

Newsletter

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There are two main reasons claims are contentious or in some cases denied.

Having a claim is stressful, and you expect that having dutifully paid premiums for many years that the insurance product will work. Unfortunately many insurance claims end up being contentious and/or combative, and there are two key reasons for this. This month we examine one of those reasons: arguments over non-disclosure and misrepresentation.

I'm not a lawyer so I won't go into technical detail, but I'll attempt to summarise the key issues:

1. An Insurance company makes a decision to underwrite your risk based on the information you provide.
2. You have a duty under the Insurance Contracts Act to disclose to the insurer, before the contract of insurance is entered into, every matter that
 - (a) you know to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
 - (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.
3. The duty of disclosure does not require the disclosure of a matter:
 - (a) that diminishes the risk;
 - (b) that is of common knowledge;
 - (c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or
 - (d) where the compliance with the duty of disclosure is waived by the insurer (i.e. where you failed to answer a question in a proposal form or gave an obviously incomplete or irrelevant answer to; and the Insurer did not chase it up);
4. You have a duty not to misrepresent any facts / statements.

5. If you fail to comply with the duty of disclosure or made a misrepresentation to the insurer there are three possible consequences:

- (a) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract. In other words, cancel the policy.
- (b) If the insurer is not entitled to avoid the contract (e.g. it was an innocent non-disclosure), the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made.

For example, an Insurer may argue that “had we known ‘abc’ we would have added exclusion ‘xyz’ to the policy and therefore our liability for this claim would have only been ‘\$’”[in some case liability can be reduced to \$0].

- (c) There is no impact where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into.

6. How do you know what is relevant to advise the Insurer? Well, you have to use your judgement and common sense. Unfortunately there is no ‘master list’ of items that you must disclose, although you can get an idea what an Insurer is interested in by the nature of the questions they ask in the proposal form.

Sometimes it’s not as easy as it sounds – the Insurer may ask a question only allowing for a ‘Yes or No’ response. However, in reality it may be more of a ‘Yes and No’ answer. If you answer it definitively one way, and a claim occurs that relates to that question, you can rest assured that the Insurance company will focus on your response and highlight any discrepancy.

I advise my clients that if you are in doubt as to whether you should or should not disclose something to an Insurer, then be conservative and disclose. In the example provided above, the best way to deal with this would be to take some extra time and explain (in a separate document if necessary) why it is both yes and no. At the end of the day the cost of disclosing (time and effort) far outweighs the consequences of not disclosing.

7. Be careful if you are looking at alternative Insurers. What you may have disclosed to your current Insurer a few years ago and be on their file, will probably need to be disclosed again to any potential new Insurers. This is particularly relevant in light of the current available policy wordings - which often restrict cover for matters disclosed in the current Submission (i.e. your current proposal form and attachments) and may not automatically pick up past information/activity.

8. This may all sound obvious. However, the issue of non-disclosure and misrepresentation is one of the main protagonists in contentious and disputed claims.