

Insurance Insights

AFCA Decisions:

Online insurance purchases, non-disclosures at inception of policy.

Key takeaways

- Insurer bears the onus of proof in establishing it can deny a claim due to non-disclosure.
- At inception, a policy must provide a clear and understandable duty of disclosure notice, in writing.
- Online policy application and acceptance provides unique challenges.
- Insurer needs to provide evidence that the insured failed to disclose relevant information.
- Underwriting guidelines are crucial in proving the process of assessing unacceptable risk in denying a policy.

The Australian Financial Complaints Authority (AFCA) can consider a complaint by a consumer about a life insurance or general insurance product. Its decisions will be binding on the insurer but not the consumer who can proceed to litigate a dispute in the traditional way, through the courts. It is therefore important that insurers take note of its precedents when required to make submissions to AFCA.

While not providing any new precedent, [AFCA Case No: 663411](#) succinctly articulates the factors taken into account in deciding whether an insurer is entitled to decline a claim and cancel a policy, for a non-disclosure at inception. This decision considers an online purchase of insurance which is particularly relevant at the present time.

Background

The Insured held a home and contents insurance policy (**the Policy**) with an Insurer. Subsequently, she lodged a claim for loss of contents due to theft from her home, the following day. The claim was denied by the Insurer, on the basis that the Insured had failed to disclose relevant information at the inception of the Policy.

Can the insurer decline the claim due to non-disclosure?

The general criteria the Insurer was required to prove is the following:

- The Insured was clearly informed of her duty of disclosure - s22 of the *Insurance Contracts Act 1984 (the Act)*.
- The Insured failed to comply with her duty – s21 and 21B of the Act.
- The extent of the Insurer’s prejudice by this failure- s 28 of the Act.

Decision

The Tribunal found that the Insured had failed to comply with her duty of disclosure. The insured had made at least five insurance claims made between 22 February 2015 and 30 May 2018, which were not disclosed to the Insurer. Further, the insured’s partner ‘L’ had a significant criminal history and convictions in the previous five years or so before inception of the Policy. The judge was satisfied the Insured knew about the previous claims as well as some, if not all of her partner’s criminal convictions. The crimes were not specified.

The Tribunal found that the Insurer was entitled to deny the claim due to non-disclosure, subject to refunding the insured’s premiums, because:-

- the Insurer had clearly informed the Insured of her duty of disclosure;
- the Insured failed to disclose the relevant claims history and also her partner’s criminal history (L was a household member for the purposes of the Policy - the questions asked by the insurer at policy inception related to the claims and criminal histories of all household members);
- the Insurer had shown it would not have agreed to offer the Policy to the Insured had she disclosed the required information, by being able to produce and explain underwriting guidelines.

Factors taken into account by AFCA

The online policy application process at inception included an ‘agree and continue’ option in order for the insurance application to continue, and the certificate of insurance again informed the Complainant of her duty of disclosure.

The certificate had allowed the Insured the opportunity to ‘review and correct any errors in the information specified in the Policy documentation’, yet she did not contact the Insurer to make corrections.

The questions asked of the Insured were clear and unambiguous and a reasonable person in the circumstances would have made the disclosures. The questions asked were:

- *In the last 5 years, have you or any other household member had any thefts, burglaries or made any insurance claims for home and/or contents?*
- *Has the policy holder or any of their household members ever been convicted of a criminal offence?*

A set of underwriting guidelines, in writing, was able to be submitted by the Insurer, as well as an explanation as to how these apply when considering whether a risk is acceptable or not. These guidelines classified the following as unacceptable risks ; Claims and Loss History for Insured or any household member in the last five years of more than three insurance claims and/or burglary/theft losses during the past five years; and applicable to the Insured or Any Household Member any criminal convictions for fraud, arson or dishonesty or any other criminal conviction in the last ten years.

The guidelines were determined to support the Insurer's position that it would not have offered the policy had the disclosure regarding relevant claims history as well as criminal history information when asked at policy inception.

Conclusion

At inception, an insurer must provide information clearly articulating the duty of disclosure in writing, and a reminder of the duty and content of disclosures in a certificate of insurance.

In an online policy inception process, an 'agree and continue' step can be useful in establishing whether a prospective insured has received the duty of disclosure notice.

Underwriting Guidelines explaining how risks are classified, and an explanation of how they are applied are a crucial step in proving that an insurer would not have accepted the risk had it known of the non-disclosure.

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