
**TRANSPARENCY, TRUST AND SECURITY: AN EVALUATION OF THE
INSURER'S PRECONTRACTUAL DUTIES**

D Millard*

B Kuschke**

SUMMARY

Transparency in insurance law attaches to the rights and duties of the parties, the relationships between insurers, insurance intermediaries such as agents and brokers, insurance supervisory law and insurance dispute resolution procedures. Regarding the rights and duties of the insurer and the prospective policyholder, it requires insurers to disclose precontractual information in a timely manner that is clear, understandable, legible and unambiguous. Transparency as a value is incredibly important in insurance contracts.

This contribution focuses exclusively on the insurer's duty of disclosure during precontractual negotiations. Although the insured's duty of disclosure has enjoyed more attention in the past, the duty clearly applies to the insurance proposer as well as the insurer. The purpose of this contribution is to evaluate the nature and extent of the insurer's transparency duties as informed by both common and statutory laws.

The insurer's duty is derived primarily from the statutory rights of access to information in accordance with the provisions of the *Constitution of the Republic of South Africa* and the *Promotion of Access to Information Act*. It is furthermore supported by specific insurance consumer protection law found in the detailed provisions on mandatory disclosures in the *Financial Advisory and Intermediary Services Act*, the *Long-term Insurance Act*, the *Short-term Insurance Act* and, finally, the Policyholder Protection Rules issued in accordance with these acts. Strict rules on advertising can be found in the General Code of Conduct issued under the FAIS Act.

* Daleen Millard. BIur LLB LLM (UP) LLD (UJ). Professor of Private Law, University of Johannesburg. Email: dmillard@uj.ac.za.

** Birgit Kuschke. BLC LLB (UP) LLD (UNISA). Associate Professor of Private Law, University of Pretoria. Member of The Presidential Council of The International Insurance Law Association (*Association Internationale du Droit des Assurances*). Email: Birgit.Kuschke@up.ac.za.

The Act furthermore specifically targets the activities of insurance intermediaries in precontractual disclosures. The fact that insurance products and services have been exempted from the scope of the *Consumer Protection Act* from 28 February 2014 should not diminish the insured's right to rely on universal consumer protection principles as envisaged by South African insurance legislation.

The insurer's duty to disclose is in the last instance also derived from the common law duty not to make misrepresentations by commission or omission. When negotiating an insurance contract, the insurer's duty to speak is not based on a general requirement of *bona fides*, but is recognised as an *ex lege* duty due to the involuntary reliance of the prospective insured on information supplied by insurers in the market. A lack of transparency should lead to the insurer's accountability. A failure to disclose material information or a disclosure of false information that goes to the root of the matter and that induces the prospective policyholder to buy the insurance product is recognised as an actionable misrepresentation. Statutory provisions do not diminish the common-law duty not to make misrepresentations, but provide details of the nature and extent of the information duty to provide clarity and legal certainty in the determination of the standards of transparency required in law.

In addition, statutes provide for enforcement actions by regulators, orders that could affect the licence of the insurer and provide for punishable offences and penalties. In terms of common law, a misrepresentation by omission or commission renders the insurance contract wholly or in part voidable. The policyholder may decide to rescind the contract and claim restitution. He may also, in conjunction with rescission, or as an alternative when deciding to maintain the contract, claim delictual damages or even constitutional damages when judged by a court of law as appropriate relief. Statutory remedies include a monetary award by the Insurance Ombud. Even though such an award is capped at R800 000, it is submitted that it is preferred to a civil law damages claim.

KEYWORDS: Transparency, Insurance Law, Insurer's pre-contractual duties, *Financial Advisory and Intermediary Services Act 37 of 2002*, Policyholder Protection Rules in terms of the *Long-term Insurance Act 52 of 1998* and the *Short-term Insurance Act 53 of 1998*.