Voluntary Disclosure: An Appraisal of the Insured's Precontractual Duty of Utmost Good Faith under the Nigerian Insurance Law

By:

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The insured's pre-contractual duty of utmost good faith -voluntary disclosure under the Marine Insurance Act 1961 is outdated and harsh on the insured. The over 250 years old doctrine, first established under the English common law has attracted significant criticism for imposing an unfair burden of disclosure on the insured. Despite a call for reform in the Nigerian insurance law, after which the Insurance Act 2003 was established, there has been no dramatic change. One party- the insurance company still determines what is material fact to a contract of insurance at the detriment of the other party (the insured). Also, the new Insurance Act Consolidation Bill 2016 currently created to repeal and consolidate the laws relating to and regulating insurance business and related matters is only a coalition of all the laws governing insurance in Nigeria. As such, there is no significant change to the original provision on pre-contractual

duty. The emphasis of the Consolidation Bill is purely market-oriented and not holistically focused on the general welfare of all the parties concerned. In summary, the lack of a comprehensive legal framework hinders Nigeria from playing a leading role that creates an insurance policy which balances the interest of the parties in line with good faith.

The major problem exhibited in Nigerian insurance law- Marine Insurance Act 1961, s. 20 is the lack of clarity on how the insured is expected to voluntarily disclose material information that will influence the decision of a prudent insurer without any guidance from the insurer. A call for the insured to step into the shoes of an unknown insurer is in effect an exercise in speculation as the insurer is, in fact not under a duty to explain to the proposed insured what information is "material". Also, section 54 of the Insurance Act 2003 makes it clear to the extent that all information outside the proposal form is immaterial. On the contrary, it does not provide an equivalent implication that all questions asked are relevant questions. Both provisions formulate the duty of disclosure as a general duty which does not offer any actual guidance to the proposer. Going by this analysis, the 2003 Act has done nothing to relieve the insured of its burden on his duty of disclosure by altering the 1961 Act. Moreover, it is impractical to expect the insurer to spell out in details what information would influence a prudent insurer.

Consequently, the local judges do not have the opportunity to evaluate controversial insurance issues, and the hope of moving the law forward by clarifying the provision through case law is limited due to the lack of reported court judgements on insurance-related disputes in Nigeria. Thus, the inadequacy in the clarity of this provision creates an insufficient background which would have allowed the proposer to understand the scope and significance of the duty.

Another major problem is the sole remedy of avoidance at which a breach of an insured's pre-contractual duty to disclose, results in the avoidance of the contract *ab initio*. The insured is not only unable to recover his current losses under the policy but also liable to pay back all previous successful claims which had been paid out by the insurer, even though the insurer could have only increased the premium by a small amount had the insured disclosed the facts.

Also, the strict application of the one-size-fits-all remedy of avoidance is unduly harsh towards the insured. It leaves little room for the court to consider other solutions to an insured's breach. In addition, the insurer can repudiate the policy, notwithstanding that the undisclosed or misrepresented facts hold no relevance to the actual loss suffered by the insured.

Similarly, another weakness of this harsh remedy is the complete disregard of an insured's innocent mistake. Under the Nigerian insurance law, an insurer has a right to repudiate an insurance policy in the event of non-disclosure or misrepresentation, in so far as the insurer can prove that the insured's non-disclosure or misrepresentation affected his decision aside that the insured acted honestly and reasonably during the disclosure process or whether the insurer would have adjusted the terms of the policy had the information been disclosed. Thus, a rigid provision such as the one-size-fit-all remedy equates the innocent insured with a fraudulent insured. This solution is grossly unfair particularly to an innocent insured who unknowingly runs into such difficulty. As a result, the insured is deprived of his benefits of protection which he assumed he was entitled to.

Repudiation by the insurer also has adverse consequences for the insured in future as the insured's ability to obtain new insurance coverage is affected due to the previous cancellation of insurance coverage which also becomes a material fact that must be disclosed to other insurers. Thus, the insured is deprived of the benefits provided in the policy because the insurer is allowed to "escape retrospectively, the liability to indemnify which he had previously and validly undertaken."

For a start, Nigerian legislatures should do away with the usual adoption of foreign principles as a piecemeal approach to develop its own rules. It should only draw inspiration from the English parliament by consulting with stakeholders with a view of reforming the insurance law to create rules that sum up the best practices in the insurance industry. At present, the paramount interest should be the vulnerable insured who need the assurance that they will be treated fairly by the insurers and that valid claims are paid without undue delay. Furthermore, the need to protect an insured who does not understand enough English to interpret the insurance proposal form is also essential.

Nigeria should consider the reformed English law as specified in s. 3 (1) and s. 3(4) of the Insurance Act 2015 where the insured's duty of disclosure is complimented by the insurer's duty to ask relevant questions to elicit other information that will further clarify any doubt.

Finally, Nigerian legislatures should adequately respond to the harsh remedy of the one-size-fit-all remedy. It should consider the possibility of embracing the idea of a proportionate solution as provided in the new English reform. Such reform is desirable as it allows the courts greater flexibility to obtain fairer results. Adopting a proportionate remedy measured by the insured's level of breach will mitigate the overly harsh application of the avoidance remedy while achieving a more equitable outcome for both parties.

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