Insurance/
Reinsurance

16 April
2015

INSURANCE BULLETIN





Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

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Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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1. Regulation and legislation

UK: FCA proposes to ban opt-out sales

The FCA has announced proposals to ban opt-out selling in financial services markets, including insurance. It is estimated that such products are worth £1 billion a year to the insurance industry, so if the proposals are implemented there are likely to be significant effects for insurers.

Under the proposals, firms would be prohibited from including add-on products by default when a consumer purchases a regulated financial product, i.e. firms would be prohibited from requiring a consumer actively to opt-out of the add-on product. For instance, this would prevent companies using pre-ticked online boxes to sell add-on insurance to consumers, such as legal expenses sold with home insurance, breakdown cover sold alongside motor insurance or protection cover when taking out a mortgage or credit card.

The announcement follows an FCA study into opt-out selling, which found that the practice of opt-out selling often results in consumers purchasing insurance products they neither want nor need. The FCA believes that the proposed ban will lead to a reduction in the number of customers that buy add-on products without realising.

At this stage, the FCA is still seeking views on its proposals, and the consultation period ends in June. We will monitor and report any developments as and when they occur.

More information can be found in the consultation paper at https://www.fca.org.uk/your-fca/documents/consultation-papers/cp15-13 and the study into opt-out selling which has led to the proposals at:

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https://www.fca.org.uk/your-fca/documents/market-studies/ms14-01-final-report.

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Europe and Bermuda: Bermuda moves closer to Solvency II equivalence

Bermuda has taken a step closer to securing a declaration that its insurance regime is equivalent to Solvency II.

The Bermuda Monetary Authority (BMA) has published a consultation paper setting out proposed changes to Bermuda's insurance regime. It is understood that the BMA's proposals were designed to address any remaining areas that the European Insurance and Occupational Pensions Authority (EIOPA) identified as deficient in its final report on Bermuda's bid for Solvency II equivalence.

Solvency II equivalence is a key issue for multinational insurance groups that are headquartered outside the EEA but have subsidiaries or branches in the EEA, as they may be required to comply with certain aspects of Solvency II if the local regime is not considered to be equivalent to Solvency II. Therefore, questions of equivalence under Solvency II may have considerable implications for how companies structure and domicile their business.

A final decision on Bermuda's equivalence will follow later this year. Switzerland and Japan also have applications for a declaration of equivalence in progress. We understand that Australia, Singapore, Hong Kong and South Africa are in the process of preparing applications.

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UK: New Solvency II capital options for mutuals and friendly societies

The Mutuals' Deferred Shares Act 2015 (the Act), which received Royal Assent shortly before Easter, permits mutuals and friendly societies to issue deferred shares which qualify as tier 1 capital under Solvency II. The deferred shares will not constitute shares within the meaning of the Companies Act 2006 and their holders will have restricted voting rights.

It appears that the Act was designed to help mutuals and friendly societies to survive, in order to preserve the ability of consumers to choose these member-owned providers of financial services. The Act will give mutuals and friendly societies access to a new form of capital and may help to prevent them being forced into demutualisation by a lack of capital.

The commencement date of the Act has not been specified, so we will need to wait for HM Treasury to issue a statutory instrument which brings the Act into force. A copy of the Act can be found here: http://www.legislation.gov.uk/ukpga/2015/13/pdfs/ukpga_20150013_en.pdf

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2. Court cases and arbitration

Australia: Joinder of Insurers in the wake of *Akron Roads v Crewe Sharp*[1]

***Akron Roads Pty Ltd (in liq) v Crewe Sharp & Ors* is a recent Victorian Supreme Court decision that potentially opens up a further avenue for third parties to join insurers to proceedings in order to seek to obtain access to insurance monies under insurance policies under which they are not insured.**

The liquidators of Akron sought leave to join the insurer of two of the defendants (CGU) as a defendant to the proceeding. CGU denied liability to indemnify those defendants under a professional indemnity policy for their liability to Akron. Akron's liquidators were required to proceed in this way as the defendants and their liquidators were not able to enforce the policy themselves due to lack of funding.

In support of their application, Akron's liquidators relied upon the provisions of Section 562 of the Corporations Act 2001 (Cth) and the court's civil procedure rules relating to the joinder of third parties, as there is no equivalent law or Act in the State of Victoria of the English Third Parties (Right Against Insurers) Act. Section 562 of the Corporations Act provides that, where a company in liquidation holds insurance for the benefit of third parties and the liquidator of the company receives the insurance money, the liquidator of the company must pay that money to the third party to whom the insured was liable, in priority to other payments.

1 [2015] VSC 34

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HUGH GYLES, ASSOCIATE

Akron's liquidators proposed to seek a declaration that CGU was liable to indemnify the insured defendants and contended that, in those circumstances, the liquidators' rights to the proceeds of the insurance under Section 562 provided them with a sufficient interest in the determination of CGU's liability for the purposes of the joinder application.

CGU vigorously resisted the joinder application on the following grounds (amongst others):

- Akron's liquidators were not insured under the relevant policy and so had no entitlement to declaratory

relief against CGU. As such, they did not have sufficient interest in the proceeds of the insurance to support the joinder application.

- In any event, the liquidators' proposed claim had no proper basis and would fail as the terms of the policy excluded liability to the defendants.

The Court rejected CGU's arguments and allowed the joinder.

In reaching its decision, the Court relied heavily on the principles articulated in *The Owners-Strata Plan 62658 v Mestrez Pty Ltd*. In summary, the principles in that case provide that, although a decision to join an insurer is discretionary and fact-based and it is not available as a right, it may be in the interests of justice and its convenient administration to join the insurer if certain conditions are met. Those conditions include: where there is a bona fide dispute as to the entitlement of the insurer to deny liability, there is a substantial impediment (such as the insolvency of the insured) in the way of proceedings being conducted by the plaintiff against the insured, there is a "true legal controversy" between the plaintiff and the insurer, and the joinder of the insurer might avoid multiplicity of proceedings.

CGU is appealing the decision. If the appeal is unsuccessful, the decision has the potential to open up a new and broad avenue for third parties to seek to obtain access to insurance monies under policies to which they were not an insured, particularly if the decision is followed by the Federal and other State and Territory courts in Australia.

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UK: Can a settlement agreement be unravelled? *Hayward v Zurich Insurance Plc*[1]

The Court of Appeal recently handed down its judgment in this important case, which considered whether a settlement agreement can be rescinded on the basis of fraudulent misrepresentations regarding the underlying claim. The implication of the decision is that it will be difficult to set aside a settlement agreement unless there was no knowledge of fraud at the time the compromise was entered into.

Hayward had some years earlier been injured at work and had claimed damages from his employer. Liability was admitted but quantum was disputed on the basis that Hayward had exaggerated the extent of his injuries. However, before the quantum trial the matter was compromised by a settlement agreement embodied in a Tomlin Order. Some years later, Zurich discovered through a neighbour of Hayward that he had fully recovered from his injuries at least a year before the claim was compromised. Zurich brought a claim against Hayward claiming damages in deceit based on fraudulent misrepresentation, alternatively that the settlement agreement should be set aside.

At first instance, HH Judge Moloney QC found that Hayward had dishonestly exaggerated his injuries and on that basis the settlement agreement should be set aside. Hayward did not challenge the judge's finding that he had dishonestly exaggerated his injuries, however, he appealed against the decision to set aside the settlement agreement.

Reluctantly the Court of Appeal unanimously upheld Hayward's appeal.

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JONATHAN GOULDING, ASSOCIATE

1 [2015] EWCA Civ 327

In giving the lead judgment, Underhill LJ said that it *"is inherent in the antagonistic relationship of claimant and defendant that in deciding whether to settle he has to form an independent judgment about whether the disputed statements made as part of the claim are (to the extent that they are material to the outcome) likely to be accepted by the Court. I do not believe that a relationship of reliance arises in that context"*. He went on to say that a defendant who has made an allegation of fraud against the claimant but decided in the end not to have it tested in the court should not be allowed to revive that allegation as a basis for setting aside the settlement.

While it may "stick in the throat" that the claimant can retain the reward of his dishonesty, the defendant will have made the deal with his eyes open to the possibility of fraud, and there is an important public interest in the finality of settlements.

This is a good example of a case being made in the interests of wider public policy, in that parties who enter into a settlement with their eyes wide open to the possibility of a fraudulent underlying claim (having in this case expressly alleged it) should not be entitled to revive their grounds for disputing liability only because better evidence becomes available at a later date.

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3. HFW publications

Dubai: A welcome change for authorised firms: the DFSA's new client classification regime

HFW published a Briefing on the client classification requirements set by the Dubai Financial Services Authority, which changed on 1 April 2015. The Briefing summarises the principal changes for DIFC Authorised Firms, the next steps for Authorised Firms and the impact on the insurance industry.

A copy of the Briefing can be found here: http://www.hfw.com/A-welcome-change-for-authorised-firms-March-2015

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