New case law
The recent case of Houlihan v Friends First Life Assurance Company Limited (2014) IEHC 676 held that insurers are entitled to consider and rely upon new grounds for declining indemnity under a policy. This entitlement holds even if such grounds were not included in the original declinature letter and only came to light in subsequent proceedings brought to challenge the declinature.

By way of background the policy in issue concerned an income protection plan which provides financial assistance to a policyholder through a period of disability. The policy provides cover where the policyholder is unable to carry out their normal occupation due to a recognised illness or accident and is not in receipt of any other income.

The facts
The policyholder ceased work in April 2009 with a GP's certificate declaring he was unfit for work, having been recently diagnosed with fibromyalgia. The policyholder made a claim under the policy in September 2009. Insurers accepted the claim but based on an expectation that the treatment of his symptoms would result in the claim being of short duration. Insurers also made clear that it would be reviewed further once their medical investigations were completed.

After carrying out medical investigations, insurers concluded that the policyholder was not totally disabled by reason of sickness or accident, so the definition of disability under the terms of the policy was no longer satisfied. In December 2010, insurers declined cover. In
2012 the decision to decline indemnity was challenged by the policyholder who brought High Court proceedings against the insurers seeking a declaration that insurers were in breach of the contract of insurance.

The trial took place over five days in February 2014. Whilst there was broad agreement on the factual evidence and on the legal principles adduced in submissions, the medical evidence adduced by the policyholder was hotly disputed by insurers. In particular insurers disagreed with the policyholder’s medical attendants who believed the policyholder was unable to carry on his normal occupation. Judgment was handed down on 1 May 2015 by Mr. Justice White.

The High Court held that the burden of proof was on the policyholder to demonstrate to the Court that on the balance of probabilities, he was totally unable to carry out his normal occupation due to a recognised illness.

During the course of the trial, insurers relied upon a misrepresentation made during their review and investigation of the claim as further evidence that policy conditions were not met by the policyholder. Counsel for the policyholder argued that the insurer was not entitled to rely on new reasons in their defence. Counsel for the policyholder argued that it was not open to insurers who had declined indemnity under the policy for a particular reason to then try and rely on one or more additional reasons for declinature. He argued that this was particularly the case where they were not relied upon in making the original decision to decline indemnity. The Court disagreed with this contention.

The Court held that misrepresentation by a policyholder can be taken into consideration by insurers even if it arises subsequent to the initial claim being made and after the claim has been rejected by insurers. However the Court found that it is only a misrepresentation that was made consciously or recklessly to mislead insurers. In the event insurers wish to rely on any additional grounds to further reinforce the indemnity position, the reasons put forward should not be incompatible with the grounds originally relied upon by insurers when they made the decision to decline indemnity.

**General tips for insurers when considering indemnity issues**

- The most prudent course of action, during the initial phase of the investigation of a claim where claims handlers are not aware of the full circumstances, is to clearly reserve insurers’ rights. This will serve to protect insurers’ position and avoid any possible waiver arguments made by a policyholder at a later date.

- A happy balance can be struck if the letter reserving insurers’ rights employs carefully chosen words. Ensure that an immediate impression is not given to a policyholder that the claim is being rejected so the indemnity investigations can be managed satisfactorily for both the policyholder and their broker.

- It is important to obtain a copy of all of the policyholder’s relevant documentation as early as possible in the indemnity investigations in order to establish whether there has been compliance with the terms and conditions of the policy.

- After investigations are complete, if there are grounds either to avoid the policy for non-disclosure or to decline indemnity for the claim for breach of condition/warranty, the decision should be communicated to a policyholder as quickly as possible.

- Insurers should be very careful about communicating decisions on coverage to policyholders on an informal basis. It is advisable to have such decisions set out in clear wording in a well drafted declinature letter.

- The declinature letter should clearly set out the reasons why the claim is being rejected. To reject a particular claim on one ground may result in insurers waiving their rights to reject the claim on other grounds. Thus, it is important to identify the reasons why a claim is being rejected under the policy and on what basis.

On the factual and expert evidence adduced, the Court found that the policyholder had not consciously or recklessly misled insurers.

**In summary**

This case confirms that insurers will be entitled to rely on additional grounds for declining cover under a policy that had come to light in the context of the subsequent litigation or policy challenge, even if these grounds were not included or referred to in the original letter of declinature. However, insurers should be aware the Court placed particular emphasis on the fact that the misrepresentation by a policyholder has to have been made consciously or recklessly to mislead insurers. In the event insurers wish to rely on any additional grounds to further reinforce the indemnity position, the reasons put forward should not be incompatible with the grounds originally relied upon by insurers when they made the decision to decline indemnity.
Insurers should always be very careful to ensure that any letter of declinature or avoidance is carefully and clearly worded, so as to preserve all insurers’ rights. In light of this new decision insurers should make it clear that the grounds provided for repudiation are without prejudice to any other alternative grounds upon which they may want to rely upon at a later stage and that all their rights in that regard remain fully reserved.

The above tips are for guidance purposes only and legal advice should always be sought if there is any doubt on grounds for indemnity and letters of declinature.

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