THE INSURER'S OBLIGATION TO INFORM THE POLICYHOLDER FOLLOWING DISCOVERY OF NON-DISCLOSURE UNDER DUTCH LAW

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Introduction

When an insurer discovers that a policyholder has withheld information when taking out an insurance policy, it should be alert to react to such event in a timely and adequate manner. The law stipulates a formal requirement if the insurer wishes to bear the consequences of this non-compliance with the obligation by the policyholder to provide information.[1] According to Article 7:929 Paragraph 1 of the Civil Code (CC), the insurer may only invoke the consequences if it brings this to the attention (of the policyholder) "within two months following the discovery of the non-disclosure and stating the possible consequences". The notion behind the two-month term is that the insurer may not leave the policyholder in a state of uncertainty too long with regard to whether or not it wishes to take appropriate steps on account of the discovery.[2]

As for the right of receiving benefit, it does not make any difference if this is related to damage already inflicted and/or future damage. With respect to both categories, the legislator wants the insurer draw the attention of the policyholder to the possible consequences of the non-disclosure within two months.[3]

Article 7:929 Paragraph 1 CC looks like a simple stipulation. In practice, however, this very provision appears to incite all kinds of difficult questions. In fact, it is unclear what is to be understood by "discovery" and thus it is not always possible to indicate when the two-month term has commenced. Moreover, it is not clear exactly what information the insurer must pass on to the policyholder after making the discovery.

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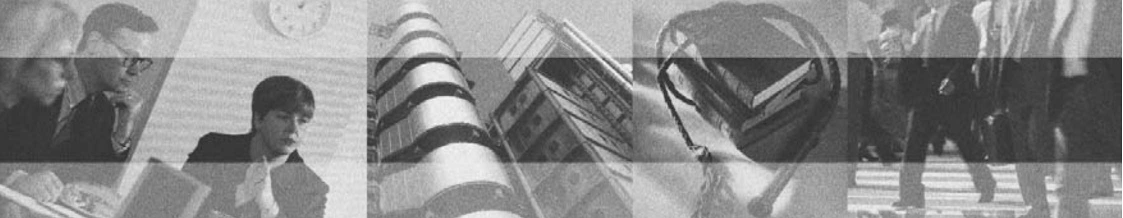
1 Such consequences can be described as follows: only when the insured has purposely acted to mislead the insurer, or when the insurer would not have concluded an insurance contract at all had it known the actual state of affairs, can the insurer terminate the insurance and, in addition, will not be liable for compensation under Article 7:929 Paragraph 2 of the Civil Code. If none of these conditions is met, but reporting the withheld fact would have resulted in either a higher premium, a lower insured amount, or adjusted conditions, the insurer will not be allowed to terminate the insurance policy, but may reduce the benefit proportionally and/or compensate based on adjusted conditions. The payout must be made in full, however, if the withheld facts are of no relevance for the assessment of the risk, as it has materialised.

2 See Kamerstukken II (Parliamentary Papers II) 1985/86, 19 529, no. 3, p. 10. L. Dommering-van Rongen, 'De mededelingsplicht van de verzekeringnemer bij het aangaan van de verzekering" (The information obligation of the policyholder when concluding the insurance) in: J.H. Wansink a.o. Het nieuwe verzekeringsrecht Titel 7.17 BW belicht, Deventer: Kluwer 2005, p. 41, and 7.17 BW belicht, p. 41 and Asser/Clausing/Wansink 2007, no. 171.
In Asser/Clausing/Wansink 2007, De Verzekeringsovereenkomst, no. 171, it is rightly pointed out that it was already the case under the old insurance law that an insurer who gains cognizance of a non-disclosure or an incorrect statement prior to the materialization of the risk would act contrary to equity and natural justice if it does not inform the insured of its discovery and then invokes the non-disclosure when the risk materialises.

3 With "non-disclosure" and "non disclosed facts", I am referring to facts withheld when taking out the insurance policy within the meaning of Article 7:928 of the Civil Code, which would justify invoking non-disclosure. I also mean facts that the insured has presented incompletely or incorrectly before taking out the insurance policy.



I recently realised all this myself when I carried out an investigation for an insurer – who was notified of a loss – with regard to what the policyholder knew at the time of taking out the insurance policy. At a certain moment, the policyholder delivered a large file to me. When I started reading, I came across a document that could only lead to one conclusion: at the time the policyholder had withheld important information. Suddenly I encountered all kinds of questions. Had I now made a discovery within the meaning of Article 7: 929 Paragraph 1 CC? Alternatively, could I still request further information without losing precious time? If I had made the discovery, should this be attributed to my client, the insurer? When did the two-month term actually commence?

I could no longer establish precisely when I had received the file. On what day exactly had I seen the document for the first time, and when did its significance occur to me? Who, for that matter, would have to provide evidence of the time when the file was delivered to me and when I had seen the document concerned? What was I to report (on behalf of) the insurer at a later stage? Should I report my findings as they were, or could I remain vague in the hope of obtaining more information? Should I, in addition, mention what the consequences of the non-disclosure were to be? What would happen if I were not to report in full?

The only fact I was certain about was that the notification to the policyholder would have to be issued in writing.[4]

In short, there is sufficient reason to examine in further detail (1) when the "discovery" by the insurer is a matter of fact and (2) what the obligation of the insurer to provide notification implies subsequently.

When discussing the first part, I shall also pay attention to the question of how compelling the two-month period is, and with whom the burden of proof rests with regard to its observance.

(1) Origin of the obligation to inform the policyholder: *"within two months following discovery"*

The "discovery" concept examined more closely

The answer to the question of what is to be understood by the concept of discovery determines when the two-month period commences. As mentioned earlier, it is not always obvious when a discovery is a matter of fact. Apart from that, there are situations in which it is obvious that a discovery has been made though this might not lead to a justified outcome.

"Discovering" means, among other things, *"observing what was unknown hitherto"*.[5] Personally I prefer another, older definition of the concept of discovery i.e.: *"concluding that something is as it is"*.[6] However, when does an insurer conclude that something is as it is, and that a fact has indeed been withheld?

4 Article 7:933 Paragraph 1 Civil Code.

5 Van Dale Groot Woordenboek Hedendaags Nederlands (Dictionary of Contemporary Dutch), Utrecht/Antwerp: Van Dale Lexicografie, third edition with new spelling, 2006.

6 Van Dale Handwoordenboek Hedendaags Nederlands 1987. Also N. van Tiggele-van der Velde uses the word "vaststellen" (conclude) in *Bewijsrechtelijke verhoudingen in het verzekeringsrecht* (diss. Rotterdam), Kluwer 2008, p. 139.

According to the Parliamentary Papers with regard to this law, a discovery is a matter of fact if the insurer has sufficient certainty that the obligation to provide information has not been fulfilled. Suspicion of a violation is not sufficient.[7]

Van Tiggele ascertains, rightly so, that for a discovery it is not only necessary for the insurer to gain cognizance of the actual state of affairs; it must also establish that it does not correspond to the statement made by the policyholder at the time of taking out the insurance policy.[8] At what point in time can it be stated that the insurer ascertains that the statement made by the policyholder at the time of taking out the insurance policy did not correspond to reality?

In this context, it is no less relevant that the conclusion should be a subjective experience of the insurer. Van Tiggele ascertains – again rightly so – that the law refers to "the insurer that makes the discovery", not to "the insurer that should have made the discovery".[9]

Thus, the term also has to be interpreted subjectively in linguistic terms. It is a matter of how and when this specific insurer established the non-disclosure in the specific case.

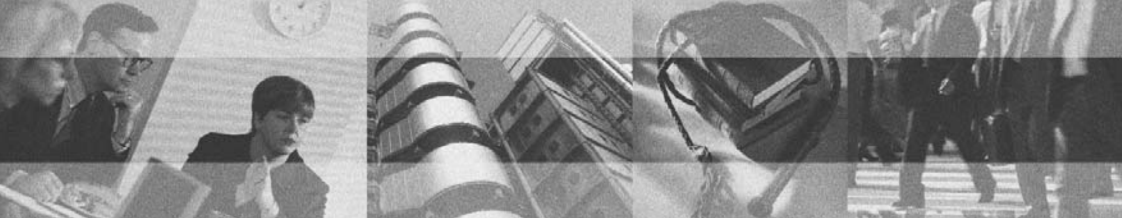
It remains to be seen, however, if this interpretation of the concept of "discovery" leads to an useful and just solution under all circumstances.

*Some examples for closer examination_*

I cite the following examples:

- An insurer who has insured a building "roofed with tiles", based on an application form, orders an investigation into the circumstances under which a vehicle insured by the same person is stolen. From the pictures taken in connection with the investigation it is obvious that the roof of the insured building is actually covered with thatch.[10]
- A house is insured as being roofed with tiles. Following damage to that house, the loss adjuster (who has the policy documents at his disposal) reports that the house is covered with thatch. During the examination the insurer initially overlooks this. However, when re-reading the assessment report six months later, he then establishes that the statement made at the time was incorrect.
- Following the damage inflicted, the loss adjuster, due to a staff shortage at the office concerned, needs a year to report. Two days after receipt of the assessment report, the insurer discovers, based on that report, that this is a case of non-disclosure.
- The insurer discovers that certain facts have been withheld, but doubts if this would justify invoking non-disclosure. The insurer therefore requests legal advice from an external legal expert. After four weeks, the latter advises that there was indeed a case of non-disclosure.

7 *Kamerstukken* (Parliamentary Papers) *1* 2005/06, 30 137, C, p. 6.
8 Van Tiggele-van der Velde 2008, p. 139.
9 Van Tiggele-van der Velde 2008, p. 140.
10 The example is from Van Tiggle-van der Velde 2008, p. 140.



- After examining the damage report, the insurer arrives at the serious suspicion that the policyholder has committed non-disclosure. It does not preclude, however, that the policyholder may be able to counter this suspicion. Therefore, it initially gives the policyholder the opportunity to present his view prior to formally invoking non-disclosure. Following a number of reminders from the insurer, the latter receives a response from the policyholder from which it appears that the latter cannot counter the insurer's suspicion.

Is the subjective criterion of "discovery" adequate for a just interpretation of the obligation to provide information? (examples 1, 2 and 3)

With the first example, one may wonder if there was a discovery indeed, as the observed fact (a thatched roof instead of a tiled roof) does not bear any relation to the insured risk, i.e. car theft, covered by a different policy. Van Tiggele is of the opinion that there was no case of discovery; the insurer has not discovered that non-disclosure occurred in relation to the thatched roof. She argues that two different kinds of insurances are concerned, i.e. a property insurance and a motor insurance, which are dealt with by different departments.[11]

I agree with Van Tiggele that the insurer did not make the discovery. He presumably saw the thatched roof in the pictures, but did not verify the situation on the ground with what he was advised of when the insurance policy was taken out. In my view, the insurer cannot be blamed for this.

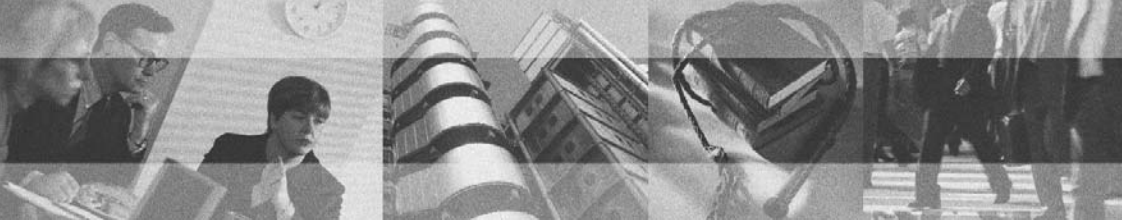
However, what should be the answer to the follow-up question? That question arises from example 2. What is the position of the insurer who does conduct an investigation in relation to the building policy? It clearly appears from the assessment report that there is a thatched roof. However, the insurer initially fails to conclude that this deviates from the statement made when the insurance policy was taken out. It is still arguable that the insurer, no matter how much he is to be reproached he is in this case, only discovered the non-disclosure when he finally started reading the assessment report properly.

Under Article 7: 929 Paragraph 1 CC, the insurer would not lose the right to invoke non-disclosure if he does not "properly" read the report within two months. He did not make the discovery because he did not pay attention.[12] Would that be an outcome that would be acceptable under all circumstances?

In the third example, the insurer discovered the non-disclosure when he finally could gain cognizance of the long-awaited assessment report; within the letter of the law, the two-month term would start at that time only. The question also arises here of whether that would be an acceptable solution.

11 Van Tiggele-van der Velde 2008, p. 140.

12 I therefore do not share the view of M.L Hendrikse and J.G.J. Rinkes in 'Enige bespiegelingen aangaande het leerstuk Verzwijging: de mededelingsplicht van de verzekeringnemer bij het aangaan van de verzekeringovereenkomst" (Meditations about the non-disclosure theory: the obligation of the policyholder to provide notification when taking out the insurance policy), NTHR 2008/5, p. 215 that the two-month period begins at the moment the surveyor's report has reached the insurer. The authors referred to are of the view that "it does not matter if the insurer has read the report or not." They explain this by referring to Article 3:37, Par. 3 BW. In my view, a surveyor's report is, however, certainly not to be regarded as a "declaration directed at a particular person" within the meaning of that article.



Within two months after the insurer should have made the discovery?

There are probably few readers of the opinion that if the insurer does not initially read the surveyor's report properly, it will still have to be able to invoke non-disclosure in all cases. In case 2, the limiting effect of reasonableness and fairness should therefore prevail as needed. The fact that the insurer may no longer be able to invoke non-disclosure following the expiry of a two-month period after receiving the report can be justified by its own conduct: it should have paid more attention. On balance, this means, therefore, that the insurer should have made the discovery earlier. This puts the criterion of "discovery" in objective terms and then has to be interpreted as the moment at which the insurer actually made the discovery or *should* have made the discovery.

This means that the insurer in the second example is too late to invoke non-disclosure; not because it actually made the discovery earlier but because it *should* have made the discovery earlier.

In itself, this is an approach which fits in with the insurance law. Indeed, obligations are also imposed on insurers which arise after they have established or *should* have established something. See Article 7:941 BW (damage report) and Article 7:957 BW (safeguard obligation).

We also see this outside of insurance law, e.g. in the case of the obligation of complaint on the part of the purchaser where the item bought does not correspond to what was agreed. The purchaser must then inform the vendor – formulated briefly – within two months after he made or should reasonably have made the discovery under Article 7:23, Par. 1 BW.[13]

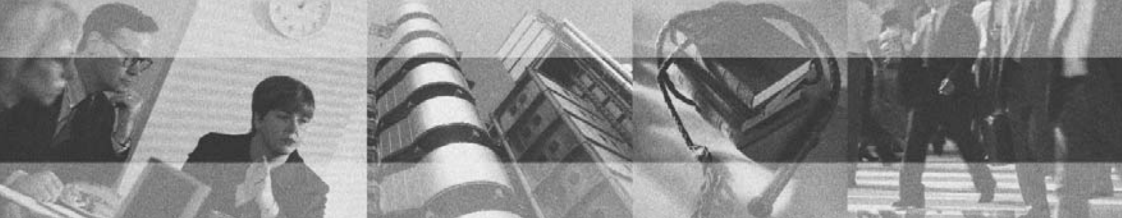
If the term "discovery" is indeed objectified in this manner by interpreting it as actually making the discovery or "should" have made the discovery, this also facilitates the resolving of the first three cases. This cannot then be limited to the question of whether the insurer provided the policyholder with information within two months of discovering the non-disclosure; it must then also be answered whether the notification took place within two months after the insurer should have discovered the non-disclosure.

In the case of the thatched roof becoming recognisable during an investigation concerning another policy, it was not up to the insurer to discover anything, with the result that it was not obliged to make any notification and the two-month period did not therefore commence.

In situation 2, the two-month period had – in subjective terms – not yet expired or, in stronger terms, had not even started when the insurer actually discovered the non-disclosure on re-reading. It appears tenable that the insurer should have made the discovery earlier.

In example 3, the conclusion also appears obvious that the insurer should have made the discovery earlier. The fact that the surveyor was seriously late in submitting his report without any good reason is at the risk of the insurer in the relationship with the

13 It is doubtful whether the word "reasonably" adds much in this context. After all, whether something "should" be done is – outside of etiquette (you shouldn't talk with your mouth full) – normally determined by reasonableness.



policyholder. It may perhaps have been in the power of the insurer to prompt quicker delivery of the report, e.g. through a reminder or appointing an other surveyor.

In brief, there appears to be every reason to objectify the term "discovery" and interpret this as having actually made the discovery or "should" have made the discovery.[14]

Furthermore, it would appear impossible in general terms to state under what circumstances and within what period of time the insurer should discover that non-disclosure has occurred. That moment will depend greatly on the circumstances of the specific case, e.g. on the ease with which the non-disclosure can be established. If it concerns a fact that is very evident, a greater degree of alertness may be expected than where it is a matter of a fact that can easily escape one's attention. Last but not least, whether there was any intention on the part of the policyholder with regard to the non-disclosure also plays a role, in my view.

If the policyholder has withheld something with the intention of misleading the insurer, caution is required in my opinion with regard to invoking against the insurer that it should have discovered the non-disclosure earlier. This is also why a general solution cannot be given for the first three cases.

Constraint in the assumption of "discovery" (examples 4 and 5)

Although I therefore advocate a broader interpretation of the concept of "discovery" by objectifying it and also deeming it to mean *"should discover",* I am of the view at the same time that constraint has to be practised when assuming that the insurer has made or should have made a discovery.

Examples 4 and 5 serve to support the latter. In the examples, it is established that non-disclosure has been committed. However, the determination of this took place at the moment the loss adjustor himself concluded that facts had been withheld or was it only when his suspicions were confirmed by the external legal expert (example 4) or by the policyholder (example 5)?

The later confirmation of the suspicions signifies that, in the first instance, the insurer had already discovered the non-disclosure. Strictly speaking, the insurer had already made the discovery when it established the withheld facts and not only when it received concurring legal advice or when it appeared to it from the reaction of the policyholder that its analysis was correct. It therefore runs the risk of the policyholder raising this against it as an objection, to avert the invoking of non-disclosure.

14 Furthermore: in the cases of time bar (verjaring), the Supreme Court is not interested in any objectifying measures. As a result of HR on 6 April 2001, *HJ* 2002, 383, the criterion of "*has become known*" in Article 3:310 BW has to be understood as the starting moment for limitation in subjective terms. It is not a matter, according to the Supreme Court, of whether "the *disadvantaged party should reasonably have been familiar with the damage and the person liable for this; it is more the case of whether the disadvantaged was actually familiar with this"*. It is obvious that this ruling also applies to the limitation of the claim on the insurer by virtue of Article 7:942 BW. This is, nevertheless, not an argument against the objectified interpretation of the term "discovery" simply because the two-month period under Article 7:929 BW is not a term of limitation (verjaring). See further in this regard in this article. Also intended by the principle of the (discharging) limitation (it is argued in this way, at least, see J.L. Smeehuijzen, *The discharging limitation* (diss.), Deventer: Kluwer2008, p. 33 ff.) is the protection of the party liable whereas the idea behind the two-month period is to protect the person entitled to the payout.

In both situations, however, the insurer appears to operate very prudently. This prudence stops the insurer from immediately attaching consequences to what it establishes through informing the policyholder that it has discovered a fact which has been withheld.

As noted above in the discussion of the term "discovery", there is not yet any mention of discovery when suspicion of a transgression exists. The insurer must have a sufficient degree of certainty that the obligation to provide information has not been complied with. In examples 4 and 5, it concerns the same facts that first "merely" evoke a suspicion of non-disclosure and only later, through external confirmation, lead to a satisfactory degree of certainty. If there were reasonable grounds for the insurer to obtain legal advice, e.g. in view of the level and significance of the complexity of the matter, an objection by the policyholder that the insurer had already made the discovery should still not be able to succeed.[15] It is, indeed, evidence of prudence to test whether the appreciation of the facts is correct, after which, in the case of confirmation, the suspicion turns into sufficient certainty.[16]

It should be possible under circumstances to expect the insurer to inform the policyholder that legal advice has been sought and that the outcome of this can have consequences for the insurance cover.[17]

It also applies with regard to the insurer who does not want to confront its policyholder with a claim of non-disclosure without a fair hearing that this should not be invoked against the insurer because it had already made the discovery earlier.

It can be said in all fairness that it was not for the insurer to make the discovery earlier than when it received or understood the legal advice that the policyholder would not be able to refute the alleged non-disclosure.

Summary concerning the term "discovery". Proposal for a definition

It follows from the above that, in my view, the term "discovery" as provided for in Article 7:929, Par. 1 BW has to be interpreted in an objective manner. It is not only a case of whether the insurer has actually made the discovery but, rather, whether it should have made the discovery. However, constraint is appropriate when answering the question of whether a discovery has actually been made or should have been made.

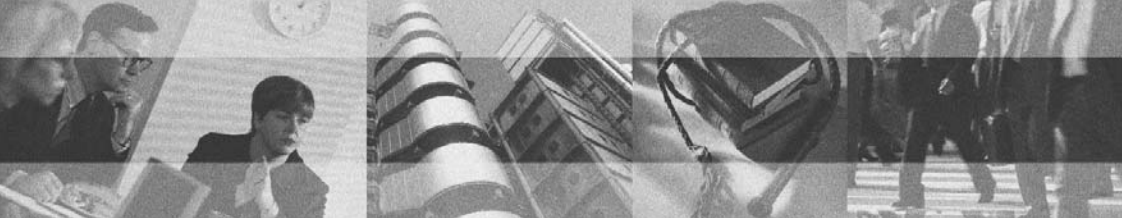
In view of the above, I would suggest the following definition for the term "discovery" as provided for in Article 7:929, Par. 1 BW:

> A discovery as provided for in Article 7:929, Par. 1 BW is deemed to have occurred when the insurer actually establishes or should reasonably have established – by testing the real risk against that stated by the policyholder when taking out the

15 Cf. HR 29 June 2007 *RvdW* 2007, 636. This ruling shows that the obligation for the purchaser arising from Article 7:23 lid 1 BW to inform the vendor after discovery is suspended if an investigation by any expert is needed, though the purchaser must inform the vendor about the investigation and the expected duration if such investigation is expected to take a longer period of time. In the same sense: Court of Appeal of Leeuwarden dated 30 January 2008 *NJF* 2008, 125.

16 Cf. also Hendrikse and Rinkes *NTHR* 2008, p. 215 who, rightly, want to prevent *"the insurer having to send the policyholder an excessively premature letter."*

17 Cf. the rulings by the HR dated 29 June 2007 *RvdW* 2007, 636 and the Court of Leeuwarden on 30 January 2008 *NJF*2008, 125.



insurance policy – that the policyholder withheld relevant facts or presented false information when entering into the insurance agreement.[18]

Attributing the discovery by the expert as an assistant to the insurer?

It cannot be gathered from Article 7:929 BW whether a discovery of facts by, for example, the expert charged with the matter by the insurer can be attributed to the insurer. This question certainly does not always arise, precisely because it is not sufficient for discovery that the true facts are observed but, rather, also that it has to be established that they are inconsistent with the statement made at the time of entering into the insurance agreement. It can likewise be the case that the latter was also established by the expert. The expert often has the policy at his disposal, for example, and can see or grasp before the insurer (to whom a report has to be submitted) that facts have been withheld.

Can the discovery by the expert, as an assistant, then also be attributed to his client, the insurer? If this should be the case, this then has consequences, of course, for the commencement of the two-month period. This would then start before the insurer has itself made the discovery.

Where it concerns assessments, it is a foregone conclusion that notifications by the expert regarding having to provide information or not about facts in connection with the assessment of the risk to be insured may not be attributed to the insurer.[19] This can be an indication that the expert's knowledge may not be attributed to the insurer.

In my view, it is essential to be cautious with regard to such attribution. The question of whether and if so, what, consequences may possibly have to be associated with a discovery of non-disclosure is of both a legal and a strategic nature. It is the insurer rather than the expert that has the right to judge whether there is scope in legal terms for invoking non-disclosure. It is also the insurer that has to determine whether it is, in commercial terms, e.g. in the relationship with the policyholder or on account of undesirable consequences such as negative publicity, sensible to invoke non-disclosure. Furthermore, the insurer must be able to reflect and, in my opinion, the two-month period also helps this purpose.

It seems to me that attributing the discovery of facts by the assisting party to the insurer may only take place in the case of the assisting party – recognisable by the policyholder – having intensively assisted the insurer and having played a significant part in its decision-making.[20]

The deadline period is critical. Extension is not possible

In all of this, it has to be borne in mind that the two-month deadline period is critical. If

18 So I also use the term "reasonably", since it cannot do any harm.

19 See J.H. Wansink and A.S.J, van Garderen-Groeneveld, *Verzwijging bij verzekeringsovereenkomsten,* Zwolle: W.EJ. Tjeenk Willink 1993, p. 91-92 and the non-published judgements by the Court of Appeal of Amsterdam discussed there.

20 In this regard I refer in part to RJ. Tjittes,' *Toerekening van kennis van een externe deskundige'*, *NJB* 2001, p. 7-15. This article by the way concerns attribution to clients in the case of legal actions by external experts. Tjittes says in this regard on p. 10, among other things: *"Nevertheless, it is an aspect that the more intensively the expert has assisted his client in concluding the legal action, the sooner his knowledge will be attributed to the client. The degree of intensity has to be judged from the perspective of the opposing party."*

the insurer allows the period to lapse without informing the policyholder, its opportunity to invoke non-disclosure is then forfeited. If this were to be different, the questions pointed out above would not be pressing or would be less pressing because rectifying a possibly defective notification should be part of the possibilities. One can certainly ask oneself whether the two-month period can be suspended or can otherwise be extended. With such an extension, the insurer would be able to give itself somewhat more "elbow room" in order to further examine the case or, however, simply lay the file on the "less urgent" pile.

The law and Parliamentary Papers say nothing on this matter, nor does the literature.

In order to be able to answer the question, it appears necessary to first establish what the nature is of the two-month period. If the period is to be regarded as a (discharging) limitation term, extension should then be possible by means of a closing action. The period under Article 7:929, Par. 1 BW cannot be considered a limitation term, however. Limitation terms are aimed at rights to claims. This follows from Article 3:306 BW. The insurer has, on the basis of Article 7:929, Par. 1 BW, nothing to demand from the policyholder after discovery of the non-disclosure (in principle); it may only invoke the consequences of the non-disclosure.

The insurer may therefore exercise an authority, but within a period of two weeks. The two-week term must then also be regarded as a time limit (vervaltermijn).[21] This is also logical if a comparison is made with the authority referred to for this on the part of the purchaser arising from Article 7:23, Par. 1 BW with regard to informing the purchaser within a period of two months that the item purchased does not correspond to what was agreed. This period is also a time limit (vervaltermijn).[22]

The observation that the two-month period under article 7:929 BW is a time limit (vervaltermijn) is not particularly helpful for answering the question of whether the period can be extended. In contrast to what many of us learned earlier, such a time limit can be extended in certain cases through a form of "interruption". This is at least argued in a convincing (and humorous) manner by Smeehuijzen.[23] Based on his analysis, however, I would not dare to conclude whether the deadline period under Article 7:929 can be extended.

Nevertheless, if the thinking behind the deadline period is taken into consideration, i.e. that the insurer may not leave the policyholder in a state of uncertainty for too long with regard to whether it intends to link any consequences to the discovery of non-disclosure,[24] the possibility of an extension then appears to be inconsistent with that concept.

I am therefore of the view that the conclusion would have to be that the two-month period is not liable to extension.[25]

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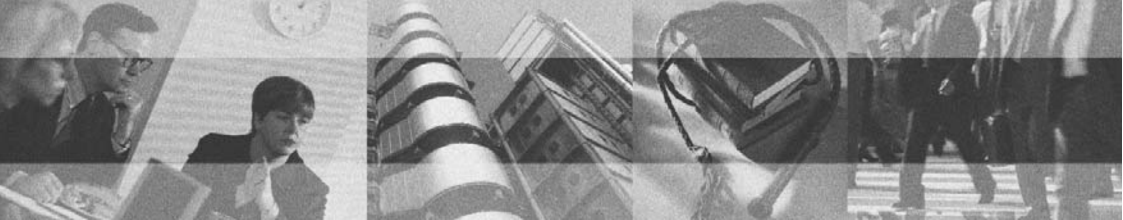
21 In the same sense, Hendrikse and Rinkes *NTHR* 2008, p. 215.

22 see Smeehuijzen 2008, p. 349.

23 Smeehuijzen 2008, p. 361 ff.

24 I refer to the introduction to this article.

25 The Articles 7:928 to 930 BW are regulatory law insofar as it concerns, stated in brief terms, non-private persons. The possibility therefore exists of agreeing with the category of policyholders that the two-month period does not apply or applies less stringently.



This therefore also means that the insurer, where it thinks it has discovered non-disclosure, cannot confine itself to a report to the policyholder that it is in the process of establishing a point of view and that it reserves it rights vis-à-vis the policyholder.[26]

Burden of proof relating to the question of whether the insurer has observed the two-month period

Another question that has to be asked in this context is that of the burden of proof. In this connection, questions arise regarding the way in which the moment of discovery has to be established as well as distribution of the burden of proof if an insured party defends itself against the invoking of non-disclosure with the argument that the insurer exceeded the two-month period before sending the notification. Does the policyholder then have to prove that the insurer made the discovery earlier? Or does the insurer have to prove that it gave notification in time, thus proving that it made the discovery less than two months prior to the notification?

The answer cannot be derived from the law, but there is an indication in Parliamentary Papers with regard to this law, which assumes that it is the insurer that has to furnish the proof. However, there is no documentary substantiation for this.[27]

It is striking that the legislator wants to impose the burden of proof on the insurer. After all, as a result of the heading of Article 150 Rv, the party wanting to invoke a legal consequence associated with a fact has to prove such fact in the case of a dispute. The insurer wants to invoke the absence or only limited existence of cover as a legal consequence of the fact that the policyholder has withheld facts.

If the insurer does not invoke non-disclosure within two months of the discovery, this has the legal consequence that the non-disclosure can no longer be invoked at all. If the policyholder invokes the legal consequence linked to exceeding the two-month deadline period, the policyholder will, in the case of a dispute by the insurer, have to prove that the period has been exceeded; i.e. the policyholder must prove that the insurer had discovered the withheld fact earlier and therefore did not react in time.[28]

The opinion of the legislator that the burden of proof rests with the insurer is therefore incorrect in my view.[29]

It will by the way not always be easy for the policyholder to satisfy the burden of proof. After all, the relevant facts and circumstances generally take place primarily within the domain of the insurer, as expressed by Van Tiggele.[30] The court can of course deem proof by the

26 Which is, of course, something other than a report as referred to earlier that there is suspicion of a transgression. In the latter case, the insurer does not yet consider itself in a position to declare that it has discovered non-disclosure. The difference is subtle, though.

27 *Kamerstukken 1*2004/05, 19 529, E, p. 7, where the minister replies that the insurer must, in the case of a dispute, state a position on this and, where necessary, prove that it has remained with the two-month deadline period.

28 Just as the obligation to motivate its position and burden of proof also rest on the vendor invoking that the purchaser did not complain in time; see Asser/Hijma 5-1, *Koop en ruil,* 2007, no. 543. In the case of time bar (*verjaring*), the obligation to make a statement and the burden of proof also rest on the party invoking a time bar period, see HR 6 April 2001, *NJ* 2002, 383.

29 In the same sense: Van Tiggele-van der Velde 2008, p. 139.

30 Van Tiggele-van der Velde 2008, p. 140.

policyholder of the insurer exceeding the two-month deadline period as having been furnished on the basis of facts and circumstances relating to the proceedings and he can impose the provision of proof to the contrary on the insurer.[31] But if the insurer opts not to provide insight into the relevant facts and circumstances, the court cannot deem the proof has having been furnished by the policyholder beforehand, either. It would then also be obvious that the insurer, if there are reasonable grounds to wonder whether the insurer has complied with the two-month deadline period, is under a greater obligation to motivate his position and to provide the necessary details on the basis of which the policyholder can establish when the discovery took place.[32]

If "discovery" is also to be understood as "should have discovered", the position of proof is then, of course, made easier for the policyholder. The insured party does not then have to prove in concrete terms when the insurer made the discovery in his specific case; rather he can confine himself to proving when the insurer should have made the discovery, which will generally be less difficult to demonstrate.

A look beyond national borders[33]

A look beyond the national borders teaches us the following.

In Belgium, there is no deadline within which the insurer has to make it known that it is invoking non-disclosure.[34] From England and France I am informed that a deadline period does not exist there, either, comparable to that under Article 7:929 BW.

In Germany, the insurer has to invoke non-disclosure within one month of the discovery of non-disclosure through actually "withdrawing" from the insurance agreement.[35] The deadline period starts when the insurer has reliable information concerning the non-disclosure. Decisive in this regard is the knowledge in the possession of the official charged with the matter by the insurer. If there is cause for doing so, the insurer must initiate a more detailed investigation. If it omits to do this, it is then deemed to be in possession of the information it should have been in possession of if it had instituted an investigation.[36]

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31 Just as the court also has the power in the case of a time bar to deem proof by the party appealed to in relation to the time when the disadvantaged party was actually familiar with the damage and person liable for this as having been furnished beforehand on the basis of facts and circumstances appearing from the proceedings, after which the disadvantaged party may offer proof to the contrary; see HR 6 April 2001 NJ 2002, 383.

32 We also see such a situation for liability claims against doctors. A doctor accused of having made a professional error can be required to give sufficient factual details to explain his/her disputing of the patient's position for the purpose of providing these starting points for the possible furnishing of proof. See HR20 November 1987, AU1988, 500 m.nt. W.L.Haardt, HR 7 September 2001, NJ 2001, 615 and more recently HR 15 June 2007, *JA* 2007, 144 m.nt. K. van der Meer.

33 With thanks for their input to Luc Schuermans, lawyer in Turnhout, Oliver Sieg, lawyer in Düsseldorf, Sylvain Rieuneau, lawyer in Paris and Chris Burt, lawyer in London.

34 By virtue of Article 7 of the Belgian Law on the national insurance agreement dated 25 June 1992, the insurer must, in the case of unintentional non disclosure, make a proposal to the policyholder concerning adjustment of the terms of insurance within one month of "*learning about the non disclosure (...)*". With regard to all this, see L Schuermans, *Grondslagen van het Belgisch verzekeringsrecht,* Antwerp: Intersentia 2008. p. 329. The author informed me, however, that there is hardly any jurisprudence in Belgium concerning this so-called *"renegotiation obligation"* which means there is also no clarity concerning the moment when the period of one month after the learning of the non disclosure starts.

35 Article 21, Par. 1 of the Insurance Contract Law 2008.

36 See in this regard: Federal Supreme Court dated 20 September 2000 - IV ZR 203/99, VersR 2000, 1486, dated 17 April 1996 - IV ZR 202/95, VersR 1996, 742; and from 20 September 1989 - IVa ZR 107/88, VersR 1989, 1249.