

Material misrepresentation and Material non-disclosure at sales stage:

An insurance contract is a contract of good faith which means that at all times both parties must act honestly without any malice or the desire to defraud the other party.

Misrepresentation is defined as the act or offence of giving a false or misleading account of the nature of something.

Non-disclosure is the fact or practice of not making information known.

When concluding an insurance contract, insurers rely on information provided by the consumer at sales stage in order to firstly ascertain whether they wish to accept the policy and secondly, if they agree to accept the policy, then on what terms and conditions.

In order for the insurer to succeed in its rejection of a claim on the grounds of misrepresentation at sales stage, the insurer must demonstrate that:

- a) a clear and concise question was posed to the consumer to which the consumer responded or that the consumer failed to respond to the question;
- b) the consumer's response amounted to a misrepresentation/non-disclosure in that the consumer provided false/misleading information or the consumer failed to provide material information; and
- c) had the consumer provided the correct information, the insurer either would not have accepted the policy or it would have imposed additional terms and conditions to the policy, example an increase in the premium.

Insurance contracts are concluded telephonically, through a signed Proposal Form or an online application form.

In the context of direct marketing where increasingly insurance contracts are being concluded telephonically, our office and the courts listen to the sales conversation in order to determine what information was required and requested by the insurer, and then what information was provided by the consumer. In the case of non-disclosure, we would look at what information was not provided by the insured.

In determining whether the insurer has created a duty of disclosure and whether a misrepresentation has taken place, regard must be had to the manner in which the questions are asked.

When looking at proposal forms and online applications, once again we look at the questions that were posed to the consumer and the answers provided. If it established that there was indeed a misrepresentation/non-disclosure, the insurer must then establish whether or not the misrepresentation was material to its acceptance of the policy. Section 53 of the Short Term Insurance Act provides that the insurer may only reject the claim and/or void the policy if the

misrepresentation is material, i.e. had the consumer provided the correct information to the insurer, either that the insurer would not have accepted the risk or that it would have underwritten the risk on different terms and conditions. Therefore, the fact that the consumer has misrepresented or failed to disclose say for example the colour of his eyes is not sufficient for the insurer to reject the claim or void the policy; the insurer must show that the colour of the consumer's eyes would have resulted in the insurer not accepting the risk and/or charging a higher premium.

Case Study:

The consumer submitted a claim for the loss of his vehicle which was hijacked. The claim was rejected due to a misrepresentation with regard to the consumer's previous claims history.

As per the transcript provided by the insurer, the consumer was asked:

"Okay, any claims in the past three years?" to which the consumer responded "yes" and then went on to explain that it was during June last year. At claims stage, the insurer established that the consumer had failed to disclose 2 other claims, which took place in May and July respectively. The insurer advised that the consumer's misrepresentation was material to its acceptance of the risk as it would have charged a higher premium had it been notified of the consumer's correct claims history.

The consumer pointed out that after giving the details of the June claim, the Advisor should have probed further with regard to the consumer's previous claims.

We advised the insurer that we are in agreement with the consumer. It was clear from the rejection reason that the question which the insurer sought an answer to was "how many claims have you had in the last three years?" If this question had been asked and the consumer responded "one", only then would that amount to a material misrepresentation on the part of the consumer.

The insurer agreed to settle the claim in full.

Within the South African context, language barriers, especially in the case of first time insurance consumers, lead to confusion and misunderstandings on the part of the consumers. Insurers must make an effort to explain concepts such as "claims", "losses", "comprehensive insurance", "regular driver", "principal driver" and "nominated driver", to name but a few, which are commonly used at sales stage. In insurance, these terms denote certain meanings, however, to the lay person these terms are not self-explanatory.

From a consumer perspective, consumers must ensure that they understand the question correctly before providing an answer. In the event that the consumer does not understand the question and/or is unsure of the information which the insurer seeks, the consumer must first seek clarity about the information sought and, secondly, the consumer must advise the insurer that she/he is unsure of the correct answer as the information is either not within his/her

knowledge, or she/he cannot recall the correct answer. Where English is not the consumer's first language, the consumer must request that the conversation be carried out in a language in which she/he is fluent. It is also important not to rush through the conversation as the consumer might not fully comprehend the question being asked and only answer a portion of the question or provide the incorrect response. In these harsh economic times, the premium is an important consideration but it is not the only consideration as having a claim rejected due to misrepresentation/non-disclosure could have even more devastating financial consequences.

It is very difficult for this office to argue against a sales conversation which is clear and concise if the consumer only raises the defence that she/he did not understand the questions being asked long after the fact. Most sales conversations will conclude with the insurer asking the consumer to confirm that she/he has understood the questions being asked and that he/she has provided true and complete information.

If the consumer misrepresents or fails to disclose material facts to the insurer, his/her policy may be cancelled with effect from the start date and the consumer is entitled to receive a refund of all premiums paid since the start date. However, a refund of premiums will not help when the consumer is dealing with his vehicle which has been written off or his home burgled.

The insurer's voidance of the policy in the event of a misrepresentation/non-disclosure also impacts the consumer's insurance experience going forward as the insured will have to disclose the voidance to future insurers in order for them to correctly underwrite the risk and charge the correct premium.

Misrepresentation/non-disclosure at claims stage and insurers reasonable requests:

The consumer's duty to disclose does not end once the cover starts. Consumers are required to inform the insurer of any material change to their circumstances throughout the life of the policy. In the case of a car, such material events may include a change in address, regular driver, number of claims submitted, financial circumstances, including judgements, and so forth. Consumers are also required to be entirely truthful about the circumstances prompting a claim submitted to the insurer for payment. The insurer needs to establish the facts surrounding the loss so as to determine its liability in terms of the policy.

In order to avoid paying fraudulent claims, insurers go to great lengths to thoroughly investigate claims and to validate the information that consumers provide to them during the sales and claims stage. Most claims conversations are recorded and insurers also emphasize the importance of providing true and complete information during the claims process.

The insurer can reject a claim where the insured's version with regard to the circumstances of the loss changes at any stage during the validation of the claim, provided that this information is material to the cover provided by the insurer. For example: where the consumer lied about being with his wife as opposed to his girlfriend immediately prior to the accident will not be considered to be material to his claim for damages to his vehicle arising from the accident.

However, if the consumer lied about being in church as opposed to being in a pub prior to the accident, this misrepresentation would be considered to be material if the insurer has evidence that the consumer was under the influence of alcohol as the policy specifically excludes cover where the consumer drove the vehicle whilst under the influence of alcohol.

Especially in the event of a single vehicle accident on a Saturday night, the insurer will ask the consumer to provide it with authorization to access the consumer's beacons and billings for the night in question, copies of his bank statement for the transactions on the date of loss, medical records, and a report from the tracking company confirming the vehicle's whereabouts on the date of the loss. This information will verify if the consumer was indeed at a religious meeting where no alcohol was being served or at a friend's 21st birthday party.

Consumers go to great lengths to avoid providing information to insurers as they are under the misconception that by requesting this information, the insurer is infringing on their right to privacy. It must be pointed out that all the rights enshrined in the Bill of Rights are subject to limitations, especially in circumstances where consumers have agreed to be bound by the terms and conditions of the policy contract, which provides that the consumer must comply with the insurer's reasonable requests.

Case Study:

The consumer submitted a claim to her insurer following a motor vehicle accident. The consumer's claim was rejected on two grounds:

1. Fraud or dishonesty – consumer misrepresented that she was driving the vehicle at the time of loss.

The consumer contended that she was driving the insured vehicle at the time of loss whilst a witness at the scene advised that he saw a male emerge from the driver's seat. The independent witness on the scene said that he witnessed the accident and he was the first person to approach both vehicles after the accident. This witness confirmed that a male emerged from the driver's seat. Unlike this witness, the third party driver did not see who emerged from the driver's seat of the vehicle.

The consumer also advised that on the night of the incident, she left her premises at 19h00 however, CCTV footage did not show her leaving her complex between 18h45 and 20h33. In light of the above discrepancies, the insurer requested the consumer's bank statements and beacons and billings in order to confirm her whereabouts prior to the incident.

2. Failure to comply with a reasonable request – the insured failed to provide the insurer with her bank statements and her beacons and billings.

It is reasonable and necessary for the insurer to validate the claim in light of the circumstances surrounding or related to the incident, specifically the identity of the incident driver.

The insured did not provide the insurer with her bank statements and her beacons and billings which is in breach of her obligations in terms of the policy. In the circumstances, the insurer is entitled to reject the claim.

OSTI's approach to Misrepresentation at sales stage and claims stage:

If the insurer has rejected the claim due to a misrepresentation at sales stage, then we would listen to the sales conversation in order to establish whether a duty of disclosure had been created, if the consumer had misrepresented certain information or failed to disclose certain information and lastly that the misrepresentation was material to the insurer's acceptance of the policy.

Where the question was not correctly asked, the insurer is asked to settle the claim in full.

In the case where there has been a change in circumstances after inception of the policy which the consumer failed to disclose to the insurer, the insurer would be legally entitled to reject the claim in full. However, under such circumstances, OSTI will ask the insurer to settle the claim on a proportional basis, less the percentage of its premium prejudice. This principle is in line with OSTI's equity jurisdiction which allows for a proportional settlement of the claim where the misrepresentation/non-disclosure is considered to be unintentional. If the misrepresentation is intentional / fraudulent, OSTI will uphold the insurer's rejection of the claim and voidance of the policy.

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