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MENAIR INSURANCE AWARDS 2017 WINNER

UK CAPTIVE 2017 SERVICES AWARDS WINNER LAW FIRM HOLMAN FENWICK WILLAN

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1. Regulation and legislation

Europe: When do companies selling insurance-based investments need to consider if they are appropriate for their customers?

A consultation paper[1] has been published by the European Insurance and Occupational Pensions Authority (EIOPA) on proposed guidelines under the Insurance Distribution Directive (the IDD) for companies selling Insurance-Based Investment Products (IBIP). The guidelines will help to clarify when it is possible for companies to sell an IBIP without considering whether it is suitable or appropriate for the customer. EIOPA recognises that some customers may be interested in "execution-only" services and will not want to pay for additional services that they consider unnecessary when they have sufficient knowledge of financial markets.

Background

As a general rule, the Insurance Distribution Directive (IDD) requires companies selling IBIPs to assess the suitability or appropriateness of an IBIP for their customer:

- The **suitability test**: If advice is given with the sale, the IDD requires the salesperson to gather information on the customer for example their knowledge and experience in that investment, their financial situation and investment objectives and provide a statement stating how the advice meets the customer's preferences, objectives and other characteristics (Article 30(1)).
- The **appropriateness test**: If advice is not given with the sale (i.e. the transaction is "execution only"), the salesperson is still required by the IDD to gather the customer's knowledge and experience in the specific investment to consider if it is appropriate, and warn the customer if it is not (Article 30(2)).

However, if certain conditions are met, EU member states are permitted to derogate from the above obligations and to permit companies selling IBIPs, but not providing advice, not to apply the appropriateness test under Article 30(3). One of those conditions, in Article 30(3)(a), requires that the IBIP:

- Not incorporate a structure which makes it difficult for the customer to understand the risks (if already deemed "non-complex" under Markets in Financial Instruments Directive II) (Art 30(a)(i)) or
- Be considered "non-complex" (Art 30(a)(ii)).

The guidelines

EIOPA's draft guidelines clarify how to interpret the above conditions. Where an IBIP contains any of the features listed below, EIOPA considers that the IBIP should be considered to incorporate a structure which makes it difficult for the customer to understand the risks involved and, therefore, that the "appropriateness test" should be applied:

- A clause, condition or trigger that allows the insurance undertaking to materially alter the nature, risk or pay out profile of the investment.
- No option to surrender or otherwise realise the investment at a value available to the customer.

EIOPA's guidelines may still change and even when they are final, member states may impose more stringent requirements.

- Explicit or implicit charges that may technically be options of surrender but may cause unreasonable detriment to the customer.
- A complex mechanism that determines the maturity or surrender value of a pay out upon death.
- Any of the following if they are difficult to understand: product charges, surrender fees and contractual provisions regarding modifying the person receiving the benefits.

What does this mean for those selling IBIPs?

EIOPA's guidelines may still change and even when they are final, member states may impose more stringent requirements. Until EIOPA finalises the guidelines, which it has indicated it will do after the European Commission adopts certain delegated acts later this year, and until member states transpose the IDD, the guidelines provide a useful explanation of when, in practice, companies may need to apply the appropriateness test.

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1 https://eiopa.europa.eu/Publications/Consultations/EIOPA-CP-17-001_IDD_Guidelines_Complex_IBIPs.pdf

2. Court cases and arbitration

UK: Permission refused – a lesson for claimants seeking to amend particulars of claim: *Pietro Gatto (T/A AG Avvocati Gatto) v Allianz SPA*[1]

The court refused permission to amend particulars of claim in circumstances where the application had been made very late, there was no good reason for the delay, and permitting the amendment would mean losing the trial date in circumstances where the parties had been preparing for trial for some time.

The court considered that a balance was needed between the injury to the claimant if the amendment was refused, and the injury to the defendant if the amendment was permitted.

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A professional indemnity policy was issued in July 2007 by the defendant to the claimant, an Italian lawyer. The policy was governed by Italian law. Two claims for professional negligence were brought against the claimant in England and Northern Ireland. In 2014, the claimant issued a claim for cover in respect of only one of the professional negligence claims, and a trial was set for May 2016. The claimant was granted permission to amend his particulars of claim to add the second claim. Following expert evidence, in October 2016 the claimant indicated his intention to further amend his particulars of claim on the basis that a further issue of Italian law required investigation, namely that as a matter of Italian law the defendant was liable for the unlawful conduct of its agent whether negligent or fraudulent.

The claimant served his proposed amended particulars in late November 2016. Following refusal by the defendant to consent to the amendment on 16 December 2016, the claimant made an application to the court for permission to amend his particulars on 21 December 2016. The claimant asserted that a letter dated July 2007, which accompanied the policy, stated that the policy complied with the minimum terms and conditions and could not be avoided on any grounds. Giving evidence, a former employee, who had been the defendant's agent, stated that he had not signed the letter and that he no longer worked for the defendant at the time. The claimant's case was that there had been a fraudulent misrepresentation and that the defendant was vicariously liable for the acts of its employees.

The court found that, from mid-2015, the claimant had had grounds to assert that there had been a misrepresentation in the July letter. The court also found that from November 2016, the claimant had had grounds to suspect that the misrepresentation had been fraudulent. However, the court considered that the claim for damages for misrepresentation could have been made earlier, and could see no good explanation for the delay. The court considered that a balance was needed between the injury to the claimant if the amendment was refused, and the injury to the defendant if the amendment was permitted. If the amendment were permitted, investigation would be necessary as to what had happened some 10 years ago, and the court would need to consider whether the employer of the defendant's agent handed the claimant a letter, whether they knew that the letter was untrue in saying that the agent had signed it, and whether the agent had actually signed the letter. The trial date would certainly be lost, which the court considered to be unjust where the trial had been listed for some time. On the basis that the claimant had given no good explanation for the delay, the court considered that this was a clear case where the application to amend the particulars should be refused.

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1 QBD (Comm), 27 January 2017

UK: Liquidator of insurance company entitled to terminate law firm's appointment under claims control clause: In the Matter of Enterprise Insurance Company plc sub nom Frederick David John White v Ozon Solicitors Ltd[1]

In circumstances where an indemnity insurer was acting both in the insured's interest and its own, regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (the Regulations) did not apply and the liquidator of an insurance company was, by virtue of a claims control clause, entitled to terminate a solicitor's firm's retainer and instruct another firm.

The insurance company had been declared by the Financial Services Compensation Scheme (FSCS) to be in default and in 2015 a liquidator was appointed over it. The respondent had been the insurance company's solicitors. In 2016, the liquidator took steps to terminate the respondent's retainer and gave instructions for the files to be transferred to another firm. The liquidator disclaimed the insurance policies on the basis that claims that had already been made would be honoured. The FSCS was happy to rely on the liquidator's judgment with regard to compensating eligible policyholders as quickly as possible. At the time, there were 1,300 outstanding claims in respect of motor policies underwritten by the insurance company, and millions of pounds were owed to policyholders.

The liquidator applied for delivery up of files and related material from the respondent. The issue for consideration by the court was whether the liquidator was entitled to transfer the case to another firm. The liquidator argued that he was entitled to transfer the retainer and the files pursuant to a claims control clause in the policies which said he had full discretion on the conduct of any claim. The respondent's case was that the liquidator was not entitled to rely on the claims control clause as to do so would be in breach of the Regulations which gave the insured the right to choose a lawyer for himself in relation to litigation. Further, the respondent argued that even if the claims control clause was in principle capable of allowing the insurer to change solicitor, such power was by implication limited.

The court held that the claims control clause not only allowed the insurance company to choose solicitors at the outset, but also allowed it to change solicitors. The court considered that this was not uncommercial, on the basis that the insurer had to cover the cost of the legal bills and it therefore made sense that the insurer could choose the legal representative. The court considered that the rationale behind regulation 6 of the Regulations was to avoid conflicts of interest (i.e. where an individual making a claim was in conflict with another, and the same insurer was the liability insurer). Regulation 3 provided that the Regulations did not apply to anything done by a person providing civil liability cover for the purpose of representing the insured in proceedings which were at the same time done in the insurer's own interest. This applied to the current situation: where the insurer was involved in litigation so as to limit its liabilities, there was no risk of a conflict of interest arising, and so the intention of the Regulations was not triggered. The court considered that the Regulations were not intended to apply where an indemnity insurer was acting both in the insured's interest and in its own, and that if the Regulations did apply in such a situation it would cause wide-spread confusion among insurers.

The court held that the claims control clause not only allowed the insurance company to choose solicitors at the outset, but also allowed it to change solicitors.

The court found that the question of whether the clause was being exercised properly was a matter for the contractual counter-parties rather than the respondent. Both the liquidator and the insurance company had an interest in the handling of the claims, and whilst the FSCS had stepped in as indemnifier it was looking to the insurance company for recovery. The liquidator had an interest in the size of the claims submitted to the FSCS and how they were resolved. The FSCS was happy to rely on the liquidator's judgment, including in respect of the appointment of solicitors. In circumstances where the liquidator had complained about the level of the respondent's fees, the relationship between the liquidator and the respondent was impaired to the extent that they would not be able to work effectively together. The court considered that there was no reason to think that the power granted by the clause had been improperly exercised, that the liquidator had successfully terminated the respondent's retainer and was entitled to instruct another firm. The application for delivery up of the files and other materials was allowed.

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1 Ch D, 3 February 2017

HFW win Law Firm of the Year 2017 at the UK Captive Awards

3. HFW publications and events

UK: HFW wins Law Firm of the Year at the UK Captive Awards

We are delighted to announce that HFW won Law Firm of the Year 2017 at the UK Captive Awards on Thursday 9 February. We also won this award in 2014 and 2016.

UK: Government moves to tackle sanctions breaches

HFW have published a briefing[1] on the new powers of the UK Office of Financial Sanctions Implementation (OFSI) to impose civil monetary penalties for breaches of trade sanctions. The powers are expected to come into force in April 2017, in a move which appears likely to result in increased enforcement in the UK against sanctions breaches. The briefing contains further details of the powers and the steps which businesses should take in light of this development.

1 http://www.hfw.com/UK-Government-moves-to-tackle-sanctions-breaches-February-2017

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