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HFW to sponsor and attend Dubai World Insurance Congress

HFW to attend Lilliehammer Energy Claims Conference

HFW to present to Generali WW Claims Managers in Paris

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## **hfw** 1. Regulation and legislation

### **Europe: Update on the Insurance Distribution Directive: Publication of EIOPA's Technical Advice and draft Implementing Technical Standards**

**Under the Insurance Distribution Directive (IDD), the European Commission (Commission) can adopt certain delegated acts, to supplement or amend certain non-essential elements of the IDD. The European Insurance and Occupational Pensions Authority (EIOPA) received a request from the Commission for EIOPA to provide the Commission with technical advice on product oversight and governance, conflicts of interest, inducements and, suitability or appropriateness of insurance-based investment products (IBIP), each of which need to be specified in delegated acts.**

EIOPA's advice was published on 1 February 2017 (Advice) and a Draft Implementing Technical Standards (ITS) on Insurance Product Information Document (IPID) was published on 7 February 2017, which EIOPA must submit to the Commission by 23 February 2017.

#### **The advice**

##### **Product oversight and governance**

EIOPA currently has no plans to introduce price controls, although it considers that the interests of customers should be taken into consideration throughout the life cycle of a given product. EIOPA provides further clarification of the criteria used to determine when an insurance intermediary may be considered to be manufacturing insurance products and details relating to the information exchange permitted between

manufacturers and distributors of insurance products.

#### **Conflicts of interest**

EIOPA takes a tough stance on the issue of conflicts of interest. It sets out a list of circumstance where conflicts may arise, including circumstances where an insurance intermediary is involved in the management or development of a product.

#### **Inducements**

Despite the extensive feedback received on the non-exhaustive list of criteria for the assessment of detrimental impact, following a public consultation in July and October 2016, no fundamental amendments have been made. EIOPA considers the term "inducement" to include payments to insurance intermediaries, who are contractually obliged to conduct distribution activities exclusively with one or more insurance undertakings, such as tied agents. There are no separate rules for tied intermediaries under IDD.

EIOPA is proposing a list of criteria for assessing whether an inducement increases the risk of detrimental impact but has stressed that the purpose of this is not to introduce a ban on inducements.

#### **Insurance-Based Investment Products (IBIPs)**

As detailed in last week's Bulletin<sup>1</sup>, there is an obligation on insurers and intermediaries to determine the extent of the information to be collected from customers in light of a customer's knowledge, experience, financial situation and investment objectives. Insurers and intermediaries should inform customers "clearly and simply", that the reason for assessing

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the customer's suitability is to enable the insurer or intermediary to act in accordance with the customer's best interest. If the information required is not obtained, then the insurer and/or intermediary will not be permitted to recommend IBIPs to the customer.

#### **Implementing Technical Standards (ITS)**

The purpose of the ITS is to provide a standardised format and template for the IPID. The IPID is a significant project within the overall work of EIOPA on IDD. The object of the IPID is to ensure that customers are given sufficient information about non-life insurance products in order that they can readily compare different products and make informed purchasing decisions.

A link to the Advice can be found at <https://eiopa.europa.eu/Publications/Consultations/EIOPA%20Technical%20Advice%20on%20the%20IDD.pdf> and a link to the ITS can be found at <https://eiopa.europa.eu/Publications/Technical%20Standards/Draft%20Implementing%20Technical%20Standards%20on%20the%20Insurance%20Product%20Information%20Document.pdf>.

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1 <http://www.hfw.com/Insurance-Bulletin-16-February-2017>



## **hfw** 2. Court cases and arbitration

**UK: The importance of the retainer to the scope of a professional's duty of care: *Denning v Greenhalgh Financial Services Ltd***

**The recent High Court case of *Denning v Greenhalgh Financial Services Ltd*<sup>1</sup> serves as a reminder of the importance of the retainer when considering the scope of the duty of care owed by a professional.**

In this case the judge gave summary judgment for the defendant pensions advisor where the claimant alleged that the adviser had acted negligently in failing to review and advise on an earlier transfer of the claimant's pension plan by a different adviser. It was common ground that the defendant was not instructed to consider the merits of the historical advice provided, the alleged errors were not obvious and it was not necessary, to give the retainer business efficacy, to add any implied term that the defendant should have advised on the historical advice provided.

The Judge distinguished the facts from those in *Credit Lyonnais SA v Russell Jones & Walker*<sup>2</sup> in which it was established that in unusual cases a professional adviser may owe a duty of care to give advice outside the scope of a retainer, if in

the course of performing the retainer, the professional was provided with information that would lead any competent professional to perceive and advise upon a legal risk.

The judge held that for there to be an extended duty to advise, the matter in respect of which the professional had allegedly failed to advise would need to be obvious, and there would need to be a close relationship between that matter and the agreed retainer. The judge found that at the date of the defendant's instruction, the earlier transfer had no substantive connection to the matters on which the defendant was instructed to advise, nor did the claimant provide the defendant with information which would have enabled the defendant to advise on the earlier transfer. The claim was therefore struck out on the basis that the defendant did not owe a duty of care in contract or tort to advise on the earlier transfer.

This case highlights the importance of clarity in the terms of a professional's retainer and clarifies the limited circumstances in which a court may permit the extension of a professional's duty of care beyond the scope of the agreed retainer. This case will be of interest to both professionals and professional indemnity insurers alike.

For more information, please contact **Alison Proctor**, Senior Associate, London, on +44 (0)20 7264 8292, or [alison.proctor@hfw.com](mailto:alison.proctor@hfw.com), or your usual contact at HFW.

## **hfw** 3. HFW publications and events

**HFW to sponsor and attend Dubai World Insurance Congress**

HFW Partners **Sam Wakerley**, **John Barlow**, **Paul Wordley**, **Costas Frangeskides** and **Wissam Hachem**, partner at Al-Enezee in association with HFW, will be attending the Dubai World Insurance Congress in Dubai on Tuesday 28 February and Wednesday 1 March. HFW will be sponsoring the welcome reception at the Congress.

**HFW to attend Lilliehammer Energy Claims Conference**

HFW Partners **Jonathan Bruce** (London), **Nigel Wick** (London) and **Pierre-Olivier Leblanc** (Paris) are attending the Lilliehammer Energy Claims Conference in Hafjell, Norway on 1-3 March 2017

**HFW to present to Generali WW Claims Managers in Paris**

**Guillaume Brajeux** (Partner, Paris), **Iris Vögeding** (Senior Associate, Paris) and **Rosie Ng** (Consultant, Hong Kong) will give a presentation to Generali WW Claims Managers on 3 March in Paris. Guillaume, Iris and Rosie will be addressing product recall and its legal implications in Europe, Asia and the US.

1 [2017] EWHC 143 (QB)

2 [2002] EWHC 1310 (Ch)

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