

Duties of disclosure in consumer insurance

CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) ACT 2012

This Act, which came into force on 6 April 2013, changed a consumer's duty of disclosure in taking out or renewing an insurance contract, and the insurer's remedies if that duty is breached. Insurers are not able to contract out of the Act.

WHO IS A CONSUMER?

A consumer is an individual who proposes to, or who does, enter into a consumer insurance contract, that is, one that is wholly or mainly for purposes unrelated to the individual's trade, business or profession.

DUTY OF DISCLOSURE

The Act abolished the duty of disclosure in consumer insurance contracts. Previously, a consumer was subject to a duty of good faith, which required the consumer to volunteer material information to the insurer when taking out or renewing an insurance contract.

Now the consumer's duty is to **take reasonable care not to make a misrepresentation** (note that a failure to reply to an insurer's request to confirm or amend information previously given can also be a misrepresentation).

Whether or not a consumer has taken reasonable care not to make a misrepresentation will be determined in the light of all the relevant circumstances. The Act provides the following examples of factors which may need to be taken into account when making such a determination:

- the type of consumer insurance contract in question, and its target market;
- any relevant explanatory material or publicity produced or authorised by the insurer;
- the clarity and specificity of the insurer's questions;
- if an individual fails to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, the clarity with which the insurer communicated the importance of answering such questions (or the possible consequences of failing to do so); and
- whether or not an agent (eg a broker) was acting for the consumer (the Act sets out factors to consider in determining whether an agent is the agent of the consumer, or the insurer).

The standard of care is that of a reasonable consumer. If however the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, these will be taken into account.

If a consumer makes a misrepresentation **dishonestly**, it will always be considered as showing lack of reasonable care.

In respect of life insurance contracts, there is also a **duty imposed on the person whose life is being insured** – prior to the Act, if a consumer took out insurance on another person's life, the person whose life was insured did not normally owe a duty of care about the information provided, as they were not a party to the contract. The Act changed this, so that the person whose life is being insured has a duty to take reasonable care not to make a misrepresentation when answering the insurance company's questions.

INSURER'S REMEDIES ON BREACH

If the consumer is in breach of his or her duty to take reasonable care not to make a misrepresentation, the insurer will have a remedy only if it can show that without the misrepresentation it would not have entered into the contract (or agreed to the variation), or would have done so on different terms. The remedies available to the insurer will depend on whether the misrepresentation was deliberate or reckless, or careless.

If the insurer can show that the consumer's **misrepresentation was deliberate or reckless**, the insurer can treat the contract as if it never existed, refuse all claims, and retain any premiums paid (unless it would be unfair to the consumer to retain them). A misrepresentation is deemed to be deliberate or reckless if the consumer knew that, or did not care whether, it was untrue or misleading; and either knew that, or did not care whether, the matter to which the misrepresentation related was relevant to the insurer. Unless the contrary is shown, a consumer is considered to have the knowledge of a reasonable consumer and to know that a matter about which the insurer asks a clear and specific question is relevant to the insurer.

If the consumer made a **careless misrepresentation**, that is, one which he or she genuinely believed to be true but did not take sufficient care to check the facts, then:

- if the insurer would not have entered into the contract if it had known the truth about the misrepresentation, it may refuse all claims, but it must return any premiums;
- if the insurer would still have entered into the contract but on different terms, the contract may be taken to include those different terms; and
- if the insurer would have entered into the consumer insurance contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.

The Act also provides that where a member of a group insurance policy makes a representation, it will have consequences for the cover of only that member, and not for the policy as a whole.

ABOLITION OF BASIS OF CONTRACT CLAUSES

The Act abolished the use of "basis of contract" clauses in consumer insurance contracts.

Under a basis of contract clause, a person who applies for an insurance contract warrants the accuracy of their answers on the proposal form, and agrees that such answers will form the basis of the contract. This elevates all the answers from the status of representations to that of warranties, with the effect that an insurer may avoid liability under the contract for an inaccurate representation, even if the representation was not material and did not induce the insurer to enter into the contract. The abolition of basis of contract clauses means that insurers are less able to avoid liability for inaccurate representations.

Insurers are still able to include specific warranties in consumer insurance contracts, but they will be valid only if they are fair within the meaning of the Consumer Rights Act 2015.

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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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