

Short notes on:

FURTHER UNPACKING SUBROGATION – THE DON'TS

Introduction

Short term insurances are regulated by the Short-Term Insurance Act no. 53 of 1998 as amended. The Policy holder ("Insured") can insure various items, whether it be household contents, motor vehicles or personal items. Insurance is important, in the sense that it insures or indemnifies (cover losses insured against) the insured against certain perils causes financial harm in the form prescribed in terms of the policy document.

The principle of subrogation has been a well-known principle in South African Law. It enables the Insurer after it has paid out the insured for the loss incurred to claim against the third party who caused the damage-causing event – for purposes of preserving the principle of indemnity. Indemnity therefore implies that the insurer compensates the insured for a loss suffered as result of a risk materialising whether it be patrimonial (asset in an estate) or non-patrimonial (bodily integrity). Similarly, an insurer may have a claim against the insured where the insured prevented the insurer from exercising its rights or where the insured was over compensated.

The don'ts

Generally, Insurers will incorporate clauses in the policy document in terms of which the insured undertakes to not interfere with the Insurer's right to recover losses on behalf of the insured. The insured thereby undertakes not to commit any act or omission which may diminish a claim by the Insurer against a third party. Practically, this may include an undertaking not to admit liability for the loss incurred. The idea behind the undertaking, firstly, it may not be advisable to accept liability as the legal principles of liability can be a complicated beast taking into account the principle of apportionment of damages in certain circumstances where liability cannot easily be established. This means that it may seem to the insured that it was liable when in actual fact it is not the case or the insured and the third party were both liable to a certain degree – therefore it's never a good idea to accept liability. Secondly, in terms of the Subrogation principle, the insurer has the right to recover its loss from a third party on behalf of the insured where such third party caused the loss.

What if the insured acts in a manner that diminishes the Insurers claim

The principles of the law of contract may apply should the insured, for example, admit liability in any form where a third party is responsible for the damage-causing event. The Insurer would have otherwise had a right to claim against the third party were it not for the conduct of the insured. In this instance and without derogating from the legal principles of contract and salvage, the Insurer may have a claim against the insured.

Another common situation is where the insured receives double payment for losses incurred, for example: where an insured is involved in a motor vehicle accident and claims for damages to a motor vehicle in the form of anticipated repairs to restore the motor vehicle to its pre-collision value. In addition to receiving coverage from the insurer for the repairs to the motor vehicle, the insured receives payment from the third party, who was the negligent party to the accident. In this instance, the insured would have received double payment, and if the over-paid amount is not paid to the Insurer by the insured, the insured would have been unfairly enriched at the expense of the Insurer. The Insurer may have recourse against the insured based in unjust enrichment, alternatively breach of contract. Once again, this preserves the principle of indemnification which all insurance contracts are based on with certain variations which may apply. The principle of indemnification will obviously limit the insured's liability equal to amount of over-payment.^[1]

Conclusion

An insured should be well acquainted with the Policy documents, which prescribes the extent of insurance cover. Furthermore, it is not advisable to attempt to negotiate with the third party who caused the damage-causing event or not to avoid limiting the insurer's right in respect of subrogation. It is advisable for the insured when submitting a claim, to comply with the Insurer's requirements and to let the process run its course to avoid unnecessary complications.

Contact us at Schoemanlaw Inc for all your insurance law and dispute resolution needs.

^[1] South African Insurance Law Lexis Nexis 2013, pages 385 -386