

*These notes refer to the Consumer Insurance (Disclosure and Representations) Bill [HL]  
as brought from the House of Lords on 17 January 2012 [Bill 274]*

# **CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) BILL [HL]**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These explanatory notes relate to the Consumer Insurance (Disclosure and Representations) Bill as brought from the House of Lords on 17 January 2012. They have been prepared by HM Treasury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. These notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

### **TERRITORIAL EXTENT AND APPLICATION**

3. The Bill extends to the whole of the United Kingdom apart from clause 11(3) which does not extend to Northern Ireland and clause 11(4) which extends only to Northern Ireland: clause 11(3) amends legislation which extends only to Great Britain and clause 11(4) amends the equivalent legislation in Northern Ireland.

4. This Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them. In relation to Northern Ireland this Bill only covers matters that are reserved to Westminster. If there are amendments relating to a matter that has been transferred the consent of the Northern Ireland Assembly will be sought for them. The Bill does not deal with provisions within the legislative competence of the National Assembly for Wales. If there are amendments which fall within the legislative competence of the National Assembly its consent will be sought for them.

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## **BACKGROUND**

5. The Bill gives effect, with minor modifications, to the recommendations set out in the Law Commission and the Scottish Law Commission's 2009 joint report "Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation" (Law Com No. 319; Scot Law Com No. 219).

6. British insurance law developed during the 18th and 19th centuries, and was partly codified by the Marine Insurance Act 1906 ("the 1906 Act"). Although strictly the 1906 Act only applies to marine insurance, the courts have consistently held that it applies to all forms of insurance, including consumer insurance, on the grounds that it codifies the common law.

7. The 1906 Act requires that the insured person must disclose every matter that would be material to the insurer's decision to insure. Failure to do this permits the insurer to avoid the contract and refuse all claims under it, even where the insured person is not aware of what the insurer would consider material.

8. To ameliorate the effects of the existing statute law a series of guides and codes have been produced by regulators (the Financial Services Authority and the Financial Ombudsman Service have both produced guidance) and industry (the Association of British Insurers has produced a code of conduct). The 1906 Act specifies one set of rules, FSA Rules set out different standards and the FOS reaches decisions on a third and separate set of principles.

9. The purpose of the Bill is to update the law relating to pre-contractual disclosure and misrepresentations and simplify the existing legal framework by removing layers of case law, guidance and voluntary codes which currently set the standards expected in this area.

## **SUMMARY**

### ***Abolishing the consumer's duty to volunteer information***

10. The Bill replaces the duty to volunteer material information with a duty on consumers to take reasonable care not to make a misrepresentation during pre-contractual negotiations. If a consumer breaches this duty and this misrepresentation induces the insurer to enter the contract, the insurer will have a remedy. The nature of the insurer's remedy depends on the nature of the consumer's misrepresentation. If a consumer makes a deliberate or reckless misrepresentation, the Bill permits the insurer to treat the contract as if it never existed and refuse all claims. If, when answering questions posed by an insurer, a consumer answers carelessly, the Bill provides that the insurer may have a remedy according to whether it would have entered into the contract on different terms. If it would not have entered into the contract at all it may refuse all claims but it must return the premiums paid. If it would have entered into the contract on different terms, the contract may be taken to include

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those different terms. If the premium would have been higher this may have consequences for the amount of any claim. If the consumer acts with reasonable care, the insurer must pay the claim in full.

### ***Group insurance***

11. The Bill makes provision for a situation where a member of a group insurance policy makes a misrepresentation. Where this happens the misrepresentation will only have consequences for the cover of that member and not for the policy as a whole.

### ***Life insurance on the life of another***

12. The Bill also makes provision in relation to insurance taken out by a consumer on another person's life. Currently, the person whose life is being insured does not normally owe a duty of care when providing information, because they are not a party to the contract. The Bill changes this so that when answering questions posed by the insurance company, the person whose life is being insured has a duty to take reasonable care not to make a misrepresentation. If that individual makes a misrepresentation, the insurer will have the same remedies they would have had if the consumer taking out the policy made the misrepresentation.

### ***Intermediaries***

13. The Bill expressly preserves normal agency law, which states that a party is responsible for the actions of their own agent. The Bill sets out a framework for deciding whether, for the purposes of the Bill, the intermediary acts as an agent for the insurer or for the consumer.

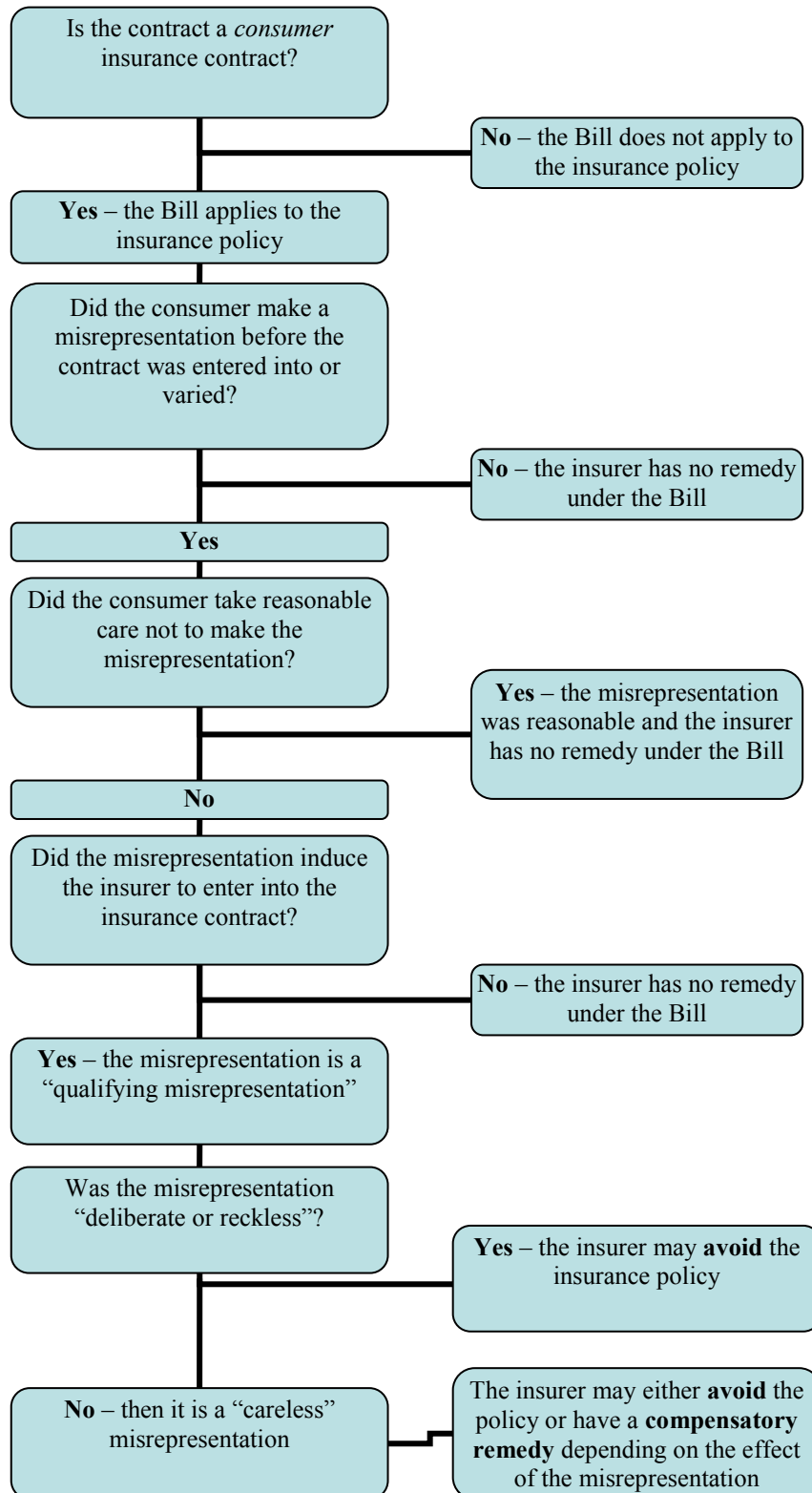
### ***Consequential Amendments***

14. The Bill disapplies sections 18, 19 and 20 of the 1906 Act in respect of consumer insurance contracts, as defined in the Bill. The Bill also makes section 17 of the 1906 Act subject to the provisions of the Bill. In addition, the Bill disapplies any common law rule to the same effect as these sections.

15. Section 152(2) of the Road Traffic Act 1988 and Article 98A of the Road Traffic (Northern Ireland) Order 1981 (S.I. 1982/154 (N.I.)) are amended by the Bill because they relate to insurance companies avoiding motor insurance contracts where the insured has made a non-disclosure or misrepresentation.

16. The scheme of the Bill is best thought of as a series of questions which the insurer, court or ombudsman must ask before deciding to reject all or part of the claim.

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**COMMENTARY ON CLAUSES**

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### **Clause 1: Main definitions**

17. Clause 1 defines the terms “consumer insurance contract”, “consumer” and “insurer”. The Bill defines a consumer insurance contract based on the status of the persons who enter into the contract. The contract must be between a consumer and an insurer.

18. A consumer is defined as an “individual” who is acting wholly or mainly for non-business purposes. Thus the consumer must be a natural person, rather than a legal person (such as a company or corporation). The definition expressly provides for mixed use contracts. Where a policy covers some non-business and some business use, the main purpose of the insurance needs to be considered. For example, insurance would be considered to be “consumer insurance” if private vehicle insurance covers a limited amount of business use, or if home contents insurance covers some business equipment.

19. The “business of insurance” is not defined in the Bill. The majority of those who carry on insurance business are required to have permission to carry on business from the Financial Services Authority (FSA) (in accordance with the Financial Services and Markets Act 2000). The definition of insurance for purposes of FSA regulation is set out in an Order,<sup>1</sup> and generally follows the common law, as established by case law. However, the Order includes some contracts which may not be insurance at common law (such as pension management contracts) and excludes some contracts which may be insurance, such as funeral plans. For the purposes of the Bill, the definition of insurance follows the common law definition. It includes all consumer insurance contracts, even those which are specifically excluded from FSA regulation.

20. However, a person does not need to have such permission before they are an “insurer” for the purposes of the definition in clause 1 of the Bill. On the other hand, the insurer must be acting in the course of business: the Bill does not apply to purely private arrangements made between two individuals.

### **Clause 2: Disclosure and representations before contract or variation**

21. Clause 2 abolishes the duty of disclosure in consumer insurance contracts and replaces it with the duty “to take reasonable care not to make a misrepresentation”. This removes the consumer’s duty to volunteer information to the insurer. Instead, consumers are required to answer insurers’ questions honestly and to take reasonable care that their replies are accurate and complete. If consumers do provide insurers with information which was not asked for, they must do so honestly and carefully.

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<sup>1</sup> The Financial Services and Markets Act (Regulated Activities) Order 2001, S.I. 2001/544.

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22. Subsection (1) stipulates that the consumer's duty arises during pre-contractual negotiations when entering into a new insurance contract or varying an existing contract. There is no explicit reference to renewals, as in law these are regarded as new contracts. However, renewals are covered by the duty.

23. Subsection (2) contains the duty on the consumer to take reasonable care not to make a misrepresentation to the insurer. There is a considerable body of case law defining a misrepresentation which is relevant to this provision. In particular, even though it is literally true, a statement may amount to a misrepresentation because it is incomplete.<sup>2</sup>

24. Subsection (3) confirms that a failure to reply is capable of being a misrepresentation for the purposes of the Bill. For example if the consumer gives particulars by telephone and later fails to respond to a written request to amend them if incorrect or incomplete, the failure may constitute a misrepresentation. This may be a significant issue on renewal, where a consumer may be asked to confirm or amend the information previously given. Whether such a failure is a misrepresentation will depend on the facts.

25. Subsection (4) states that the duty in subsection (2) replaces the current duty of disclosure, which is found in section 18 of the 1906 Act. The duty in section 18 derives from the duty of utmost good faith, which is set out in section 17 of the 1906 Act. Clause 2(5) modifies the duty of utmost good faith so that a consumer is no longer required to volunteer information to the insurer.

26. The Marine Insurance Act 1906 applies directly to marine insurance but it has also been held to be an authoritative statement of common law principles to be applied to other non-marine insurance contracts. Therefore, clause 2(5) works in two ways. Subsection (5)(a) applies to any common law rule to the same effect as section 17. Subsection (5)(b) then applies to any consumer insurance contracts which are also marine insurance (such as insurance on private yachts).

27. However, section 17 is wider than just the pre-contractual duty to disclose and also imposes duties on the parties after the contract has been formed. The Bill does not affect these post-contractual duties such as the duty not to make a fraudulent claim.

### **Clause 3: Reasonable care**

28. Subsection (1) states that when deciding whether a consumer has taken reasonable care not to make a misrepresentation, all relevant circumstances are to be taken into account. Subsection (2) lists examples of factors that may need to be taken into account when making a judgment as to whether reasonable care was taken.

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<sup>2</sup> See *Winter v Irish Life Assurance plc* [1995] 2 Lloyd's Rep 274.

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These include the type of insurance in question, any relevant explanatory material and how clear and specific the question was. This list is indicative and non-exhaustive: additional factors may be taken into account when suitable. Where a consumer contract is renewed or varied the consumer may, in some circumstances, make a misrepresentation by failing to respond to the insurer's questions (see clause 2(3)). Subsection (2)(d) indicates that how clearly the insurer communicated the importance of answering its questions is a factor that may be taken into account in deciding whether the consumer failed to take reasonable care. So for example an insurer may, before renewing a consumer insurance contract, ask the consumer whether particulars previously given have changed. This does not mean that the consumer would necessarily have to respond if the facts have not changed – in some cases (such as motor insurance) insurers may ask the consumer to respond only if the consumer's circumstances have changed.

29. The list of factors in subsection (2) is indicative and non-exhaustive: additional factors may be taken into account when relevant.

30. Under subsection (3) the test when looking at whether the consumer has taken reasonable care, is objective; that of the reasonable consumer. This test does not usually take into account any particular characteristics of the actual consumer, such as their age, knowledge of English or level of understanding. The notion of "reasonableness" is a commonly used concept in English law to provide an objective but flexible standard against which any individual's conduct can be measured. The reasonable consumer denotes an average consumer with no special skills or knowledge taking into account the examples in subsection (2).

31. An exception to the application of that test is contained in subsection (4). Where an insurer knew about, or should have known about a consumer's particular characteristics or circumstances, those are to be taken into account. The Association of British Insurers' Code of Practice,<sup>3</sup> states that insurers should pay the claim in full where:

The consumer has acted honestly and reasonably in all of the circumstances, including the customer's individual circumstances but only where these were known to the insurer.

Subsection (4) reflects this but goes further in adding "ought to have been aware". This is not intended to impose onerous duties on inquiry on the insurer but is intended to catch characteristics and circumstances they should have noticed, but failed to do so.

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<sup>3</sup> ABI Code of Practice, "Managing Claims for Individual and Group Life, Critical Illness and Income Protection Insurance Products" (January 2009).

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32. Subsection (5) states that acting dishonestly is always a breach of the duty. This is also an exception to the “objective” standard in subsection (3).

#### **Clause 4: Qualifying misrepresentations: definition and remedies**

33. Clause 4 sets out the circumstances in which an insurer will be entitled to a remedy for a misrepresentation. Two conditions must be met.

34. Firstly, under subsection (1) the consumer must have made a misrepresentation in breach of the duty set out in clause 2(2) to take reasonable care not to make a misrepresentation.

35. Secondly, the insurer must establish on the balance of probabilities that, had it known the true facts, it would not have entered into the contract or agreed the variation in exactly the terms agreed. This reflects the current law on inducement as developed following the House of Lords decision in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*.<sup>4</sup>

36. Under the current law (set out in section 20(2) of the 1906 Act) a misrepresentation only provides the insurer with a remedy if the misrepresentation would influence the judgement of a hypothetical prudent underwriter. This test is not preserved by the Bill. The Bill provides instead that the insurer which is a party to the contract must show that it relied on the misrepresentation, regardless of whether any hypothetical insurer would have done so.

37. Under subsections (2) and (3), if the conditions in subsection (1) are met, the misrepresentation is termed a “qualifying misrepresentation” and attracts the appropriate remedy set out in Schedule 1.

#### **Clause 5: Qualifying misrepresentations: classification and presumptions**

38. Subsection (1) provides for qualifying misrepresentations to be classified under the Act as either (i) deliberate or reckless or (ii) careless.

39. A consumer acts deliberately if they act with knowledge. As established in the case of *Derry v Peek*,<sup>5</sup> a consumer acts recklessly if they act without care and regard for the truth of an answer. This can be distinguished from making a statement which one genuinely believes to be true but without sufficient care to check the facts. This would potentially be a careless misrepresentation.

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<sup>4</sup> [1995] 1 AC 501.

<sup>5</sup> (1889) LR 14 App Cas. 337.



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40. In this context “careless” is being used in a special sense. Subsection (3) makes clear that a qualifying misrepresentation is “careless” if it is not “deliberate or reckless”.

41. Under subsection (4), the onus is on the insurer to show that a misrepresentation was deliberate or reckless. There are, however, two presumptions set out in subsection (5). Where the presumptions apply, the burden of proof is reversed.

42. The effect of the presumptions may be illustrated by an example, in which a consumer fails to mention a heart attack in response to a clear and specific question. As most reasonable people would normally know that they had suffered a heart attack, the insurer does not need to prove that the consumer acted deliberately or recklessly. Instead it is up to the consumer to show that he or she did not know about the heart attack, or did not understand the question. Thus the consumer might explain that they had confused a minor heart attack with another condition, or might provide other evidence of lack of understanding.

#### **Clause 6: Warranties and representations**

43. This clause abolishes “basis of contract” clauses. Under the current law, insurers may include a declaration on an insurance proposal form or policy stating that the consumer warrants the accuracy of the answers or that the answers form the basis of the contract. This effectively turns the consumer’s representation into a warranty. The insurer is therefore discharged from liability for all claims if a misrepresentation was made, even if the misrepresentation was immaterial and did not induce the insurer to enter the contract.

44. It would remain possible for insurers to include specific warranties in the contract of insurance. To be valid, such a warranty would need to be fair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999.

#### **Clause 7: Group insurance**

45. Subsection (1) provides a definition of group schemes to which this clause applies. It is a wide definition and can include insurance policies such as employment schemes, block building policies taken out by landlords for tenants and building insurance taken out by freeholders for long leaseholders.

46. In order to meet the test set out in subsection (1)(a) the policy entered into by a person (“A”) should offer a direct benefit to a third party (“C”). The policy should do more than simply cover A’s liability towards C, and must provide some additional cover for C.

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47. By subsection (1)(c), the contract must meet the definition of consumer insurance, if C had taken out the cover directly. In other words, C must be an individual who is acting for purposes wholly or mainly unrelated to their trade, business or profession.

48. By subsection (1)(d), C must have provided the insurer, directly or indirectly, with information before the insurer becomes liable for the insurance cover that C benefits from.

49. Where a group member makes a misrepresentation, the scheme under the Bill applies. Subsections (2) and (3) provide that an insurer has a remedy if the individual (C) acted without reasonable care when answering questions posed by the insurer and these representations induced the insurer to provide a particular level of cover for C.

50. When a member of the covered group makes a misrepresentation, subsection (4) stipulates that this only affects the cover of that individual (not the policy as a whole).

51. Subsection (5) provides that nothing in this clause affects duties and remedies in respect of A. Of particular relevance is that the majority of policyholders will be businesses and therefore governed by the law applicable to business insurance. Their duties under the law of business insurance, such as the duty of disclosure, are unaffected by the Bill.

#### **Clause 8: Insurance on the life of another**

52. When a consumer takes out insurance on the life of another, the person whose life is being insured (“L”) may be required to answer questions posed by the insurer. This is information that an insurer may rely upon, but the duty under clause 2(2) to take reasonable care not to make a misrepresentation would not apply, as L is not a party to the contract. Subsection (2)(a) provides that in consumer insurance contracts taken out on the life of another, the representations made by L will be treated as if they were made by the consumer taking out the insurance. In effect, L owes the insurer a duty to take reasonable care when answering their questions.

53. By subsection (2)(b), when the state of mind of the provider of the information is in question, it is the state of mind of L that is relevant and not that of the individual taking out insurance on L’s life.

54. The result of this clause is that an insurer has a remedy against the consumer if either the consumer or L fails to take reasonable care when answering the insurer’s questions.

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### **Clause 9: Agents**

55. This clause stipulates that the factors contained in Schedule 2 apply when determining whether an “agent” is acting as the agent for the insurer or for the consumer. The term agent can cover a variety of job titles such as insurance brokers, insurance consultants, intermediaries and others.

56. Under normal agency law, a person is responsible for the actions of their own agent. This rule is specifically preserved in clause 12(5) and has the following consequences.

57. If the agent acts for the insurer, any wrongdoing by the agent is the responsibility of the insurer and the insurer will have to pay any claim accordingly.

58. If the agent is acting for the consumer, the agent’s knowledge is considered to be that of the consumer. If an agent acts deliberately or recklessly an insurer may be entitled to avoid a policy even if the consumer themselves had acted honestly and reasonably. If the agent acts carelessly then the insurer has the same proportionate remedies (set out in Schedule 1) that it would have had against a careless consumer.

59. Schedule 2 is only to be applied when determining for whom an agent acts for the purposes of this Bill. It applies only to consumer insurance.

### **Clause 10: Contracting out**

60. Subsection (1) prevents insurers from contracting out of the provisions of the Bill to the detriment of the consumer. A term in a consumer insurance contract or a term in another contract is void to the extent that it would put the consumer in a worse position than provided for in the Bill.

61. Subsection (2) stipulates that this clause only covers matters that are within the scope of the Bill. Therefore this clause has no effect on terms in insurance contracts requiring disclosure after the contract has been agreed.

62. Subsection (3) provides that this clause does not apply to contracts for the settlement of a claim. Without this subsection, it might be possible to argue that a contract settling a claim for less than the claim was worth would be a contract which put the consumer in a worse position than provided for in the Bill.

### **Clause 11: Consequential provision**

63. This clause abolishes certain existing rules in relation to consumer insurance contracts.

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64. Sections 18, 19 and 20 of the 1906 Act require the insured and the insured's agent to act with utmost good faith before entering into an insurance contract, by disclosing material information and not making a misrepresentation. The sections apply to consumer insurance in two ways. First, they embody the common law rules which apply to all insurance, including consumer insurance. This is because the 1906 Act has been taken to state the common law position in relation to pre-contract information and disclosure in non-marine insurance. Secondly, they apply directly to marine insurance, including any marine insurance taken out by consumers (for example, to cover pleasure boats).

65. The subsection therefore acts in two ways. Subsection (1) abolishes any common law rules having the same effect of sections 18, 19 or 20 of the 1906 Act on consumer insurance contracts. Subsection (2) disapplies sections 18, 19 and 20 of the 1906 Act specifically in relation to consumer marine insurance.

66. Subsection (3) amends section 152(2) of the Road Traffic Act 1988. The Road Traffic Act provides for a scheme of compulsory motor insurance by which motor insurers generally have an obligation to satisfy judgments obtained by third parties, even if the insured person had breached their insurance contract. There is however an exception in section 152(2) by which an insurer can obtain a declaration that it is entitled to avoid the policy because the insured made a non-disclosure or misrepresentation. The effect of this section is more limited than first appears. Under an agreement between the Motor Insurance Bureau and the government, insurers have undertaken to ensure that the third party is compensated whether the policy is avoided or not. Section 152(2) only has a practical effect where there are two or more possible insurers who might be obliged to pay the third party. For example, if one insurer is able to avoid the contract under this section, the other insurer is obliged to pay the full cost.

67. The amendments to section 152(2) made by this subsection provide that an insurer is only entitled to avoid a consumer insurance policy if they would be able to avoid the policy under the Bill.

68. Subsection (4) amends the equivalent provision for Northern Ireland.

#### **Clause 12: Short title, commencement, application and extent**

69. Subsections (2) and (3) provide for the operative provisions of the Bill to be brought into force by order, subject to there being an interval of at least one year after the Bill is passed.

70. Subsection (4) ensures that the Bill does not have a retrospective effect on contracts made before it comes into force. The Bill only applies to contracts made, and to variations (of earlier contracts) agreed, after commencement.

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71. Subsection (5) provides that the existing principles of agency law shall continue to apply to consumer insurance contracts. Under existing agency law, a person is responsible for the actions of their own agent. This is discussed in the notes to clause 9.

72. Subsections (6) and (7) specify the territorial extent of the Bill, which is described in paragraph 3 above.

## **Schedule 1: Insurers' remedies for qualifying misrepresentations**

### ***Part 1: Contracts***

73. The first part of this Schedule provides the remedies available to insurers when a consumer has made a qualifying misrepresentation before a consumer insurance contract was entered into. This would include a renewal.

### ***Deliberate or reckless misrepresentations***

74. Paragraph 2 specifies the remedies available where a consumer has made a deliberate or reckless misrepresentation. The insurer is entitled to avoid the contract and refuse all claims. The insurer may also retain premiums, unless it would be unfair to do so.

### ***Careless misrepresentations - claims***

75. Paragraphs 3 to 8 set out the remedies available when a consumer who has made a careless misrepresentation makes a claim. The remedies are based on what the insurer would have done had the consumer complied with their duty to take reasonable care not to make a misrepresentation.

76. By virtue of paragraph 5, if the insurer would not have entered into the contract, the insurer can avoid the contract and refuse to pay all claims. If the insurer chooses to avoid the contract, it must repay to the consumer all premiums paid.

77. Paragraphs 6 to 8 set out the position if the insurer would have entered a contract, but on different terms. If the terms would not relate to the premium, paragraph 6 provides that the insurer can treat the contract as having been entered into on those different terms. If, for example, the insurer would have included an exemption clause or imposed an excess, the claim would be treated as if the contract included that exemption clause or excess.

78. If the insurer would have charged a higher premium, paragraph 7 allows the insurer to reduce the claim proportionately. The formula for calculating the reduction is contained in paragraph 8. It stipulates, for example, that if an insurer only charged

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£1,000 but should have charged £1,500, the consumer would receive two thirds of the claim.

79. In some cases, both paragraphs 6 and 7 may apply: the consumer would obtain a proportionate settlement of the element of the claim that falls within the adjusted contract terms.

### ***Careless misrepresentations – treatment of contract for the future***

80. Paragraph 9 addresses the effect of a careless misrepresentation on the future of the contract.

81. If the insurer would not have entered into the contract at all, then paragraph 5 applies. The insurer may avoid the contract (and must return the premiums). This means that the contract no longer exists, and the insurer may refuse all past and future claims.

82. However, where the insurer would have contracted on different terms or for a higher premium (or both):

- a) in non-life insurance, either side is entitled to terminate future cover on reasonable notice;
- b) for life insurance, the insurer must continue the policy either on the existing terms or on amended terms.

83. In a non-life insurance contract, where an insurer discovers a careless misrepresentation (either in the context of an existing claim or otherwise), it has a choice: it may notify the consumer that it intends to treat the contract as subsisting on different terms (sub-paragraph (4)(a)); or it may terminate the contract (sub-paragraph (4)(b)). If it decides to terminate the contract, then it must give reasonable notice to the consumer, and refund the amount of the premium that relates to the balance of the contract term (sub-paragraph (7)). If an insurer simply does nothing, it is very likely to be found to have waived its rights, under the English law of waiver or the Scots law of personal bar.

84. If the consumer receives notice that the insurer intends to continue the contract on different terms, the consumer also has a choice: he or she may agree to continue the contract on amended terms; or he or she may terminate the contract (sub-paragraph (6)). Again, the consumer must give reasonable notice, and is entitled to a refund of the part of the premium which relates to the future.

85. Where the contract is wholly or mainly life insurance, however, a careless misrepresentation does not give the insurer the option to terminate the contract. Instead, the contract will continue on the existing terms or on amended terms (sub-

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paragraph (5)). If the insurer would have charged more, the insurer may give the consumer the option to pay the additional premium. It is not, however, obliged to do this. It may prefer to continue the existing premium and pay only a proportion of the claim. However, the insurer must notify the consumer of the amended terms in accordance with sub-paragraph (4)(a). The consumer may then choose to continue the contract or to terminate it as described above.

### ***Part 2: Variations***

86. Where a qualifying misrepresentation is made before a variation is agreed, it is necessary to ascertain whether that variation can reasonably be treated separately from the rest of the contract. For example, a consumer insures a house and at a later date, extends the insurance to include a lock-up garage. It would be necessary to ascertain whether the lock-up garage could be treated separately from the rest of the contract.

87. If the variation can be treated separately, then the remedies contained in Part 1 of Schedule 1 apply only to the variation.

88. If, however, the variation cannot be treated separately, then the remedies in Part 1 of Schedule 1 are available in relation to the whole of the contract. In effect it will be treated as if the misrepresentation had been in relation to the whole contract.

### ***Part 3: Modifications for group insurance***

89. Under clause 7(4), where a member of a group scheme breaches the duty to take reasonable care not to misrepresent, this has consequences only for the cover of that individual, and not for the policy as a whole.

90. Part 3 therefore provides modifications to the remedies available to the insurer, so that where a group member has made a qualifying misrepresentation, the remedies only affect the group member's cover, and not the rest of the contract.

91. Paragraph 16(a) is included because, in group insurance schemes, the premiums can be paid by either the policyholder or the group members who are receiving the benefit of the cover. When deciding whether it would be unfair to retain premiums (under paragraph 2(b) of the Schedule) an insurer should consider whether it would be fair on the person who paid the premiums, whether that be the policy holder or the group member.

92. Paragraph 16(b) stipulates that the right to terminate cover (under paragraph 9) belongs to the policyholder rather than the group member.

### ***Part 4: Supplementary***

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93. Section 84 of the 1906 Act stipulates when an insurer has a duty to return premiums. Paragraph 17 of the Schedule provides that where the insurance policy is for marine insurance which is also consumer insurance, section 84 should be read in conjunction with Schedule 1. This is particularly relevant to section 84(3)(a), which states that where an insurer avoids an insurance contract from the outset, the premium is returnable unless there has been fraud or illegality. This must be read subject to paragraph 2 of Schedule 1 of this Bill, which allows the insurer to retain premiums in some cases for deliberate or reckless misrepresentations.

## **Schedule 2: Rules for determining status of agents**

94. Schedule 2 provides rules to determine for whom an agent is acting where an intermediary assists a consumer in providing an insurance contract.

95. Under paragraph 2, the intermediary is always considered to act for the insurer in three cases:

- a) Where the intermediary acts as an appointed representative under section 39 of the Financial Services and Markets Act 2000. Section 39(3) states that:

“The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility.”

At present, the section only applies to regulatory matters under the 2000 Act, though it is often taken to apply more widely. Paragraph 2(a) extends the same principle to acts done by the intermediary in relation to collecting and transmitting pre-contract information.

- b) Where the intermediary has been given express authority to collect information as the insurer’s agent.
- c) Where the intermediary has express authority to bind the insurer to the contract.

96. Paragraph 2 focuses on the intermediary’s capacity at the time of the action in question. Thus paragraph 2(b) only determines the status of the agent “when the agent collects information from the consumer”. Similarly, paragraph 2(c) only applies “when the agent enters into the contract”. Thus an intermediary may act for the consumer in advising on the choice of insurer, and for the insurer in binding the insurer to cover.



*These notes refer to the Consumer Insurance (Disclosure and Representations) Bill [HL]  
as brought from the House of Lords on 17 January 2012 [Bill 274]*

97. If none of the circumstances listed in paragraph 2 are met, paragraph 3(1) sets out a rebuttable presumption that the agent is acting for the consumer. The presumption can be rebutted if considering all the circumstances it is clear that the agent is acting for the insurer. Paragraph 3(3) contains some factors which help confirm the presumption that the agent is acting for the consumer. Paragraph 3(4) contains factors which tend to show that the agent is acting for the insurer. Even if there are some factors indicating a close relationship between the insurer and insured, these may be outweighed by specific factors indicating that the intermediary acts for the consumer.

98. Neither of the lists of factors in paragraph 3(3) or 3(4) is exhaustive, individual factors may not always be significant and any other relevant factors and sources should be considered such as those contained in industry guidance and the Financial Services Authority's Handbook.

99. Paragraph 4 contains a power, subject to affirmative resolution, which will enable the Treasury to add, omit or alter any factor. The Treasury may only exercise this power if either or both of the lists have become outdated, for example owing to developments in the market.

## **FINANCIAL EFFECTS AND PUBLIC SERVICE MANPOWER**

100. The implementation of the Bill will require some administrative activity by the Treasury, but the costs are expected to be insignificant.

101. The Bill is not expected to have any significant effect on the workload of the courts, but it may reduce some of the work of the Financial Ombudsman Service (which is a private body).

102. The Bill will not affect public service manpower.

## **REGULATORY IMPACT ASSESSMENT**

103. The Bill is a Law Commission Bill. It seeks to clarify the law in relation to pre-contractual disclosure in relation to consumer insurance contracts. The Treasury has carried out an impact assessment. This is available from the Insurance and Risk Team, HM Treasury, 3/19, 1 Horse Guards Road, SW1A 2HQ.

104. The Bill is essentially a codification of existing best practice. The behaviour of most insurers is not expected to change significantly as a result. The aim is to provide for clear, coherent and understandable law so that insurers and consumers can fully understand their rights and obligations. It is expected that compliance will be simplified and consumers will benefit from clearer protection. This is expected to result in a net financial benefit to the insurance industry with the one off transitional training and documentation costs (c £1.25m) and ongoing annual increased legal costs (c £0.06m) offset by significantly fewer complaints to the Financial Ombudsman Service saving £0.7 per year.

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## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

105. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House to make a statement about the compatibility of the Bill with the Convention rights (as defined in section 1 of that Act).

106. The Financial Secretary to the Treasury has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

“In my view the provisions of the Consumer Insurance (Disclosure and Representations) Bill are compatible with the Convention rights.”

107. The Bill modifies the existing strict duty of disclosure broadly in accordance with best practice and provides a framework for finding the appropriate remedy when there has been a qualifying misrepresentation. It only applies in relation to contracts made after the Bill comes into force and to variations (of earlier contracts) that are agreed after that time.

108. It is possible that the result of clauses 2, 3 and 11 (replacing a consumer’s duty to volunteer material information with a duty to take reasonable care not to make a misrepresentation) will result in consumers being asked more, and more specific, questions about their circumstances. Under clause 8 the same result may apply in relation to an individual whose life is insured but who is not a party to the insurance contract as that clause provides for statements made by that individual to be treated as having been made by the party to the contract. To the extent that Article 8 (right to respect for private life) is engaged it is considered that the provisions are justified by the benefits to consumers of removing the current strict disclosure requirements (which can lead to hardship if misunderstood) and of providing clear rules imposing reasonable disclosure requirements.

109. Clause 4 and Schedule 1 specify rules relating to the remedies that an insurer may have when the consumer has made a misrepresentation. In some cases insurers will have a lesser remedy for a misrepresentation than exists in theory under the present law. If Article 1 of the First Protocol (protection of property) is engaged by these provisions they are thought to be justified as conditions provided for by law which are in the public or general interest. It is thought necessary, and in the interests of both consumers and insurers, to provide for a balanced, fair and proportionate sequence of remedies for misrepresentation. Any adverse effect on insurers by altering the balance between insurers and consumers in relation to remedies for misrepresentation is thought to be fully justified to prevent hardship for consumers.

110. The provisions of the Bill broadly match the best practice expected of insurers and consumers by the Financial Ombudsman Service before the Bill comes into force, so it may be that any changes in the practice of insurers of the kind mentioned in paragraph 108 and any adverse effects on property rights mentioned in paragraph 109 will be extremely modest in practice.

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## **COMMENCEMENT DATES**

111. Under clause 12, clauses 1 and 2 will come into force on the day the Act is passed. However the remainder of the Bill will not come into force until an Order is made by the Treasury appointing the day on which it will come into force. This appointed day cannot be within the period of one year beginning with the day on which the Act is passed.