



Effective Communication:

How to Reduce your Exposure to Legal Liability

Presented by:



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Introduction

- Communicating Claims and Underwriting Decisions
- Avoiding Claims for Interest
- Legal Professional Privilege and 'Without Prejudice' Communications
- Telephone Underwriting including Case Study



Communicating Claims and Underwriting Decisions

Procedural Fairness and Communicating Decisions in TPD Claims

- Duty of Good Faith requires insurer to disclose adverse materials and provide an opportunity for response
- Duty arises in circumstances where insurer is “judge in the insurer’s own case” (ie. Where opinion clause is present)
- Breach of Duty allows Court to step in and fill the decision making role of the insurer



Communicating Claims and Underwriting Decisions

Procedural Fairness and Communicating Decisions in TPD Claims (cont.)

- Duty falls on insurer not trustee so communication with trustee in Group Insurance is vital.
- Your file notes should show:
 - You have considered the correct question
 - You have considered appropriate evidence
 - You have not considered extraneous or irrelevant evidence
 - You have had due regard to the interests of the insured
 - That the decision you have reached is reasonably open to you on the evidence



Communicating Claims and Underwriting Decisions

Procedural Fairness and Communicating Decisions in TPD Claims (cont.)

- Letters of Decline
 - Provide reasons
 - Cite correct definition of TPD
 - Confirm all evidence was considered
 - Provide explanation where there is conflicting evidence
- On review, assess if claimant falls within TPD definition and provide claimant with opportunity to respond. (*Dumitrov v SC Johnson + Sons (2006) NSWSC 1372*)



Communicating Claims and Underwriting Decisions

Underwriting Decisions

- Actual underwriter should give retrospective underwriting opinion where possible
- Opinion should follow the relevant guidelines and be consistent with other proposals (see FOS Decision no. 16733)



Communicating Claims and Underwriting Decisions

Underwriting Decisions (cont.)

- Case Example – FOS Decision no. 16733
- Insurer declined death benefit for non-disclosure of malignant glioma
- Medical evidence submitted to FOS left open possibility that deceased was originally diagnosed with benign tumour
- In its submission, insurer failed to identify where in the guidelines it confirmed 'decline' for benign or malignant tumour
- *“The Panel notes it is insufficient for a member to simply provide underwriting guidelines without interpreting them, or explaining the steps taken to arrive at the decline decision.”*



Communicating Claims and Underwriting Decisions

Fraud Claims

- Before denying claim communicate with insured by letter or interview and invite explanation
 - Shows good faith
 - May strengthen your case
 - Could prevent costly mistake if insured has plausible explanation for conduct
- Ensure your agent “stacks up” in non-disclosure cases and obtain signed statements from agent where possible
- Gather and record information on your file to ensure you have evidentiary material for a sustainable decision.



Communicating Claims and Underwriting Decisions

Fraud Claims (cont.)

Case example – *Boekenstein v Tyndall (NSWSC 1997)*

- Claim denied for fraudulent misrepresentation of pre-inception income
- Insured alleged he didn't understand question in proposal and disclosed only 'gross' income when proposal asked for income less expenses.



Communicating Claims and Underwriting Decisions

Fraud Claims (cont.)

Case example – *Boekenstein v Tyndall (NSWSC 1997)*

- Insured's evidence at trial contradicted assessors version of events but Judge accepted the assessor *“as a reliable witness and... accepted the contemporaneous notes she made as being accurate”*.
- Decision illustrates that where credibility as a witness is at stake file notes are essential and can be vital to the defence of your case at Court or FOS

Section 57 of the ICA

Interest will be payable from “*the day as from which it was unreasonable for the insurer to have withheld payment*” to the date the payment is in fact made.

Preferred interpretation of s57

- Requires the courts to assess whether it was reasonable for the insurer to refuse payment of the claim at any given time, taking into account the information that was before it

Alternative interpretation of s57

Sayseng v Kellogg Superannuation Pty Ltd [2007] NSWSC 583

*“the question of reasonableness is to be judged by reference to the true position in respect of the claim [ie. that the Plaintiff was TPD] with allowance to be made for the insurer to have **a reasonable period of time within which to investigate the claim** and to consider its position”*

Avoiding claims for interest

Courts have imposed their own views of what a reasonable time is for the insurer to investigate life insurance claims

- *Sayseng*: 10 months after receipt of the claim (but before proof of age had been provided)
- *Triffitt*: date of first decision in 2001, despite the fact that claim accepted based on additional materials only provided in 2007
- *Philips v TOWER*: 30 days from date of initial disablement – although claim had not yet been lodged by that date
- *Nino*: 3 months after receipt of claim

Avoiding claims for interest

Effective file management can help show the court why it was reasonable not to make payment of the claim

- Maintain order - anyone should be able to pick up your file and quickly work out the sequence of events
- Place all documents received on the file and date stamp them – consider creating an ‘evidence log’
- Make file notes regarding the evidence that you receive stating why you believe additional evidence is required if the claim is not admitted

Avoiding claims for interest

Proactive file management can demonstrate what is a reasonable time in which to assess the particular claim

- Proactive file management – don't let letters sit on your desk or emails sit in your inbox
- Regular file reviews – set up a reminder system to request outstanding information
- Do your homework – make sure you are contacting the right person or department within the right organisation
- Phone a friend – making a telephone call to the right person can sometimes get faster results than sending an email or letter

Avoiding claims for interest

Effective communication between insurers and trustees will ensure the claim is dealt with swiftly and fairly

- Maintain open communications
- Agree on critical times for review of the claim based on time elapsed from receipt of the claim
- Provide/request regular updates on the progress of the claim
- Implement a communications strategy – eg. centralised points of contact between the insurer and trustee

Compromised claims

- Take detailed file notes of your settlement discussions with the claimant or their solicitors
- If you compromise a claim consider, where appropriate, obtaining a Release covering interest

Avoiding claims for interest

Summary

- Your first aim should be to ensure that all relevant documents are received and properly reviewed and documented and a realistic assessment of the claim is made and recorded
- Your second aim is to demonstrate that claims are being proactively managed, and provide a basis from which the insurer (and trustee) can demonstrate what is a reasonable period of time for the investigation of a particular claim

Legal professional privilege

- All relevant evidence will be subject to compulsory court process
 - Discovery (the production of documents by the parties)
 - Subpoenas (the production of documents or presentation of oral evidence to the Court by third parties)
 - Interrogation (answering written questions on Affidavit)

Legal professional privilege

- Legal professional privilege is the common law right to protect oral or written communications from disclosure if they:
 - passed between an individual/company and their/its legal advisers;
 - are for the dominant purpose of obtaining legal advice, or for use in actual, pending or reasonably anticipated legal proceedings; and
 - are confidential.



Legal professional privilege

Avoiding conduct which may waive privilege

- When communicating to the claimant avoid advising them about any legal advice you have received
- Do not quote the contents of your legal advice in correspondence to the claimant
- When providing copies of legal advice to reinsurers, expressly state that you maintain privilege over the advice



Legal professional privilege

General Tips

- Clearly mark all your communications with your legal advisers
- Clearly record that your communication is with a legal adviser - do not just use abbreviations or names
- Record communications with your legal advisers on separate file notes, not within the body of your file notes
- Ensure your legal advisers mark their name and position on any communications to you

- Evidence of admissions made by the parties in the course of genuine negotiations to settle an existing dispute is privileged unless all parties to the negotiations agree to the contrary
- You cannot use the readiness of the other party to negotiate settlement as evidence of an implied admission
- This is said to encourage more open settlement discussions

- Use of the words “without prejudice” is neither necessary nor sufficient to attract the privilege – but is recommended
- Whether a communication is “without prejudice” depends on the intention of the parties which is determined by the nature of the discussions or negotiations between them
- If you wish to be able to rely on correspondence (eg. a settlement offer) in respect of costs, you should expressly state on the correspondence “without prejudice saves as to costs”

- Ex gratia = “by favour”
- An action that is done voluntarily, out of kindness, as a favour, and without legal obligation
- Making an *ex gratia* payment does not prevent an insurer from denying liability in respect of a subsequent similar claim: *Anglo-Pacific Trading Co Pty Ltd v Steadfast Insurance Co Ltd* [1955] VLR 228

- Although an insurer will have the right to offset certain payments, this may not extend to *ex gratia* payments
- When making *ex gratia* payments an insurer should indicate:
 - If the claim is accepted, the *ex gratia* payments will be offset against any further payments owed under the policy
 - If the claim is not subsequently accepted, the insurer reserves the right to recover the *ex gratia* payments
- *Ex gratia* payments may be income for the purposes of taxation

Duty of Disclosure

“The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure...” [s.22 – Insurance Contracts Act]

- If the notice is not given, the insurer cannot rely on a failure to disclose in order to exercise its rights under a policy (unless fraud)
- Is “clearly inform” subjective or objective?
- Depart from the prescribed form at your own risk!
- The words “*your rights to claim under the policy may be affected*” held not to be sufficient [*Deverson v AMP Motor Ins. (SADC 6 May 1993)*]

“Written Notice of Duty of Disclosure”

- S.69 *Insurance Contracts Act* – where not “reasonably practicable” to give written notice, written statement of duty of disclosure to be provided to insured within 14 days after the contract is made
- Statutory presumption that notice is deemed to be given at the time it would have been delivered in the ordinary course of post
- Issues of proof / systems
- If loss occurs outside the 14 day period and before written notice is given, the rights of the claimant are the same as if the information had not been given [s.69(3)]

“Insurance Contracts Act – Relevant Provisions”

- Knowledge through previous dealings and ‘constructive knowledge’
- Obviously incomplete answers – waiver by insurer [s.21(3) *Insurance Contracts Act*]
- Ambiguous questions and answers [s.23 *Insurance Contracts Act*]
- An unanswered, obviously incomplete or irrelevant answer to a question in a proposal form is not, on its own, a misrepresentation [s.27 *Insurance Contracts Act*]



Telephone Underwriting

- Case Example



Telephone Underwriting

Practical Considerations

- Outsourcing / adequately qualified operators
- Ensure complete, clear and accurate answers are provided
- Consider timing and environment in which the call is made



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