

The Law Commission – Misrepresentation and Non-Disclosure Money Marketing (October 2006)

With the Law Commission and the Scottish Law Commission taking an interest in the effect of non-disclosure on claims it is quite likely that in the not too distant future we will see a step change in the way non-disclosure, the single most important issue facing the protection industry, is dealt with.

Whilst no fixed decisions have been reached, the Law Commission has published an 'Issues Paper' on the subject of 'Misrepresentation and Non-Disclosure' which includes a number of tentative conclusions and proposals. The Issues Paper is designed to stimulate discussion and debate and is well worth a read (www.lawcom.gov.uk/insurance_contract.htm).

In the last couple of weeks we have seen some insurers react to the publication, and in a number of ways. Some argue that the changes proposed are needed to help build confidence in our market. Others suggest that a number of the recommendations are already largely in place, albeit on a voluntary basis. Others apparently don't see the need for change. What I am certain of is that we could all benefit with an injection of clarity and it is the Law Commissions view that this is best dealt with by statute.

Fundamental changes are proposed and it is in the interest of all active in the protection market to understand these. The authors view is that the basis of 'utmost good faith' in insurance has developed unevenly and that there is confusion around non-fraudulent misrepresentation and non-disclosure. The proposed remedy is to shift the onus from customers having to make full disclosure, to the insurer having to collect all information it deems relevant.

The practical implementation of this is that when it is obvious a customer has been unable to answer a question fully, and where an insurer has collected consent to collect a GPR, then the customer should be able to rely on the insurer collecting the additional information from the GP, if it deemed it necessary. If the insurer does not collect the additional information, then in the eyes of the law the insurer will have waived its right to such information. The document also proposes this 'waiver' will be deemed to be in effect if the insurer fails to ask a specific and clear question about a particular matter it would want to use when considering a claim. It goes on, where a material fact is not disclosed by the customer, then the proposal is that it would be for the insurer to show that the customer appreciated the significance of the fact or that a 'reasonable insured' would have. Even where an insurer can show negligent misrepresentation by the customer they may still have to make a proportionate payment, except only where such a disclosure would have meant the specific element of cover would have been excluded or that cover would have been declined altogether.

As I said fundamental changes, so what can we expect all this will mean to us?

If these changes come about, and I think they will, then insurers are going to have to pay more claims which will mean they will have to increase premiums to cover their costs and best guesses today peg these at around 15-20%. Whilst there are some obvious downsides to such a move in price the longer and more deeply I think about this the more I am inclined to believe that overall, it would be a good thing.

Of course other things will change too; I expect we will see even longer application forms and insurers are bound to ask for more GPRs, which in turn will slow the application process further, frustrating us all.

Life companies are likely to follow their GI counterparts in developing a register of claimants, probably with attaching reference to any associated broker as they look for the possibility of intermediary influenced behaviour.

The changes will lead to increased non-disclosure and yet inevitably to an improvement in our markets reputation. However this will take time to unwind as we still have a few years of embedded unpalatable statistics and bad news stories to come.

By Richard Verdin, Sales & Marketing Director, Direct Life & Pensions Ltd

