the CHARTERED INSTITUTE of LOSS ADJUSTERS

CILA

Fraud and Property Claims

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On behalf of the
CILA Anti-Fraud Special Interest Group

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1. Introduction

While this paper has been prepared to assist candidates sitting the CILA Advanced Diploma examinations it should be of benefit to all general property adjusters and claims handlers.

However, in all cases you should follow your own employer's guidelines on fraud investigation and refer to your line manager or obtain legal advice when in doubt.

We would also recommend that you should have access to a copy of 'Property Insurance Law and Claims' published by CILA when studying for your examinations or as a general reference point for day to day claims handling.

Whilst many property adjusters may pass a claim, where they recognise fraud indicators, to a specialist within their company it is still important for all property adjusters to understand the principle of fraud and its investigation.

2. What is fraud?

The Online Oxford English Dictionary

defines fraud as:

'Noun: *Wrongful or criminal deception intended to result in financial or personal gain'.*

The Association of British Insurers

defines fraud as:

'Insurance fraud is when someone invents or exaggerates a claim, or does not tell the truth in order to obtain cheaper cover.'

There is no legal definition of fraud.

Court of Appeal Hearing: Versloot Dredging BV v HDI Gerling Industrie [2014] EWCA Civ 1349

Para 117 'Since the hearing The Law Commission has published (July 2014) a finalised draft bill dealing with, inter alia, ***fraudulent claims****, which is in the same form as an earlier draft produced before the hearing. The draft bill provides that* ***"If the insured makes a fraudulent claim under a contract of insurance - (a). The insurer is not liable to pay that sum":*** *clause 12 (1) (a);* ***but does not define "fraudulent claim"****. The Report takes the view that* ***it is for the Court to decide what amounts to a fraudulent claim*** *(22.6).*

This is confirmed in para 99 of the Explanatory Notes to the Insurance Act 2015.

Section 12: Remedies for fraudulent claims

99. The section does not define "fraud" or "fraudulent claim". The remedies will apply once fraud has been determined in accordance with common law principles. (22)

(22) For example, see the test for fraud in Derry v Peek (1889) LR 14 App Cas 337.

When is fraud proved? Derry v Peek 1889 LR 5 TLR 625

http://www.bailii.org/uk/cases/UKHL/1889/1.html

This was a House of Lords decision in relation to information given in a company prospectus.

Lord Herschell:

First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice.

Secondly, fraud is proved when it is shown that a false representation has been made

(1) knowingly, or

(2) without belief in its truth, or

(3) recklessly, careless as to whether it be true or false.

The Fraud Act 2006

http://www.legislation.gov.uk/ukpga/2006/35/contents

The Fraud Act 2006 simplified the existing law with the purpose of securing more convictions for fraudulent activity.

The Act extends to England, Wales and Northern Ireland. The Act **does not** extend to Scotland except section 10(1) which amends the Companies Act 1985.

Section 1

Creates a new general offence of fraud and introduces three possible ways of committing it. The three ways are set out in sections 2, 3 and 4.

Section 2 – Fraud by false representation.

(1) A person is in breach of this section if he –

(a) dishonestly makes a false representation, and

(b) intends, by making the representation –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if –

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading.

Section 3 – Fraud by failure to disclose information.

A person is in breach of this section if he—

(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and

(b) intends, by failing to disclose the information –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

Section 4 – Fraud by abuse of position.

(1) A person is in breach of this section if he –

(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,

(b) dishonestly abuses that position, and

(c) intends, by means of the abuse of that position –

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

The Explanatory Notes that accompany the Fraud Act give additional guidance including:

In relation to 2 (1) (a);

Definition of dishonesty

The current definition of dishonesty was established in *R V Ghosh* [1982] Q.B. 1053.

The judgment sets out a two-stage test.

1/ whether a defendant's behaviour would be regarded as dishonest by the ordinary standards of reasonable and honest people, and if yes

2/ whether the defendant was aware that his conduct was dishonest and would be regarded as dishonest by reasonable and honest people.

In relation to 2 (1) (b);

The person must make the representation with the intention of making a gain or causing loss or risk of loss to another. The gain or loss does not actually have to take place.

In relation to 3 (a)

Of relevance to insurance is the Law Commission's Report on Fraud:

"7.28…Such a duty may derive……, from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance),….."

The Law in Scotland

In Scotland, criminal fraud (as opposed to civil) is mainly dealt with under the common law and a number of statutory offences. The main fraud offences in Scotland are:

Common law fraud

Fraud is committed when someone achieves a practical result by the means of a false pretence. In other words, where someone is caused to do something they would not otherwise have done by use of deception.

Proving an intention to deceive is essential in all cases, and can often be inferred from the actions of the accused.

Uttering

The crime of 'uttering' occurs when someone tenders 'as genuine' a forged document to the prejudice of another person. Forging a document only becomes a crime if it is shown to have been tendered (to an individual or the public at large) with an intention to defraud/cause someone prejudice.

Civil fraud

Fraud can also feature in a civil context as a delict (or tort) allowing recovery of loss, for example where a party is induced to enter into a contract through fraudulent misrepresentation.

As with criminal fraud, the false statement must be made with the relevant intention; however, unlike for the crime of fraud, recklessness or negligence is sufficient for civil fraud.

3. Claims investigation

UNDERLINING PRINCIPLES

In our day to day jobs we are required to investigate property insurance claims on behalf of our principles.

CILA – Role of the Loss Adjuster

The CILA website describes the role of the loss adjuster as to:

1) Verify whether the policy covers the loss or damage

2) Verify the amount (if any) the policy should pay out

Policy requirements

Whether it is a domestic or commercial claim the policy will require the policyholder to provide at their expense all **reasonable** details and evidence which we may ask for.

However, when investigating any property claim we have to balance the requirements of the FCA and achieve the objective of the ABI on fraud.

The Financial Conduct Authority (FCA)

https://www.handbook.fca.org.uk/handbook/ICOBS.pdf

We need to comply with the FCA's rules on insurance claims handling, which are set out in Insurance: Conduct of Business 8 (ICOBS) requiring amongst other things that insurers must:

1. *Handle claims promptly and fairly;*
2. *Provide reasonable guidance to help a policyholder make a claim and also provide appropriate information on its progress;*
3. *Not unreasonably reject a claim (including by terminating or avoiding a policy); and*
4. *Settle claims promptly once settlement terms are agreed.*

If at any stage in the claim process the policyholder complains about the investigation of the claim, then this should be dealt with in accordance with your principles and the FCA revised rules on complaint handling with effect from 30 June 2016:

https://www.fca.org.uk/publications/policy-statements/ps15-19-improving-complaints-handling-feedback-cp14-30-and-final

The FCA defines a complaint as:

'Any expression of dissatisfaction, whether oral or written, and whether justified or not, from or on behalf of an eligible complainant about the firm's provision of, or failure to provide, a financial service'.

Provided you have followed the above guidance the complaint should be an opportunity to reinforce to the policyholder our role as loss adjusters and the reason why we cannot accept the claim until all reasonable evidence has been provided.

Association of British Insurers (ABI) objectives on fraud

'Reducing and deterring fraud remains a priority for the insurance industry. Our industry has a zero tolerance approach to weeding out the cheats'.

The ABI figures in 2014 show that this policy is having a positive effect:

'The fall in the number of detected fraudulent property insurance claims (both domestic and commercial) reflects the strong deterrent message hitting home to potential cheats. In 2014 the number of detected property frauds at 24,533 was down 29% on 2013, with the detected value at £108 million down 21%.'

The Enterprise Act 2016

http://www.legislation.gov.uk/ukpga/2016/12/contents

This received Royal Assent in May 2016 and amends the Insurance Act 2015 requiring the following section to be inserted after section 13:

“Implied term about payment of claims

(1) It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.

(2) A reasonable time includes a reasonable time to investigate and assess the claim.

(3) What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account—

(a) the type of insurance,
(b) the size and complexity of the claim,
(c) compliance with any relevant statutory or regulatory rules or guidance,
(d) factors outside the insurer’s control.

(4) If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable)—

(a) the insurer does not breach the term implied by subsection (1) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but
(b) the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when.

(5) Remedies (for example, damages) available for breach of the term implied by subsection (1) are in addition to and distinct from—

(a) any right to enforce payment of the sums due, and
(b) any right to interest on those sums (whether under the contract, under another enactment, at the court’s discretion or otherwise).”

PRACTICAL ASPECTS OF CLAIMS INVESTIGATION

In most cases the policyholder will quickly be able to provide the requested information to enable the claim to proceed to settlement.

However, we need to be aware that fraud can occur at any stage during the claim process:

When Fraud can occur:

Policy inception

Where there has been misrepresentation or withholding of material fact.

Mid-term or renewal

For example, an item added to the policy when in fact it was lost or stolen prior to it being insured.

Claim Stage

Either there has been a deliberate loss or no loss has occurred

Later discovery that a loss had not occurred or was a smaller loss

A fraud is committed where the policyholder, later discovers that an item was not lost or the loss was substantially smaller than first thought, but does not advise his insurance company.

Agapitos & Anor v Agnew & Others (2002) EWCA Civ 247

Types of fraud

No loss

Where there simply was no loss.

Deliberate loss

Where the policyholder has deliberately caused the loss or damage in order to submit a claim.

Fraudulent exaggeration

Deliberately inflating a claim is fraud but case law determines that the dishonest element must be substantial either in proportion to the claim or in isolation

Substantial means the dishonest part must be more than minimal

Case law suggests a small degree of exaggeration for the purpose of claim negotiation is permitted –

Nsubuga v CU (1998) and Orakpo v Barclays Insurance Services (1995)

'A long line of authority establishes that if an insured makes a fraudulently inflated claim under the policy he forfeits any lesser claim which he could properly have made. An owner who claims $10,000.000, knowing that the claim could not possibly be worth more than $9,000,000 recovers nothing.'

Para 75. Court of Appeal Versloot Dredging v HDI Gerling [2014] EWCA Civ 1349

As Lord Hobhouse observed in *The "STAR SEA"* at para 62,

'*The logic is simple. The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.'*

Para 9 Supreme Court Versloot Dredging v HDI Gerling [2016] UKSC 45

Fraudulent Means or device

Development of case law

***Agapitos & Anor v Agnew & Others [2002] EWCA Civ 247* – Court of Appeal decision.**

http://www.bailii.org/ew/cases/EWCA/Civ/2002/247.html

This was a claim bought under a Marine Insurance policy, but the decision applies equally to property claims.

On the 19th February 1996 there a fire on the passenger ferry "Aegeon".

The fire occurred while the ferry was laid up in Greece undergoing maintenance work and as a result of 'hot work's being undertaken.

The claim itself was considered valid but false representations were made as to when the hot works commenced on the vessel.

Section 17 of the Marine Insurance Act 1906 relates to 'utmost good faith'

A contract of marine insurance is a contract based upon the **utmost good faith**, and if the utmost good faith be **not** observed by either party, the **contract may be avoided** by the other party.

The appeal related to three issues, the main two being:

1/ Whether and in what circumstances the common law rule and / or section 17 of the Act 1906 apply in the event of use of fraudulent means or devices to promote a claim which may prove at trial to be in all other respect valid.

2/ Does the application of that rule cease with the commencement of litigation.

Lord Mance

'…., I would suggest that the courts should only apply the fraudulent claim rule to the use of ***fraudulent devices or means*** *which would, if believed, have tended, objectively but prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the Insured's prospects - whether they be prospects of obtaining a settlement, or a better settlement, or of winning at trial".*

Three tests are applied:

1. the device must be directly related to the claim; and
2. the device must have been intended by the assured to promote his prospect of success, and
3. it must not be irrelevant but such that, if believed, it would have tended to yield a not insignificant improvement in the assured's prospects of success prior to any final determination of the parties' rights.

Between them these conditions ensure that only relevant lies, told to deceive and objectively capable of doing so, will lead to forfeiture.

***Versloot Dredging BV v HDI Gerling [2016] UKSC 45* – Supreme Court Decision**

http://www.bailii.org/uk/cases/UKSC/2016/45.html

This was again a claim bought under a Marine Insurance policy, but the decision applies equally to property claims.

On the night of 28/29 January 2010 the cargo ship "DC Merwestone" left port in Lithuania.

It was freezing cold when they left port and the crew had used the emergency fire pump and lines to blast chipped ice away from the hatch covers before opening them.

This set in motion a chain of events which resulted in the ingress of water which flooded the engine room. A claim was bought under the policy for the cost of repairs at 3.4 million Euros.

At the court of appeal it was concluded that the owners had a valid claim and were not responsible for the actions of the crew or the condition of the vessel that night, but held that the claim was lost a result of the collateral lie told by owners.

A 'reckless untruth' was told regarding the activations of the bilge alarm.

The judge commented that he reached that conclusion with regret because he regarded it as unjust.

The question at issue on this appeal [to the Supreme Court] was what constitutes a fraudulent claim. Three possible situations were identified:

1. The whole claim may have been fabricated. In which case, irrespective of whether a fraudulent device had been used, the insurer would not be liable to pay the claim.

2. There may be a genuine claim, the amount of which has been dishonestly exaggerated. This is a typical case for the application of the rule. The insurer is not liable, even for that part of the claim which was justified.

3. The entire claim may be justified, but the information given in support of it may have been dishonestly embellished, either because the insured was unaware of the strength of his case or else with a view to obtaining payment faster and with less hassle.

   The appeal was concerned with embellishments of this kind. They are generally called "fraudulent devices". Lord Sumpton, explained the expression is borrowed from a standard clause avoiding contracts of fire insurance from the 19th and early 20th century which he considered was archaic and did not adequately describe the problem. He used the expression 'collateral lies', by which he means a lie which in turns out when the facts are found to have no relevance to the insured's right to recover. The question being considered was 'whether the insurer is entitled to repudiate a claim supported by a false statement, if the statement was irrelevant, in the sense that the claim would have been equally recoverable whether it was true or false.'

   Lord Sumpton, concluded '*this is the first time that the House of Lords or the Supreme Court has had the opportunity to resolve the question whether the fraudulent claim rules applies to justified claims support by collateral lies*.'

   'I have reached the conclusion that the rule does not apply to such claims.'

   He accordingly allowed the appeal and entered judgement against the insurers for the sum of 3.2 million Euros.

The second situation, referred to by Lord Sumpton, may apply where a 'fake invoice' is submitted for an amount that the insured was not entitled to recover. A recent FOS decision on the 01 December 2016 follows the principle:

DRN7294208 http://www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=136798

In summary, RSA paid the claim at £1,900.00 and agreed that in addition they would pay the VAT element on submission of a VAT invoice.

The insured then submitted a 'fake invoice'. If RSA had accepted the fake invoice, it would have been induced into paying an additional 20 per cent of the claim in respect of VAT which wasn't actually due to Mr S.

FOS decision: 'Even though part of the claim was genuine the fraud 'taints' the whole claim and so RSA doesn't have to pay any of it. That means I think RSA's entitled to recover the money which it's already paid Mr S in respect of this claim.'

Fraud indicators

Most loss adjusters and insurers will have their own 'set' of fraud indicators as a means of identifying potentially fraudulent claim. Although, they should be used with caution as they in itself are not proof of fraud.

Examples of fraud indicators include the following:

Recent or proposed change in risk

Claim made within 6 weeks of renewal

Claim made within 6 months of inception

Gaps in insurance history

Policy alteration to subject matter of claim prior to claim intimation

Non disclosure of material fact

Delay in notifying police/insurer

High frequency of previous claims

Altered documentation

Incorrect VAT number

Change in story

Significant overstatement

Loss incompatible with lifestyle

Circumstances inconsistent/incompatible with damage/loss

Lack of forced entry

arson/wilful fire raising (Scotland)

Waiver, estoppel and reservation of rights letter

These should always be considered at the very early stages of any claim where you consider that liability may be in doubt or where you suspect fraud.

Waiver

This is where an insurer, either by words or action, indicates to a policyholder that it does not intend to enforce it's legal rights even though it has a right to avoid the policy or decline indemnity and is aware that it has such a right.

Estoppel

Is where even though insurers were unaware that they had grounds to avoid the policy or decline the claim, but again by either it words or actions, or those of its appointed representative e.g. the loss adjuster, give the policyholder reason to believe that the claim would be accepted under the policy and the policyholder acted upon that information to its detriment.

Reservations of rights letter

To avoid the effects of 'waiver' or 'estoppel' you may issue a 'reservation of rights' letter which clearly states that insurers rights are reserved and none of their statements or actions should be understood as waiving its rights generally including their right to rely on any further matters that might arise during the course of any further investigations.

However, a reservation of rights letter should not be issued as a matter of routine and you should always refer to your principal's guidance on this matter.

Furthermore, you should be aware of the 'Statement of Principles' issued by AIRMIC (Association of Insurance and Risk Manager) and agreed with various insurers:

Statement of Principles

These apply on notification of a potential loss or series of potential losses under a contract of insurance reasonably anticipated to exceed £2.5m ("the Potential Loss") from the date of first notification of the Potential Loss to the insurer for a period of 90 days ("the Period").

During the course of your investigation you may need to verify the information provided by the insured with the police and requests to the police must be undertaken in accordance with the Memorandum of Understanding:

ACPO (now NPCC) / ABI Memorandum of Understanding (MOU): June 2014

https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2014/ACPO%20ABI%20MoU%20Exchange%20of%20Info.pdf

They must be made using the appropriate Appendix from as specified in the MoU:

Appendix D (a)

is used to obtain confirmation of the information regarding lost property, crime reference numbers, date/time when offence was reported, details of persons involved. The police will charge a fee for this.

Appendix D (b)

is used when the insurer requires additional information to the above and the consent form should be supplied. The police will charge a fee for this.

Appendix E

is used to request information held by police where there is evidence to suspect a fraudulent insurance claim under Section 5. There is no charge for requests made under this section.

In more extreme cases it may be decided to appoint a private investigator. This should be done in accordance with the following guidelines:

ABI Guidelines on the instruction and use of Private Investigators September 2014

https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2014/Fraud/Private%20Investigators%20Guidance.pdf

Before a Private Investigator is appointed the following due diligence should be undertaken, taking account of relevant FCA regulatory requirements. This should include performing an impact assessment and a 'reason for instruction' note should be completed, documented and retained/ Areas to be assessed and included are:

What are the insurer's grounds for suspicion?

What means have been explored, other that the use of a Private investigator, to verity the insurer's suspicions?

What information needs to be disclosed to the Private investigator so that he can fulfil his instructions?

What information would be required from the Private investigator to verify suspicion?

These should be read in conjunction with the:

Information Commissioner's Officer (ICO) guidance: When can I disclose information to a private investigator? December 2012

https://ico.org.uk/media/1556/disclosures_to_private_investigators.pdf

The Data Protection Act 1998 regulates the processing of personal information and requires organisations to keep it secure. It general restricts disclosure of personal information to third parties unless an exemption applies.

A Private Investigator will be instructed in order to verify an insurer's reasonable suspicions of fraud and to assist in the processing of genuine insurance claims. Where Private Investigators are not routinely instructed, a generic reference to the processing of data, including disclosures to third parties, for the prevention, detection and investigation of crime (including fraud/attempted fraud) might be sufficient.

This information should be included in the notification given to customers. The customer would have the right to be informed of the identity of the third parties should they make an enquiry of the insurer.

Where Private investigators are instructed routinely, the insurer should make that clear to customers in its fair processing notice. The insurer should inform the applicant / policyholder at the earliest stage that a Private investigator might be used.

As part of your investigation you may discover, through press reports for example, that the insured has a criminal conviction. However, you should be aware of

The Rehabilitation of Offenders Act 1974 and the guidance issued by the Ministry of Justice on the 04 March 2014:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299916/rehabilitation-of-offenders-guidance.pdf

The guidance notes state:

For most purposes the 1974 Act treats a rehabilitated person as if he or she had never committed, or been charged with charged or prosecuted for or convicted of or sentenced for the offence and, as such, they are not required to declare their spent caution(s) or conviction(s), for example, ***when applying*** *for most jobs or* ***insurance****, some educational courses and housing applications.*

The rehabilitation period (the length of time before a caution or conviction becomes spent) is determined by the type of disposal administered or the length of the sentence imposed. Rehabilitation periods that run beyond the end of a sentence are made up of the total sentence length plus an additional period that runs from the end of the sentence, which we have called the 'buffer period'. Other rehabilitation periods start from the date of conviction or the date the penalty was imposed.

The 'buffer periods' are halved for those who are under 18 at date of conviction (save for custodial sentences of six months or less where the 'buffer period' is 18 months).

The rehabilitation periods for sentences with additional "buffer periods" which run from the end date of the sentence are shown in the table below:

Sentence/disposal	Buffer period for adults (18 and over at the time of conviction or the time the disposal is administered). This applies from the end date of the sentence (including the licence period).	Buffer period for young people (under 18 at the time of conviction or the time the disposal is administered). This applies from the end date of the sentence (including the licence period).
Custodial sentence* of over 4 years, or a public protection sentence	Never spent	Never spent
Custodial sentence of over 30 months (2 ½ years) and up to and including 48 months (4 years)	7 years	3½ years
Custodial sentence of over 6 months and up to and including 30 months (2 ½ years)	4 years	2 years
Custodial sentence of 6 months or less	2 years	18 months
Community order or youth rehabilitation order**	1 year	6 months

If, having checked the requirements of the Rehabilitations of Offenders Act, you need to verify a conviction that that was not declared you should follow the guidance below:

ABI Guidance: Enforced Subject Access: Disclosure of Criminal Convictions: August 2015

https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2015/Fraud/Enforced%20Subject%20Access%20Disclosure%20of%20Criminal%20Convictions.pdf

Section 56 Data Protection Act outlaws enforced subject access.

The introduction of s.56 means that the insurer should not give a policyholder or applicant the option to complete a Subject Access Request (SAR), without taking independent legal advice to ensure that providing such an option does not amount to an enforced SAR.

While there exist limited defences to committing a s.56 offence, such as the request being 'in the public interest', the DPA makes it clear that a request is not in the public interest simply because it is for the prevention or detection of crime.

An insurer wishing to verify the criminal conviction history of a policyholder or potential policyholder may use the basic disclosure service provided by Disclosure Scotland (which covers UK-wide disclosure), and Access Northern Ireland. A basic disclosure certificate either contains information about every unspent conviction of an applicant or states that there are no convictions, although the exact content will differ according to whether the application is processed under legislation pertaining to England and Wales or to Scotland. Convictions, even for some serious offences, can become

spent relatively quickly so the scope of the information returned may be more limited than under the former SAR process.

Whether or not the insurer chooses to make an application for basic disclosure, the advent of s.56 does not alter the position that should undisclosed convictions or criminal activities get discovered through other means – such as news reports or internet-based research – the insurer could seek to use and rely on them in evidence.

Disclosure can only be made of convictions which are not spent at the time of the disclosure request, not the time of the insurance policy inception.

Further guidance can also be obtained in:

CILA: Technical Bulletin 38: Data Protection Act 1998 : Section 56 issued July 2015

https://www.cila.co.uk/cila/download-link/sig-downloads/anti-fraud/4-technical-bulletin-38-data-protection-act-1998-section-56/file

This bulletin is available on the CILA Anti-Fraud SIG web page.

When investigating a claim there are times when in may be appropriate to obtain a written statement form the policyholder.

Statement taking

A witness statement:

(i) Should be expressed in the first person.

(ii) Should state the full name of the witness and the witness's place of residence.

(iii) Should state the witness's occupation.

(iv) Should usually be in chronological sequence divided into consecutively numbered paragraphs each of which should, so far as possible, be confirmed to a distinct portion of the evidence.

(v) Must indicate which of the statement in it are made from the witness's own knowledge and which are matters of information and belief, indicating the source for any matters of information and belief.

(vi) Must include a statement by the witness that be believes that the facts stated in it are true.

(vii) Must be signed by the witness.

(viii) Must have any alterations initialed by the witness.

(ix) Must be dated.

For further guidance refer to the Ministry of Justice ‘Practice Direction 32 – Evidence’ and in particular Paragraphs 17 – 25

https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part32/pd_part32#witness

THE ROLE OF THE INSURANCE FRAUD BUREAU

The Insurance Fraud Bureau (IFB), is a not-for-profit company established in 2006 to lead the insurance industry's collective fight against insurance fraud.

They act as a central hub for sharing insurance fraud data and intelligence, using our unique position at the heart of the industry and unrivalled access to data to detect and disrupt organised fraud networks.

They use a wide range of data and intelligence to achieve two primary objectives:

- Help insurers identify fraud and avoid the financial consequences
- Support police, regulators and other law enforcement agencies in finding fraudsters and bringing them to justice.

They also try to raise public awareness of insurance fraud scams: how they work and how to spot them, so that the chances of being caught out are reduced

4. Standard of Proof

Criminal Law

The evidence must prove the case 'beyond a reasonable doubt'.

Civil Law

The standard of proof is determined on the 'balance of probabilities'.

However, following the decision in S and M Carpets Ltd v Cornhill [1981], in civil fraud trials the balance needs to be tipped further than this:

> 'If a defendant or plaintiff is to allege fraud, then the standard of proof is somewhat higher than that ordinarily applicable to civil matters, but not as high as that relating to criminal matters'.

The burden of proof lies with the Insurer to prove a fraud has taken place, the legal principle is 'he who asserts must prove'.

Financial Ombudsman's Service

The FOS has provided the following statement specifically for inclusion in this paper:

Individual policyholders and small businesses can complain to the Financial Ombudsman Service if they are unhappy with the way their claim has been handled or with the amount offered in settlement. The ombudsman can make awards of up to £150,000. Here is a link to the website where you will find a lot of information http://www.financial-ombudsman.org.uk/

The ombudsman decides cases on the same basis as the court – the balance of probabilities. And like in the courts an allegation of fraud requires very persuasive evidence. So it isn't sufficient simply to have some concerns about a claim or to think that it is unsatisfactory in some respects and reject it without giving good reasons. You will need evidence of fraud or enough evidence to throw such doubt on the claim that the ombudsman will dismiss it as better dealt with in court where evidence can be given under oath and witnesses can be cross-examined.

And when looking at claims you have to be realistic. The ombudsman may feel that it's unreasonable to expect a consumer to hang on to receipts for many years. There can be other ways of establishing the existence of an item – photographs for example. And if someone has suffered a burglary or a catastrophic loss, through flooding for instance, it may be unfair to expect them to produce an immediate itemised list of what they've lost. Remembering an item later doesn't necessarily mean that part of the claim is fraudulent.

Have a look at the decisions database to see how ombudsmen have treated cases of alleged fraud http://www.ombudsman-decisions.org.uk/Default.aspx

Caroline Mitchell

Lead ombudsman

13 February 2017

5. Investigation outcomes

Although the claim may have been referred for investigation due to the presence of fraud indicators there are a number of possible outcomes of those investigations:

Genuine claim

In which case the claim should proceed to settlement, subject to the policy terms and conditions, without delay to meet the requirements of the FCA and The Enterprise Act 2016 as outlined earlier.

Repudiation of claim

This could be because the insured has been in breach of a material policy condition or warranty; or has failed to prove their claim.

Claim withdrawn by policyholder

If you believe there is evidence of an attempted fraud having been committed, then you should consider treating as a ‘fraudulent claim’.

Policy avoidance

If you have established there has been a material non-disclosure or misrepresentation insurers may elect to avoid the policy but will need to meet the requirements of the Consumer Insurance (Disclosure and Representations) Act 2012 and Insurance Act 2015.

Fraudulent claim

Where evidence of fraud has been proven to the required onus of proof then the remedies set out in the next section may be available.

6. Remedies available

Typical policy wording

Fraudulent claims

If any claim on this policy is in any respect fraudulent or if fraudulent means are used by you or anyone acting on your behalf to obtain benefit under this policy or if any damage is caused by your willful act or with your connivance, all benefit under this policy shall be forfeited.

We retain the right to keep the premium and to recover any sums paid by way of benefit under the policy.

The Insurance Act 2015

http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted

The Act provides the insurers with clear statutory remedies when a policyholder submits a fraudulent claim. The main remedy in the Act is the one already established by the courts: if a claim is tainted by fraud, the policyholder forfeits the whole claim. The Act also address a current area of uncertainty: the insurer may refuse any claim arising after the fraudulent act. However, previous claims are unaffected.

Part 4 – Fraudulent Claims

12 Remedies for fraudulent claims

(1) If the insured makes a fraudulent claim under a contract of insurance—

(a) the insurer is not liable to pay the claim,

(b) the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and

(c) in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.

(2) If the insurer does treat the contract as having been terminated—

(a) it may refuse all liability to the insured under the contract in respect of a relevant event occurring after the time of the fraudulent act, and

(b) it need not return any of the premiums paid under the contract.

(3) treating a contract as having been terminated under this section does not affect the rights and obligations of the parties to the contract with respect to a relevant event occurring before the time of the fraudulent act.

(4) in subsections (2)(a) and (3), "relevant event" refers to whatever gives rise to the insurer's liability under the contract (and includes, for example, the occurrence of a loss, the making of a claim, or the notification of a potential claim, depending on how the contract is written).

Referral to the Insurance Fraud Register

Where fraud is proven placing the policyholder's details onto the Insurance Fraud Register, where their details will remain for 5 years from the date the Fraud Condition is met.

Referral to local police

As part of the investigation process you should seek advice from insurers as to whether or not it is appropriate to refer the matter to the local police for investigation.

Referral to the Insurance Fraud Enforcement Department (IFED)

https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/ifed/Pages/Make-a-referral.aspx

Where a serious level of fraud was discovered it may be appropriate to refer to the IFED and their referral guide and referral form should be used.

If the claim has already been paid or partly paid then the following may also be considered:

Bring an action under the tort of deceit

Insurers can bring an action to recover their outlay under the tort of deceit where insurers have been deceived.

In order to succeed in a tort of deceit the test that applies is the one set out in Derry v Peek (1889) which was set out in section A.

The Proceeds of Crime Act 2002

http://www.legislation.gov.uk/ukpga/2002/29/contents

This sets out the legislative scheme for the recovery of criminal assets including from insurance fraud.

It applies to the whole of the United Kingdom although there are separate provisions applying to England and Wales, and Scotland and Northern Ireland.

Confiscation Orders: Part 2 England and Wales Parts 3 and 4 Scotland and Northern Ireland

A confiscation order may be made if the defendant is convicted of an offence and the court determines that the defendant has a 'criminal lifestyle' and has benefited from his 'general criminal conduct'.

Part 5: Civil Recovery, including cash seizure

Part 5 of POCA provides a scheme to reclaim the proceeds of crime through civil proceedings. It permits the recovery of criminal assets where no conviction has been possible, for example because individuals avoided conviction by remaining remote from the commission of the crimes from which they benefited or because they have fled abroad. Civil recovery applications are made in the High Court against property that is or represents property obtained through unlawful conduct. The relevant enforcement authority (that is, the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of the National Crime Agency (NCA)) may make an application for a property freezing order to prohibit any person from dealing with the property.

7. Summary

	Civil Law	Criminal Law
Definition of 'Fraud' or 'insurance fraud'	None	None
How is 'fraud' decided.	'…it is for the Court to decide what amounts to a fraudulent claim.' (Quoting from the Law Commission Report) **Para 117 Versloot v Gerling [2014] EWCA Civ 1349** Section 12: Remedies for fraudulent claims 99. The section does not define 'fraud' or 'fraudulent claim'. The remedies will apply once fraud has been determined in accordance with common law principles. For example, see the test for fraud in Derry v Peek [1889] LR 14 App Cas 337 **Para 99 of the Explanatory Notes to the Insurance Act 2015.** What constitutes a fraudulent claim. Three possible situations were identified: 1.The whole claim may have been fabricated. In which case, ….. , the insurer would not be liable to pay the claim. 2. There may be a genuine claim, the amount of which has been dishonestly exaggerated. The insurer is not liable, even for that part of the claim which was justified. 'The logic is simple. The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.' (quote from Lord Hobhouse, The 'Star Sea') 3. The entire claim may be justified, but the information given in support of it may have dishonestly embellished. The fraudulent claim rules **does not** apply to justified claims supported by collateral lies. The claim should still be paid. **Paras 1,9 and 23 Versloot v Gerling [2014] EWCA Civ 1349**	Crown Prosecution Service Guidance: **The Fraud Act 2006** **The Offences** Section 1 creates a general offence of fraud and introduces three ways of committing it set out in **Fraud by false representation (Section 2);** The defendant: • made a false representation dishonestly • knowing that the representation was or might be untrue or misleading • with intent to make a gain for himself or another, to cause loss to another or to expose another to risk of loss. **Fraud by failure to disclose information when there is a legal duty to do so (Section 3);** The defendant: • failed to disclose information to another person • when he was under a legal duty to disclose that information • dishonestly intending, by that failure, to make a gain or cause a loss. **Fraud by abuse of position (Section 4).** The defendant: • occupies a position in which he was expected to safeguard, or not to act against, the financial interests of another person • abused that position • dishonestly • intending by that abuse to make a gain/cause a loss
When is fraud proved	First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made: (1) knowingly, or	In each case: • the defendant's conduct must be **dishonest**; • his/her intention must be to make a gain; or cause a loss or the risk of a loss to another.

	(2) without belief in its truth, or (3) recklessly, careless as to whether it be true or false **Derry v Peek [1889] LR14 App Cas 337**	• No gain or loss needs actually to have been made. **Dishonestly** The definition in R v Ghosh [1982] 1QB 1053 applies: • was what was done dishonest by the ordinary standards of reasonable and honest people? • must the defendant have realised that what he/she was doing was, by those standards, dishonest? The question of dishonesty' is one for the jury and submissions of no case to answer should not be acceded to based only on the issue of dishonesty.
Standard of Proof	'balance of probabilities'. "If a defendant or plaintiff is to allege fraud, then the standard of proof is somewhat higher than that ordinarily applicable to civil matters, but not as high as that relating to criminal matters'. **S and M Carpets Ltd v Cornhill [1981] 1 Lloyd's Rep. 667**	'beyond a reasonable doubt'.
Statement taking	Follow Guidance from the Ministry of Justice 'Practice Direction 32 – Evidence'; para 17 – 25	'A person whom there are grounds to suspect of an offence **must be cautioned** before any questions about an offence,……, are put to them….' **PACE Code of Practice Code C (2012) 10.1**
Main Remedies	**The Insurance Act 2015** If the claim is tainted by fraud, the policyholder forfeits the whole claim. **12 Remedies for fraudulent claims** (1) If the insured makes a fraudulent claim under a contract of insurance— (a) the insurer is not liable to pay the claim, (b) the insurer may recover from the insured any sums paid by the insurer to the insured in respect of the claim, and (c) in addition, the insurer may by notice to the insured treat the contract as having been terminated with effect from the time of the fraudulent act.	**The Fraud Act 2006** The maximum sentence is 10 years' imprisonment