

## IMPROVING THE INTELLIGIBILITY OF INSURANCE POLICIES

*by David StL Kelly*

### **Introduction**

Despite the increasing demand for simpler and more intelligible legal documents, many insurers retain old wordings which are virtually unintelligible to many insureds, and are often barely intelligible even to people who have become familiar with them during long careers in the industry.

This article seeks to demonstrate that unintelligible insurance policies can be readily converted into a much more intelligible form; that doing so creates no significant risk of accidental change in the meaning or effect of the policies; and that the exercise is one which all insurers should undertake because of the costs which unintelligible documents impose on them.

Three factors adversely affect the intelligibility of insurance policies: their language, their structure and their design. I will deal in turn with each of these factors, giving examples of what can be done to improve them and to remove the unnecessary barriers to understanding which, in their present form, they create. I will then briefly examine the myth about the risk of inaccuracy through accidental change, and the costs which unintelligible documents impose on the insurance industry.

### **Language**

Numerous linguistic factors affect the intelligibility of insurance policies, many of them inherited from long ago. Archaic language, unnecessarily lengthy sentences, needless repetition and convolution, an obsession with the passive rather than the active voice - all these combine to make policies harder to read than they have to be. Considerable improvements can be made in the intelligibility of a policy by rectifying each of these problems, even though, as I point out later, they are usually not the most important factors affecting a policy's intelligibility.

A large amount has been written about archaisms, sentence length, the use of the passive voice, and so on. It would be pointless to repeat it here. Instead I will

give a few examples of how difficult passages can be rewritten in a more intelligible form. First, take the following lengthy sentence in an insuring clause.

In consideration of the payment of the premium stated in the Schedule, the Company hereby agrees subject to the limitations terms and conditions hereinafter mentioned or endorsed hereon to indemnify the Insured against all claims (including claimants' costs and expenses arising as a result of any claim) which the Insured shall become legally liable to pay as damages up to the Limit of Indemnity stated in the Schedule in the aggregate in any one Period of Insurance and which are notified to the Company during the Period of Insurance stated in the Schedule or any period for which the Company shall have offered and the Insured shall have paid the premium for renewal of this Policy and which arise by reason of any negligent act error or omission on the part of the insured.

This can be readily improved by eliminating unnecessary qualifications and by separating the different items of information from one another.

The insurer will indemnify the insured against claims (including claimants' costs) that arise from an act or omission in the conduct of the profession described in the schedule. The insurer will only do so if they are made against the insured and notified to the insurer during the period of insurance. The insurer will only indemnify the insured up to the limit stated in the schedule for all claims in total made during the period of insurance.

Take another lengthy sentence, from a clause explaining what types of claim are covered.

We will indemnify you against claims in respect of actual or alleged liability arising from any act, error, misstatement, misleading or deceptive conduct, omission, neglect or breach of duty whatsoever and wheresoever made, committed or attempted, or allegedly made, committed or attempted by you in the conduct of your business or occupation.

This reads so much better if the underlying principle is extricated from the mass of detail.

We will insure you against claims in respect of actual or alleged liability arising from an act or omission in the conduct of your business or occupation.

In fact, the mass of detail becomes irrelevant (perhaps even dangerous because some detail may be omitted) once the underlying principle has been clearly stated.

Finally, take the following 2 insuring clauses (originally widely separated from one another) from a claims made and notified professional indemnity policy.

- 1 The insurer will indemnify the insured against any claim or claims (including all legal costs and expenses for which the insured shall become legally liable to the claimant).
  - (a) made against the insured during the period of insurance specified in the certificate of insurance; and
  - (b) immediately notified in writing to the company by the insured during the period of insurance; and
  - (c) arising out of an act, error or omission in the conduct of the occupation described in the certificate of insurance.
  
- 2 If, during the period of insurance, the insured shall first become aware of any event or circumstance which in the insured's opinion may give rise to a claim and if, during the period of insurance the insured shall give the insurer written notice of the event or circumstance, a claim made after the expiry of the period of insurance arising from that event or circumstance shall be deemed to have been made during the period of insurance.

The problem with all of this is that the 2 heads of cover are not expressed in an integrated, coherent way. The deeming clause introduces a fiction which hides both the link and the contrast between the 2 clauses. That link and that contrast are revealed when the 2 clauses are translated into the following.

- 1 The insurer insures the insured against liability to pay compensation and costs in relation to a claim that is first made against the insured, and

immediately notified to the insurer in writing, during the period of insurance stated in the certificate of insurance for an act or omission in the conduct of the occupation described in the certificate of insurance.

- 2 The insurer also insures the insured against liability to pay compensation and costs in relation to a claim of the type described in clause 1 that is first made against the insured after the period of insurance, if it arises from a circumstance that first comes to the insured's attention, and is immediately notified to the insurer in writing, during that period.

### **Structure**

Oddly enough, the most important defect in insurance policies is not their language but their structure. Related information is often scattered throughout a policy. For many insureds, the jigsaw puzzle is just too difficult to solve. In a few cases I know of, the problem has arisen from the insurer's calculated decision to make it difficult for a prospective insured to get a full picture of such negative things as the fees charged in relation to the policy. But in most cases, the explanation is more mundane. Too little thought has been given to structuring the document in a way which will enable insureds to readily grasp its significance.

There are numerous examples of poor structure in insurance policies. One, as already indicated, is the way in which, in claims made and notified policies, the operative clause and what is usually known as the deeming clause are often widely separated from one another (the record, so far as I am aware, is 7 pages!). And this, despite the fact that, in the absence of the deeming clause (extending the cover to claims arising from circumstances notified during the period of cover), the operative clause (granting cover in respect of claims (not circumstances) notified during the period of cover) gives a most misleading impression of what the policy actually covers.

Another example is the use made of definition sections not just to define important terms, but also to restrict the cover provided by the policy. For example, home contents insurance policies commonly include in the definition of contents a number of provisions which do more than describe the relevant

items. They also limit the cover by reference to specific dollar amounts for these items.

For example:

Articles of jewellery, furs, watches, gold or silver articles or objects, bullion, precious stones, coin collections, stamp collections and gems. These items are limited to \$1,000 for any one article or collection up to a maximum of \$5,000 for all articles or collections or 20% of the Contents Sum Insured (whichever is the lesser) for claims arising from any one event.

This type of misuse of definitions has been the subject of criticism by legislative drafters at least from the time of Lord Thing - a century ago. Insureds are most unlikely to go to a definitions section in order to find a limitation on the cover. While people in the industry familiar with the device may hardly give it a thought, it is a significant barrier to insureds properly understanding the limits of their cover.

The solution is, of course, quite simple. All monetary limitations on the cover (whether the global sum insured or the sums insured for particular items) should be brought together in the body of the document. The following indicates how that can be done.

The maximum amount the insurer is liable to pay under this policy in respect of all claims arising from one event is the sum insured specified in the certificate of insurance. In respect of any of the items set out in the first column of the following Table, the maximum amount the insurer is liable to pay in respect of all claims arising from one event is the amount set out alongside it in column 2 of the Table.

## Table

Item	Limit on cover
...	...
...	...
...	...

The use of definitions to impose monetary limits on the cover is bad enough. Their use to impose important exclusions from cover or to modify the basis on which liability is assessed is even worse. An example of the former is the use of the definition of 'you' (ie, the insured) in a home buildings and contents policy to exclude a claim by each insured if one of them deliberately causes the relevant loss:

"you" means the insured, the insured's spouse and any child of either who is resident in the home buildings. An act or omission by one insured person is deemed to be an act or omission by each of them.

An example of the use of definitions to alter the basis of liability is the insertion of the following clause at the end of the definition of 'replacement cost' .

Until an amount equal to the replacement cost has been actually expended, our liability is limited to the sum insured shown in the policy schedule or present value (whichever is the lesser) of the building and/or contents destroyed or damaged.

No insured can reasonably be expected to look for substantive provisions like these in the definitions section of a policy. The solution is, again, quite simple: remove the material from the definitions and put it in an appropriate place in the body of the document. The exclusion should be put in an appropriately prominent place in the Exclusions. The alteration to the basis of liability should be combined with the main provisions dealing with that subject.

## Design

The third factor contributing to the unintelligibility of insurance policies is their design. Everyone is familiar with the fine print of insurance policies. Most policies no longer require (if they ever did) a magnifying glass to read them. But they commonly suffer from numerous other design defects which make them unattractive and impenetrable.

Design is a discipline in itself. Here, I can do no more than summarily indicate the types of defect which need to be rectified.

- ▼ First, words are crammed into a page without adequate thought being given to the effect that has on readers. There is ample evidence that readability can be improved by limiting the width of the lines of text, and by increasing the 'white space' in other ways (including line and paragraph spacing) to give the text a more segmented and less crowded look.
- ▼ Secondly, headings are used sparsely and often ineffectively. The reader can be helped through a complex document by the use of informative headings based on his or her needs rather than on the insurer's (or lawyer's) conceptual framework. Headings in question format can be particularly helpful.
- ▼ Thirdly (and less frequently), typographical choices are made which take little account of the evidence that they detract from a document's intelligibility. These include the use of a sans serif typeface for the body of a document, the inappropriate use of highlighting (such as the highlighting of defined terms with initial capitals or bolding), and even (in one case) the use of all capitals for the text of the document!

Worse still though is the tendency to concentrate solely on text language rather than on more graphical ways of communicating. Significant improvements can be achieved by using tables to relocate and integrate different pieces of related information; and by giving concrete examples of the application of averaging and similar clauses involving complex calculations.

In short, insurance policies should incorporate any design feature that helps overcome barriers to understanding and improves their intelligibility.

## **Construction**

Like lawyers themselves, people in the insurance industry are initially sceptical about the possibility of drafting insurance policies in plain English. There is a myth abroad that any alteration to long established wordings will lead to an alteration in their true meaning and effect. The interpretations put on those wordings by the courts will be lost.

My experience in redrafting a large number of insurance policies indicates that these fears are unfounded. It is possible to achieve a huge improvement in the intelligibility of insurance documents without running any significant risk of accidentally changing their meaning and effect.

One must, of course, retain technical terms and particular words or phrases which have the benefit of a considerable amount of judicial consideration attached to them. But the vast majority of the alterations that will improve the intelligibility of a document have nothing to do with such matters.

Removing archaism, repetition, convolution (and even straightforward grammatical and syntactical errors) runs no significant risk of accidental alteration of the content of the policy. Nor does re-conceptualising and integrating the subject matter into a coherent form. Nor does improving the design features of the policy. In fact, the redrafting process regularly leads to a deliberate revision of the policy, and to the removal of doubts and ambiguities which the original concealed.

In a sense, it is true that insurance policies have to be complex because the reality they deal with is complex. But they do not have to be as complex as they are. Enormous improvement can readily be made to them. The question is whether the effort, and the cost, are worth it. The answer has to be 'Yes'! . Poorly constructed documents impose substantial costs on the industry - costs which far outweigh the cost of rewriting them in a more intelligible form. These costs affect an organisation's efficiency, effectiveness and competitiveness.



## **Efficiency**

Consider the additional internal costs associated with unintelligible documents:

- ▲ the cost of training people who use the documents - eg, sales people and claims people
- ▲ the cost of dealing with inquiries from the public which should not have been necessary
- ▲ the cost of handling disputes with insureds which should never have arisen
- ▲ the cost to management in having to review the decisions made by staff who are themselves uncertain of how the documents are to be interpreted.

All of these can be removed, and substantial savings made, if the documents are converted into a readily intelligible form.

## **Effectiveness**

The sad fact is that, because they are so difficult to understand, many insurance documents contain errors which are only revealed when they are reviewed and translated into a more coherent form. Sometimes, the error is a simple one which is unlikely to cause great mischief. In other cases, it is much more important than that.

The worst situation is where the policy has ceased to be the basis on which the business is done. A corporate culture concerning the meaning of the document has replaced them. In some cases, the corporate culture and the documents are far apart. In one case I experienced, a superannuation policy that was being reviewed contained conflicting clauses dealing with what was to happen to members' contributions. When that was pointed out to the company, it revealed that neither clause was correct. The company did something else altogether!

I need hardly emphasise the extent of the risk to which this type of divergence between theory and reality gives rise.

## **Competitiveness**

Those insurers which are quick to respond to the demand for intelligible documents will surely steal a march over their competitors. To meet a demand from clients and potential clients is surely better business practice than to ignore it. Those who want intelligible documents will go to those who have gone to the trouble of providing what they want. It is as simple as that.

In one case I was involved in, an insurer calculated the total cost (mainly internal opportunity costs) of re-engineering and redrafting a major export credit insurance policy at \$1 million. It decided to go ahead with the project on the basis that it would recover the cost within 4 years through increased premiums. It released the new produce without fanfare. Nonetheless, only 18 months later it had recovered double the cost through increased premium attributable solely to the change to the new product. Not a bad return on their investment!

It is vitally important for insurers to recognise that plain English is not just a consumer fad! It is, of course, important for consumers and for domestic lines of insurance. But it is equally important in relation to business insurance. Indeed, business insurance policies are probably more in need of it than many domestic ones. The benefits of the plain English movement will only be fully realised for the insurance industry when complex business policies are simplified and when the unnecessary costs they impose on both insurers and insureds are finally eliminated.

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