investigator's reports or other documentary evidence that will only clear up the issues in dispute.

b) The above also applies in the event of your company relying on a technical expert opinion. By quoting selectively from the reports, you might avoid having to provide the report (and thus all the facts) to the

Ombudsman.

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CLASS OF USE: PRIVATE OR BUSINESS USE?

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When your average "Joe Soap" purchases a motor insurance policy, is he aware of the importance of the answers to questions that he is asked by the Insurance Company or broker?

Often, problems are created for the "man on the street" when numerous, sometimes confusing, underwriting questions are asked, which may have a big impact on either the validity of the policy or alternatively on the validity of a future claim. These questions are normally canvassed either by the Insurer or a broker via a recorded, telephonic conversation or through the completion of an application form.

All too often, incorrect information is provided to the Insurance Company due to the fact that important clauses in the policy are not properly canvassed or explained to clients by either the broker or Insurer.

AN EXAMPLE OF THIS IS WHEN A CLIENT IS ASKED WHETHER HE WOULD LIKE TO INSURE HIS VEHICLE FOR:

1. **Private/Domestic Use; and**

2. **Business Use**

Are Insurers or intermediaries taking the time to explain the difference and the meaning of these two options? When prospective clients complete their application forms, are they being properly assisted? Are clients aware of the inclusions and exclusions printed in their policy booklets?

This article looks at the definition and difference between the above alternatives, with the use of examples from actual policy wordings. The Ombudsman's perspective, when faced with a complaint where claims are repudiated due to the vehicle being used contrary to the Description of Use Clause, will also be considered.

1. **CLASS 1: PRIVATE USE:**

Example of clause: "This confines use to social, domestic and pleasure

purposes, including journeys between home and the permanent place of work. Occasional but not regular use between places of business is allowed."

Commentary: Not all insurance companies allow for limited business use and therefore it is imperative that the Insured reads the policy wording to see what the cover is.

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2. CLASS 2: BUSINESS USE:

Example of clause: "This Class of Use is as for Class 1 but includes usage for business and professional purposes. Business purposes includes if we deem your occupation to require the daily use of the vehicle during business hours."

Commentary: Here the sales representative used in the previous example would have been correctly insured, as she required the vehicle for business usage on a daily basis.

Some insurance policies exclude commercial use from cover and therefore its is imperative that the client read the relevant policy wording under this section to establish what falls within business use and what is classed as commercial use and therefore excluded.

Example:

"Vehicle may only be used for social, domestic, pleasure, business and professional purposes, **EXCLUDING** hiring, carriage of passengers for hire or carriage of fare paying passengers, driving instruction for reward, racing, speed or other contests, rallies or trials or use for any purpose in connection with the motor trade."

The office of the Ombudsman strives to apply fairness and equity when deciding on all matters. The concept of materiality, in accordance with Section 59 of the Short Term Insurance Act, is used as one of the benchmarks in deciding on cases where claims have been repudiated due to incorrect class of use. A further guideline to an equitable approach is that of "causal nexus" or causal link. In other words, we look at whether there is a link between the breach of the policy condition complained of and the actual loss incurred.

The test applied in matters such as these is: "What was the vehicle being used for at the time of the loss?" Each case is looked at individually and all the facts relating thereto are taken into consideration.

Case study:

The Insured, a senior inspector of machinery, was involved in a motorcycle accident on the 21st October 2004 whilst on his way to visit his mother after having completed a survey in Mandini. The policy was issued restricting the use to social, domestic and pleasure. Insurer declined the claim on the basis that the motorcycle was being used contrary to the Description of Use Clause, as it was being used for business.

It was established from the Insured's employer that the Insured arranged that on completion of the survey he would be off-duty, as he wished to visit his mother who resided close to the inspection site. It was while he was travelling to her home that the accident occurred, with a third party failing to stop at an intersection. The Insurer held that this was business use and therefore repudiated the claim.

The Ombudsman disagreed with the Insurer on the use at the time of the accident. It was clear from the information obtained that the Insured had concluded the business for the day and therefore was on his own time when the accident occurred. The Ombudsman advised the Insurer that the critical issue is the use of the motorcycle at the time of the incident and not the use prior to the incident. The claim was consequently settled.

Where an insured has elected to insure a vehicle for private use and fails to inform the insurer that the vehicle is occasionally used for business purposes, Insurers seek to repudiate the claim and void the policy from the inception date due to misrepresentation. This is incorrect, as the insured has not misrepresented

the fact that the vehicle is insured for private use. In the event of the vehicle being used on a business trip, the vehicle would not be covered.

Often, when a claim is repudiated due to misrepresentation, an insurance company seeks to void the client's policy from inception date arguing that they were not informed of the correct risk at the inception of the policy rendering the policy null and void. The Ombudsman's office disagrees with this stance due to the fact that both materiality and causal nexus have to be considered in terms of the Act.

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