

The 2003 Casebook

The Casebook for the 261 complaints investigated between 1 January 2003 and 31 December 2003 is now available.

While the ISO strives for consistency in decisions issued by this Office, it is important to recognise that individual case summaries do not set precedents. Each case is considered on its facts in accordance with the law, any applicable Code and good insurance practice.

We have included an order form in this *Assessment*, which can be posted or faxed back to us. (Please note that each Participant and nominated consumer groups will receive 1 copy free of charge).

Useful Consumer Information

Personal Superannuation Plans - Withdrawals and Transfers

Periodically the ISO Office receives enquiries from consumers who are members of a Personal Superannuation Plan ("Plan") registered under the Superannuation Schemes Act 1989 ("the Act"), who have had requests to withdraw funds from the Plan declined. Often this relates to a request for a payment to be made before the Plan member reaches a specified age and is generally described as a withdrawal request during the locked-in period.

Although the precise details vary from Plan to Plan, the usual circumstances in which a benefit can be paid to a member before the end of a locked-in period include early payment on: the death of the member; the total and permanent disablement ("TPD") of the member; the permanent emigration of the member; and grounds of financial hardship.

The ISO's ability to resolve this type of complaint is generally limited. This is because it is usual for the Plan's trust deed, which governs the operation of the Plan, to give the trustee absolute discretion to pay a benefit on grounds of TPD, permanent emigration or financial hardship. Where this is the case, the ISO has no power to influence a Plan trustee in exercising its discretion.

In some situations, the amounts involved are small. The end result is that the consumer stops paying because of dissatisfaction with the company, which is then left to administer an individual Plan account with a small balance. This is generally not in either party's best interests, but the Plan trustee is required to work within the provisions of the relevant Plan trust deed.

The ISO Office also receives enquiries from consumers who have had requests to transfer funds from a Plan to another Plan or another registered superannuation scheme ("Scheme") declined. This can be because the lock-in arrangements in the alternative Plan or Scheme are considered to be less stringent than those applying in the current Plan. If the Plan's trust deed gives the trustee absolute discretion to approve the transfer, the ISO is unable to influence the trustee's exercise of its discretion.

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In this publication, the Insurance & Savings Ombudsman is referred to as the ISO. In the case studies, the letter "P" is used to denote Participant and "C" to denote Complainant.

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In some cases, a transfer request can be declined because the Plan's trust deed only permits funds to be transferred to another Plan or Scheme which is administered by the same company. This causes frustration for consumers who, for a variety of reasons, may want to transfer to a Plan or Scheme provided by another company, but cannot do so. However, provided the trustee has complied with the Plan's trust deed provisions, the ISO cannot require it take a different course of action.

Unfortunately, there is very little the ISO can do to assist consumers with complaints which relate to the trust deed provisions governing the operation of a Plan. Complaints can, however, be made to the Government Actuary in certain limited circumstances. (The Government Actuary's concern is limited to determining if the Plan's trustee has acted in accordance with the Act and the Plan's trust deed. In respect of the examples described above, the Government Actuary would therefore be in the same position as the ISO and be unable to assist.)

For more information about making a complaint to the Government Actuary, contact:

Government Actuary
Insurance & Superannuation Unit
Ministry of Economic Development
PO Box 10 867
WELLINGTON

Telephone: 04 913 3651
Fax: 04 913 3652
Email: isu@isu.govt.nz
Website: www.isu.govt.nz

Motor Vehicle Valuations

The ISO Office considers a number of complaints relating to the pre-accident market value of a vehicle, established by the insurer following the vehicle being declared a total loss. This might be because the vehicle was stolen and not recovered, or stolen and recovered in an extensively damaged condition. The vehicle might also have simply been uneconomic to repair following a collision.

Most motor vehicle insurance policies provide for a vehicle's pre-accident market value to be the basis of settlement, if a vehicle is declared a total loss. However, it is reasonable for policyholders to assume that their motor vehicle policy will enable them to replace the vehicle (which has been stolen or damaged beyond economic repair) with a similar vehicle. Therefore, it is important that insurers make a reasonable assessment of a vehicle's pre-accident market value before settling on this basis.

To establish a vehicle's pre-accident market value, an insurer will usually obtain 2 independent valuations. These valuations are often called into question by the policyholder, because the amounts indicated fall short of the vehicle's sum insured or the policyholder's expectations regarding the vehicle's value. While it is open to policyholders to obtain their own valuation, this is often an area where policyholders feel they are being "ripped off" by the insurer.

Many policyholders are surprised by the pre-accident market value established for their vehicle. Some policyholders incorrectly assume that they will receive the amount the vehicle was worth (or insured for) when they first arranged the insurance, regardless of the vehicle's actual market value at the time of the incident giving rise to the claim.

It is reasonable to expect that, in providing the pre-accident market valuations, the valuers have consulted the normal trade guides and allowed for any variance from the norm in the vehicle's odometer reading, its overall condition and any modifications which might have added value. Often, however, valuers are unable to inspect the vehicle (e.g. when it has been stolen and not recovered).

Case Study 1

In 1990, C became a member of a superannuation plan operated by P ("the plan").

In 1991, C increased his contributions to the plan.

In 2001, C asked P to transfer his plan benefits to a superannuation scheme he had arranged with a different company ("the scheme"). This request was declined, because the scheme permitted a retirement date which was earlier than provided in the plan.

C believed he should have the freedom to choose which company provided his superannuation benefits and wanted to consolidate all his superannuation benefits in the scheme. C wanted to know if P could legally decline his request.

The applications C completed when he joined the plan included an agreement that he would be bound by the provisions of the plan's trust deed. The plan's trust deed included various constraints on withdrawal before C's 60th birthday, but permitted benefits to be transferred to another registered superannuation scheme. This was provided that benefits in the new scheme could not be withdrawn at an earlier date than were permitted in the plan's trust deed.

After examining the 2 trust deeds and the various deeds of amendment which had been executed, the Case Manager concluded that the scheme's trust deed did not satisfy the requirement that benefits could not be withdrawn at earlier dates than were permitted by the plan's trust deed. Consequently, it was decided the plan's trustee had acted in accordance with the plan's trust deed provisions in declining to transfer C's benefits in the plan to the scheme.

Although C believed he should have the freedom to choose which company provided his superannuation benefits, the plan's trustee was required to adhere to the plan's trust deed provisions and the ISO was unable to require the plan's trustee to act outside the scope of those provisions.

Complaint not upheld

Many policyholders are bewildered when they learn that they are to receive much less than the sum insured, taking into account the vehicle's sum insured and the fact they have been paying premiums on the sum insured.

Invariably, policyholders also believe it is the insurer's responsibility to adjust the sum insured at each renewal to accurately reflect the vehicle's market value at that time. While some insurers do attempt to do so, this can never be entirely satisfactory, because the insurer does not actually see the vehicle and is not in a position to assess its condition. The policyholder is in the best position to establish the vehicle's market value at any given time and, therefore, should take the responsibility for doing so, particularly prior to the annual renewal of the insurance on the vehicle.

It is also true that, while the sum insured may be a component in the insurer's premium calculation, many other factors are involved, including: make and model of the vehicle; year of manufacture; automatic or manual; sedan or wagon; import or NZ new; where vehicle is domiciled; type of use; vehicle garaged or not; no claim bonus status of driver/s; and age of driver/s.

Vehicle owners will often have a strong sentimental attachment to their vehicle. This, together with the value they attribute to their vehicle (in terms of usefulness, reliability etc.), means vehicle owners may sometimes have difficulty in accepting a fair valuation. For example, vehicle owners who have added special features and accessories, or carried out significant modifications, might dispute whether the insurer's valuation would allow them to purchase a vehicle as desirable as the one stolen or written-off.

However, it is important to note that special features may not substantially add to a vehicle's market value and, in some extreme cases, they may actually reduce a vehicle's market value.

Specific Disclosure Issues

It is impossible to identify all of the information a consumer should disclose to an insurer when arranging a new policy or renewing an existing policy.

Most insurers ask a range of questions in an insurance application in order to obtain sufficient information. When an insurer asks for information about a consumer on an application, it does so in order to assess what sort of risk he/she represents and whether, on the basis of the information provided, it is prepared to make an offer of insurance. The consumer is obliged to clearly and accurately inform the insurer about all of the important information relating to the proposed insurance. This is referred to as the duty of disclosure.

A consumer must tell the insurer everything material to the insurance cover sought. A fact is material if it would influence the mind of a prudent insurer in deciding whether or not to accept an application for insurance and, if so, on what terms ("the materiality test"). Whether a particular fact is material depends upon the circumstances of the case and is a question of fact.

For a consumer, there is a problem with the materiality test, because it is determined by what a prudent insurer¹(as opposed to a consumer) considers material. Therefore, it is not always possible for a consumer to know or understand what sort of information a prudent insurer might want to have the opportunity to assess on an application.

If an insurer establishes that a consumer failed to disclose material information on the application or at renewal of a policy, the insurer is entitled to avoid the contract from that date. When a policy is avoided from commencement ("ab initio"), the contract is treated as though it never existed and this can affect other claims which a consumer might have made under the policy, prior to the avoidance.

¹ See: *State Insurance Ltd v Brightwell* (16 August 2001) unreported, High Court, Hamilton Registry, AP 29/01, 11.

Case Study 2

C's 1992 Holden Commodore Utility vehicle was insured with P. The vehicle was stolen and C made a claim to P in respect of the loss.

P accepted the claim and offered to pay the market value of the vehicle, which it established at \$13,000, less the \$3,000 policy excess.

C argued that the vehicle was insured on an agreed value basis rather than a market value basis. C also disputed the market valuation provided by P and believed the vehicle was worth about \$20,000, the amount he paid for the vehicle.

The Case Manager found that the vehicle was insured for its market value, rather than an agreed value established when the policy was arranged. The documentation provided by P was quite clear in this regard.

The Case Manager obtained 2 further valuations for the vehicle, which placed its market value at between \$10,000 and \$11,500 depending on its condition. Based on this evidence, the Case Manager believed P's settlement offer of \$13,000, less the excess of \$3,000, was very reasonable.

The Case Manager discussed this with C who accepted P's offer.

Complaint not upheld

Case Study 3

In February 1998, C insured his house contents with P. The policy was renewed annually. In November 2000, C's house was burgled. C made a claim to P for the stolen property. P appointed an assessor to investigate the claim and discovered that C had been declared bankrupt approximately one year prior to the claim.

P declined the claim and avoided the policy from renewal, for non-disclosure of C's bankruptcy.

After consulting with several other underwriters, the Case Manager believed that, by itself in these particular circumstances, bankruptcy was not a material fact. It would not have influenced the mind of a prudent insurer in deciding whether or not to renew the policy and, if so, on what terms. P had no proper basis on which to avoid the policy from renewal.

Complaint upheld

The current law does not distinguish between innocent and blameworthy non-disclosure, which means that even unintentional non-disclosure entitles an insurer to rely on its legal right to avoid the contract. Unfortunately, the state of the current law accentuates the consumer's difficulty with the materiality test and, in some circumstances where the non-disclosure is clearly unintentional, the insurer's right to avoid the contract may be considered to be too harsh.

Naturally, some of the information which the insurer requests on an application will be specific to the nature of the insurance involved. For example, information about the respective ages and driving histories of the expected drivers of a vehicle is very material to motor vehicle insurance. In contrast, some information is likely to be material to all insurance cover. This includes a consumer's claims history and whether or not he/she has been charged or convicted of any criminal offence.

There are, broadly speaking, 2 categories of facts which must be disclosed to an insurer: those which relate to the "moral hazard" presented by the insured's "moral character" and, those which relate to the physical risk. These facts are matters which an insurer requires when evaluating whether or not to underwrite the risk and, if so, on what terms.

Material facts relating to the "moral hazard" may include, but are not limited to:

- convictions (criminal and/or traffic);
- previous losses (irrespective of whether a claim was made);
- claims history;
- whether any insurance has been declined, cancelled or avoided from commencement;
- whether the applicant is engaged in any unlawful occupation; and
- whether the applicant is/has been bankrupt.

Material facts relating to the physical risk may include, but are not limited to:

House

- whether the property has any unusual design features or materials used in its construction;
- whether the property is/to be tenanted;
- whether the property will be unoccupied for periods of time;
- a fair assessment of the value of the property;
- a proper description of the size of the property;
- whether the property is exposed to any particular hazard by virtue of its location (e.g. flood);
- whether the property is going to have major alterations or renovations;

Vehicle

- make and model of the vehicle;
- any modifications which increase the risk of the vehicle being stolen;
- any modifications which affect the safety, speed and/or performance of the vehicle;

House and Vehicle

- how the property/vehicle will be used; and
- any security measures in place.

On a Lighter Note...

Larry and Susan's barn burned down. Susan called their insurer immediately to make a claim and said, "We had that barn insured for \$50,000 and I want my money". The bewildered Customer Services Officer replied, "Whoa there Susan! Your policy doesn't work like that. We will ascertain the pre-loss market value of the old barn and provide you with a replacement of comparable worth".

Susan pondered this and after a long pause, she replied, "I'd like to cancel my husband's life policy, thanks".

Case Study 4

In August 2002, C arranged insurance for his house with P. Four days later, the house was destroyed by fire. C made a claim to P for the loss.

During P's investigation of the claim, it established that C had an extensive criminal history and the house had been burgled the day before he arranged the insurance. P avoided the policy from inception, on the basis that neither C's criminal history nor the burglary had been disclosed when the insurance was arranged.

C argued that he had told the bank officer about his criminal convictions and the burglary. C also argued the bank officer's comments led him to believe that the information regarding his criminal convictions and the burglary was irrelevant to obtaining house insurance and did not need to be included on the proposal.

An insured has a common law duty to disclose all information which would be considered material. Information is material if it would influence a prudent insurer in deciding whether to accept a proposal for insurance and, if so, on what terms.

The questions on the proposal about criminal convictions and prior loss were quite specific in their intent, requiring the disclosure of "any loss (whether or not a claim was made) on home or contents in the past 5 years" and "further information that may affect the acceptance of this insurance? (for example - ...criminal activity or associations or convictions; or any circumstances giving greater than normal risk of loss...)".

While C disclosed his traffic convictions, no criminal convictions or details about the burglary were recorded on the proposal. C signed the declaration acknowledging all of the information he had provided was correct. There was no independent evidence to support C's position that he told the bank officer about his criminal convictions or the burglary.

The Case Manager presented the fact situation (with identifying details omitted) to another underwriter, who said that if he had been told about C's criminal history, it would have declined to offer insurance cover.

Having regard to all the evidence, the Case Manager believed P was entitled to avoid the policy from inception and decline to consider the claim, on the basis that C failed to disclose material information when the insurance was arranged.

Complaint not upheld
