

Non-disclosure Under New Dutch Insurance Law

by JD Van de Meent

An insurer must be able to assess a risk before deciding whether or not to insure it. If the insurer does decide to provide cover, it will want to attach an appropriate premium and conditions to the insurance policy. The risk assessment carried out by the insurer is largely based on the information provided by the policyholder. The policyholder therefore has an obligation to disclose all required information, which also applies under the new insurance law (which is expected to apply as from early 2006 as part of the Civil Code). The most notable changes in the new law concern the consequences of failing to perform the duty of disclosure.

Extent of the Duty of Disclosure

The extent of the duty of disclosure under the new law is based on case law as developed under the 'old' law in relation to Article 251 of the Commercial Code. The duty of disclosure is described as follows:

“Before entering into the contract, the policyholder shall be obliged to disclose all facts to the insurer that he or she is aware or should be aware of, and on which, as far as he or she knows or should understand, the insurer’s decision whether to provide the insurance, and if so, the conditions of this insurance, depends or may depend.”

The duty of disclosure is limited in two respects:

- the duty of disclosure does not relate to facts that would not have led to a more unfavourable decision for the policyholder had he or she disclosed them to the insurer;
- insofar as the insurer is or should be informed of certain facts.

Questionnaire

If the insurer issues a questionnaire, then this questionnaire will determine the extent of the duty of disclosure. The insurer may not then later claim that the policyholder also ought to have provided information that the insurer did not ask for. Moreover, the insurer may not then claim that certain questions were not or were incompletely answered. Only if the policyholder has purposely tried to mislead the insurer can the insurer claim a breach of the duty of disclosure.

Moral Risk

An insurer will often want to know whether the policyholder (or another party whose interests need to be covered) has any previous convictions in order to assess

the moral risk. The policyholder is only obliged to disclose any previous convictions if this has been expressly requested, and not in terms that could be open to misunderstanding, by the insurer, and insofar as the previous convictions took place within the eight years prior to the insurance being taken out. "Not in terms that could be open to misunderstanding" means that the insurer must state in exact terms what regarding these previous convictions is of interest to him or her. This may be, for example, criminal convictions only, or also acquittals, decisions not to prosecute and simply being arrested by the police on suspicion of a criminal offence.

What Are The Consequences of Not Fulfilling The Duty of Disclosure?

If, upon taking out the insurance, the policyholder has failed to disclose or has incorrectly disclosed certain material facts that he or she is aware or should be aware of, the insurer may, upon discovery of this, under the 'old' Article 251 of the Commercial Code, annul the insurance contract if it, acting reasonably in its capacity as an insurer, would not have provided the insurance, or at least not provided it under the same conditions, had the policyholder given a correct statement of the facts. In this case, the contract and the consequences of this are terminated with retroactive effect.

This strict penalty is (in many cases) considered too drastic because the insured parties can lose their risk cover completely, while upon correct statement of the facts the insurer would have accepted the risk anyway, albeit at a higher premium and/or restrictive conditions. This is why under the new law more balanced penalty regulations have been chosen, which are subdivided into the consequences for the continued existence of the insurance contract and the consequences for the entitlement to policy benefits.

Consequences For The Insurance Contract

As soon as the insurer discovers that the duty of disclosure has not been performed, it must inform the policyholder of this in writing within two months. In addition, the insurer must inform the policyholder of the possible consequences of non-compliance. Possible consequences are, for example, non-payment or only partial payment of policy benefits in the event of damage or loss, an increased premium or the imposition of restrictive conditions. If the insurer fails to inform the policyholder within the period of two months, then he cannot claim non-performance of the duty of disclosure on the part of the policyholder in the event of a damage incident.

If the insurer does inform the policyholder of his non-performance within the two months or if it does claim non-performance of the duty of disclosure when the risk presents itself, the *policyholder* may terminate the insurance contract with immediate effect up to a maximum of two months thereafter. He or she may then choose to place the insurance elsewhere. The policyholder may, of course, also choose to negotiate with the insurer for an adapted premium and/or conditions.

The *insurer* may terminate the insurance contract with immediate effect within two months after the discovery in two cases:

- if the policyholder has purposely misled the insurer;
- if the insurer would not have provided the insurance had it been aware of all the correct facts.

The termination comes into effect from the moment at which the contract is terminated and *actually* only has consequences for everything that happens after the termination.

Consequences For The Entitlement to Policy Benefits

What are the consequences of non-performance of the duty of disclosure as regards the entitlement to policy benefits? Under the 'old' Article 251 of the Commercial Code, there was a heavy penalty for all cases of non-performance of the duty of disclosure: no cover. If it was later noted that the policyholder had not fulfilled his or her duty of disclosure, the insured parties were not able to make a claim for policy benefits under the insurance contract. Under the new law, the following system applies:

- if the non-performance of the duty of disclosure relates to facts that have not contributed to the onset of the risk and the facts not, or incorrectly, disclosed would not have increased the chance of the risk presenting itself in this way, policy benefits must be made by the insurer in full;
- if there is a question of intent on the part of the policyholder or a third party whose interests are being covered by the insurance to mislead the insurer, the insurer is not obliged to pay the party whose intent it was to mislead him or her;
- if the insurer indicates that it would not have provided cover had the duty of disclosure been performed, and had it consequently been aware of all the correct facts, the insurer is not obliged to pay out;

- if the insurer had stipulated a higher premium or had provided cover to a lower amount had the duty of disclosure been performed, and had it consequently been aware of all the correct facts, the policy benefits are reduced in proportion to what the premium or the insured sum would have been. If, for example, the premium would have been twice as high, the amount paid out by the insurer is halved;
- if the insurer had stipulated different conditions had the duty of disclosure been performed, and had it consequently been aware of all the correct facts, the obligation to pay under the policy must be assessed as if these different conditions apply.

In almost all cases, therefore, the obligation of the insurer to pay is assessed based on the fictitious situation which assumes that the policyholder has performed his or her duty of disclosure upon taking out the insurance.

Conclusion

These more balanced penalty regulations and the basic principle that the insurance should as far as possible be maintained by the insurer, characterise the new Dutch insurance law. Instead of the old 'all or nothing' principle that applied under Article 251 of the Commercial Code, an assessment based on the situation that would have arisen upon the correct performance of the duty of disclosure is made.

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