OMBUDSMAN
FOR LONG-TERM INSURANCE

OMBUZZ

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PAYMENT IN FULL AND FINAL SETTLEMENT

Insurers sometimes make payments in settlement without advising the claimant prior to payment of the amount which will be paid, and, without obtaining the claimant's agreement that the payment is in full and final settlement. The following case demonstrates the effect of this omission where the claimant subsequently claims an additional amount.

Case Study

1 The complainant had instituted a claim on a policy after the life insured died on 17 January 2014 from natural causes. The policy had been taken out on 1 March 2013. The insurer requested further medical records from the complainant so that it could establish whether it could decline the claim. It appears that the insurer regarded the policyholder's statement that the life insured was in good health at inception as not being accurate.

2 The complainant was unable to provide the information and the insurer found it was also unable to obtain the information as the medical practitioner refused to provide medical records because of patient confidentiality.

3 Our office then suggested the following:

"I suggest that you either ask a medical practitioner (your CMO, if you have one), or an independent medical practitioner to assist you in this matter. Alternatively I suggest that you make a decision on the documents you have on file."

The insurer decided to pay the claim and paid the claim amount forthwith.

4 Thereafter the complainant requested interest on the claim as she stated that because of the delay she had borrowed money and this debt had increased when interest was added. The insurer then responded that the payment it had made had been in full and final settlement and refused to consider interest. The insurer also raised the argument that it had been an *ex gratia* payment.

5 The claimant under an insurance policy has to prove the claim, in this case the death of the life insured. The complainant had provided the necessary information to prove the claim in January 2014.

6 An insurer is of course entitled to assess the claim by investigating it. If the insurer then wishes to raise a defence to the claim it has to prove the defence by providing the necessary evidence. Therefore if the insurer wishes to rely on a pre-existing exclusion clause or on non-disclosure it has the onus to prove such defence.

7 Although the insurer stated that the claim was paid in full and final settlement it did not have the complainant's agreement to this effect. The insurer may have paid the claim with that intention but the complainant did not receive it as such. In terms of our practice, interest has to be paid on late payment of a claim. (See our practice note on our website www.ombud.co.za).

8 Our office accordingly determined that interest should be paid to the complainant.

Discussion

9. If an insurer wishes to settle a claim on the basis that it is in full and final settlement it has to obtain the agreement of the complainant prior to payment. In the absence of such an agreement it is a normal payment in terms of the policy provisions (even if the insurer regarded it as a so-called ex gratia payment). Without agreement that the payment is in full and final settlement a complainant would be entitled to request interest and compensation in our office and we would consider the request in terms of our Rules and normal practice.

10. If less than the full claim amount is paid it is even possible that a claimant could accept a payment (if it is not accepted in full and final settlement) and sue the insurer for the balance. An insurer on settling a claim may wish to obtain the claimant's agreement, prior to payment, that the amount will be received in full and final settlement of all claims arising from the relevant claim event. Insurers should seek advice on how such settlement agreements should be worded.

11. Some insurers may use the term "*ex gratia*" payment without fully appreciating its implications. An *ex gratia* payment is a payment made "by favour".

12. In a court case[1] involving the Motor Vehicle Insurance Act the following was said:

    "Why the legal advisers in so many cases insist on calling it an ex gratia payment is, on the face of it, mystifying. They gain no greater immunity for their clients than they would have had if they had openly and succinctly said 'by way of compensation in terms of the Motor Vehicle Insurance Act'.

    Nobody is under any illusion that insurance companies are in the habit of making gratuitous payments to other known users of the highway. Also there is no need for them to buy off prospective plaintiffs. If it is not third-party compensation what is it then?"

13. The term *ex gratia* may have different meanings for different people. Insurers should be circumspect about the wording they use in letters in which they undertake to pay amounts in settlement. Referring to these payments as *ex gratia* payments may not be accurate and could have unintended implications.

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[1] National Employers General Insurance Co Ltd v Springbok Timber & Hardware Co (Pty) Ltd, 1969 (3) SA 444 (W)

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