The insured's duty of disclosure

Under the duty of disclosure, a person applying for insurance must disclose relevant information to the insurer before a contract is entered into.

The importance of proper disclosure
It is extremely important to understand the extent of the duty of disclosure, because someone who fails to comply with it could find that they are in fact uninsured when they make a claim. It is therefore advisable that non native speakers of English in particular do not apply for insurance by phone.

Completing the proposal form
A person applying for insurance must:

- fully and completely answer all the questions on the proposal form
- answer questions asking for detailed information precisely (see below)
- include additional information if a 'tick the box' question does not offer an answer that applies to the person's situation.

Care must be taken to understand the insurer's questions about convictions, offences, fines, and cancellation or suspension of licence. If in doubt, say you are not sure.

If there is not enough space on the form
A page with additional information can be attached if there is not enough space on the form.
For example:
A person may not be sure whether anything has been missed if the application asks for all traffic offences, or reasons for all visits to the doctor, in the last five years.
In this case, the person should write on the application form that they are not sure that the answer is complete, and then, if required, obtain the details from the traffic authority or the doctor.

The insurer's responsibility in asking questions
For most types of insurance for consumers, it is enough for the person to correctly answer the questions on the application form. Section 21A of the Insurance Contracts Act 1984 (Cth) provides that an insurer cannot rely on an incorrect answer to an open-ended or vaguely worded question if the information it wanted could have been the subject of a specific question.
In practice this means that, unless there is something exceptional about the person's individual circumstances that should have been disclosed, the insurer cannot rely on a breach of the duty of disclosure to reject a claim if the person answered the questions correctly.

Innocent and fraudulent non-disclosure
The insurer may say it has rejected a claim because the person did not disclose information correctly in the application form. First check whether the question was clear and unambiguous - if not, it is possible to argue non-disclosure does not apply. If there is non-disclosure, it is important to determine whether the non-disclosure is innocent or fraudulent, as different consequences follow (see Consequences of non-disclosure, below).

Innocent non-disclosure
Non-disclosure is innocent if the person honestly fails to disclose a fact that they thought was irrelevant (or, more likely, have simply not thought about at all).

Fraudulent non-disclosure
Non-disclosure is fraudulent if the person knew a fact was relevant and still failed to disclose it.
Consequences of fraudulent non-disclosure

Under s 28 of the Insurance Contracts Act 1984 (Cth), if non- disclosure was fraudulent the insurance company can cancel the policy and refund the premium.
This is the case even if two people applied for joint insurance, and one of them lied on the application without the other realising it.

*Consequences of innocent non-disclosure if the insurer **would have** accepted the risk*
The insurer cannot reject a claim on the basis of non-disclosure if:

- the non-disclosure was innocent, and
- the insurer would have accepted the risk and entered into a contract even if full disclosure had been made.

However, if the insurer would have charged a higher premium or larger excess if full disclosure had been made, it can reduce the claim against that amount.
*Consequences of innocent non-disclosure if the insurer **would not have** accepted the risk*
The insurer can reject a claim on the basis of non- disclosure if:

- the non-disclosure was innocent, but
- the insurer would have rejected the proposal had it had the information.

However, it must prove that it would have rejected the proposal; by, for example, showing that it has rejected similar applications.

Life insurance
A number of special rules apply to life insurance [ss 29, 30, 31].
The main effect is that the insurance company cannot cancel the policy in the case of an innocent non-disclosure that is not discovered until three years or more after the contract was entered into, unless the applicant's age is misstated.

Ongoing nature of the duty of disclosure
Many people do not realise that every renewal of an insurance policy is a new policy — that is, a new contract requiring disclosure.
The person insured must, if asked, disclose anything that has arisen in the preceding 12 months that will be material to the insurance company's assessment of the risk of renewing the policy. For example, if the person has had a motor vehicle claim refused after taking out a home contents policy, they must — if requested by the insurance company — disclose that fact when the home contents policy is renewed.

Issues in non-disclosure
Many disputes about insurance policies arise because the consumer is *alleged* to have not disclosed information to the insurer when the policy was taken out. The following are issues to consider in checking whether the insurer can correctly reject a claim.

1. Is the non-disclosure material?
Where the non-disclosure is innocent, the insurance company can only rely on it if they would have charged a higher premium or rejected the application had they had the information. If the insurance company claims either of these things, you may wish to test their assertion by asking a friend to seek insurance, disclosing the relevant information. It can be difficult to test an insurer's assertion that it would not have issued a policy; it is possible to complain to the Insurance Enquiries and Complaints Claims Review Panel, or to issue court proceedings.

2. Was there actually non-disclosure?
The person has not breached the duty of disclosure if:

- they only become aware of a matter after taking out the policy (for example, discovering termites in a house when renovating it after purchase)
- the company was already aware of the matter (for example, it may know the person's medical history through a claim on an earlier policy).

3. Disclosure made to a third party

Where insurance is sold through a third party (particularly a car dealer, mobile phone dealer or travel agent), the proposal form is often completed as one of a series of documents, and the third party may not record all the information they are given. Since the third party is usually taken to be the insurer's agent, any statement made to them qualifies as disclosure to the insurer even if there is no record of it in the application form.

However, if the information was given to an insurance broker and the broker failed to tell the insurance company, the remedy is against the broker.

4. Failure of insurer to seek further information

Under section 21 of the Insurance Contracts Act 1984 (Cth), where a person fails to answer a question, or gives an obviously irrelevant answer, and the insurer nevertheless accepts the proposal, it is taken to have waived the person's duty to disclose the information requested.

In other words, if the insurer does not seek further information when it assesses the risk, it cannot later rely on an irrelevant or missing answer to refuse a claim.

It is important to obtain a copy of the proposal form to check whether there was, in fact, failure to disclose information or whether, for example, a box has simply been left blank, which is not a failure to disclose.

Source: Legal Services Commission SA