

## **CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) BILL [HL]**

The Bill seeks to reform long standing problems in this branch of the law.

As mentioned in paragraph 7 of the Explanatory Notes, the 1906 Act, stating ‘dry’ insurance as well as marine insurance, “requires that the insured person must disclose every matter that would be material to the insurer’s decision to insure. Failure to do this permits the insurer to avoid the contract and refuse all claims under it, even where the insured person is not aware of what the insurer would consider material”. Given that currently consumers are treated like non-consumers, paragraph 7 points up 3 difficulties about current law.

First it is sometimes difficult to draw the line between disclosure, which in other areas of the law is not required, and (mis)representation.<sup>1</sup>

Second, many if not most people, especially consumers, do not know what they should disclose, what is ‘material’, unless (unlikely in the case of consumers) they employ a competent intermediary to advise them. As mentioned in paragraph 8 of the Notes, a series of guides and codes have been produced over the years by various bodies, most recently the Financial Services Authority and the Financial Ombudsman Service, but, in the unlikely event of consumers studying this material, they would find them inconsistent and thus confusing.

Third, in these circumstances it is not difficult for a determined and defensive claims handler to refuse to pay a claim and, assuming that there has indeed been non-disclosure, avoid the insurance cover. This ‘all or nothing’ rule has been widely felt to be unfair – to all insured persons not least consumers.

In this situation the Bill replaces the duty of disclosure, the duty to volunteer material information, with a duty to take reasonable care not to make a misrepresentation during pre-contractual negotiations. In other words, consumers are not obliged to say anything (except of course state their

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<sup>1</sup> Clarke, *The Law of Insurance Contracts* (6<sup>th</sup> edition, London 2009) 22-2F.

name, and describe the house, car or whatever they want to insure). In practice they will have to answer with care the insurer's questions, 'directly' or on a proposal form, and that is all. This is the kind of rule found and favoured in many other countries in Europe,<sup>2</sup> and thus more in line with the 'reasonable expectations' of consumers at large.

Moreover, if a consumer breaches this duty (and his or her misrepresentation induces the insurer to enter the contract), the insurer will have a remedy, but one better tailored to the particular case.<sup>3</sup> Instead of getting nothing even the careless consumer may get something.

In short, the Bill seeks to simplify and clarify the law, in many respects it does this and, in my view, should be supported.

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<sup>2</sup> *Principles of European Insurance Contract Law (PEICL)* (Munich 2009) Article 2:101; and <http://www.restatement.info/>

<sup>3</sup> In practice this may be the case under current law by the 'grace and good nature' of the insurer but, surely, consumers's rights should not depend on this factor.