



HOUSE OF LORDS

Special Public Bill Committee

**Consumer Insurance
(Disclosure and
Representations)
Bill [HL]**

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The Special Public Bill Committee

The Consumer Insurance (Disclosure and Representations) Bill [HL] has been committed to a Special Public Bill Committee in the House of Lords. The Bill gives effect, with minor modifications, to the recommendations set out in the Law Commission and the Scottish Law Commission's 2009 joint report "Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation" (Law Com No. 319; Scot Law Com No. 219).

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Lord Eatwell
Lord Goodhart
Lord Hodgson of Astley Abbotts
Baroness Kramer
Lord Lloyd of Berwick (Chairman)
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Part I—Written and Oral Evidence

MINUTES OF EVIDENCE TAKEN BEFORE THE SPECIAL PUBLIC BILL COMMITTEE ON THE CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) BILL [HL]

TUESDAY 11 OCTOBER 2011

Present	Lord Borrie Lord De Mauley Lord Eatwell Lord Goodhart	Lord Lloyd of Berwick (Chairman) Baroness Kramer Baroness O’Cathain Lord Sassoon
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Examination of Witnesses

Witnesses: LORD SASSOON, Commercial Secretary to the Treasury,
and MR DAVID HERTZELL, Law Commissioner, were examined.

Q1 The Chairman: We welcome the Minister, Lord Sassoon, who is a member of the Committee, and Mr Hertzell, from the Law Commission. It would be helpful if Lord Sassoon started the ball rolling.

Lord Sassoon: Thank you. Before the recess, we had very useful and detailed discussions on the Bill, but of course that was nearly four months ago, so I hope that the Committee might find it useful if I briefly summarise some of the key points from the discussion to date and address some of the issues raised then and subsequently.

As I said at Second Reading, this is a limited and targeted Bill which applies only to consumer insurance contracts. It does not apply to insurance contracts solely or mainly covering business, including micro-businesses. This has been subject to extensive consultation, and Mr Hertzell can talk a little more about that process in a moment. It builds that approach on a broad consensus of support from industry, consumer groups and regulators. The Bill essentially updates the law on consumer insurance contracts, aligning the statute with modern best practice.

This Bill has a narrowly defined scope. Its effect is to place the onus on the insurer to ask the questions and on the consumer to answer them honestly and carefully. This shifts the burden between the insurer and consumer more in the consumer’s favour. This is entirely appropriate, as current legislation is considerably tilted in favour of insurers. In aligning the law with the existing code of best practice, the Bill is deregulatory. The current mismatch between the law and layers of regulation is complex and confusing for both industry and consumers. In future, this law will be taken into account by the Financial Ombudsman when deciding cases as required by FSA rules. Those complaints about claims above the FOS’s limit or otherwise not resolved by the ombudsman could be addressed in the courts. However, the Bill will not lead to consumers being driven to the courts any earlier than now.

I thank again the noble Lord, Lord Eatwell, and my noble friends Lord Higgins, Lord Hodgson, Lord Goodhart, Lady Kramer and Lady Noakes for their contributions to the discussion so far. In those discussions, a few consistent themes have emerged and it might be helpful if I addressed them now.

There was some discussion on the specific meaning of “consumer” in the Bill. I believe that the FSA will be writing to the Committee, if it has not already, on that point. Clause 1 defines a consumer as an individual who is wholly or mainly for non-business purposes. It is worth mentioning that the Law Commissioners were concerned to ensure consistency with other legislation and regulation. The definition was the result of extensive discussion with stakeholders and represents a careful balance and consideration of opinions, not least that of the FSA itself.

A number of noble Lords asked about the use of questions under the Bill. In particular, the noble Lord, Lord Eatwell, asked whether the Bill permitted insurers to ask catch-all questions and how it affected whether insurers might pose questions that could be viewed by society as unacceptable. The Bill does not prohibit insurers from asking catch-all questions. However, use of such questions could conceivably expose an insurer to adverse FOS judgments or FSA action. This is because under Clause 3(1), if a consumer acted reasonably in providing an incomplete answer, the insurer would still be obliged to honour the contract.

On unacceptable questions, as I said at Second Reading, this issue is dealt with elsewhere. It is not part of the scope of the Bill to discuss questions of discrimination or equalities legislation—nor do I believe it should be. That said, there are of course existing obligations not to discriminate on grounds of race or gender under the Equality Act, with which insurers will still have to comply. Additionally, under the terms of the 2008 ABI code of practice on genetic testing, with the exception of Huntington’s disease, ABI members have agreed

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not to ask consumers to have genetic tests or disclose the result of predictive tests.

The final area where there has been some discussion to date has been on the Bill's implementation. A number of noble Lords have been understandably concerned to ensure that the Government's plan in this respect fits well with other regulatory initiatives—for example, the FSA's retail distribution review and the insurance mediation directive. In so far as this Bill simply moves the letter of the law towards existing best practice, we do not believe that the implementation burdens will be at all large. However, I am happy to reconfirm that we will be mindful of the burdens of implementation on the industry. There will be at least a year after the Act's passage to bring it into force, and we will continue to consult extensively with industry representatives, including the British Bankers' Association, the ABI and others, on the best implementation date.

That concludes all I wanted to say at the opening. I have attempted to pick up some of the key themes from our discussions so far, but it may be helpful if I hand over to Mr David Hertzell, the Law Commissioner, to make some opening remarks himself.

Q2 The Chairman: We are very grateful to you, Lord Sassoon. Thank you. I welcome Mr Hertzell to this meeting. We have all read the very useful summary of the report. Some of us have actually dipped into the report itself, which is a pretty massive document. We have also all read the Government's response to the further consultation that they conducted and the amendments, few in number, that were made to the Bill as a result of the consultation. You were probably aware of that document. Having said what we are aware of or should be aware of, perhaps we could now ask you to give us a general picture of what the Bill is doing.

David Hertzell: Thank you, my Lord. In view of that statement, I will keep things as brief as I can. I am grateful for this opportunity to give evidence to the Committee and to participate in the first Bill to be introduced since the procedure for uncontroversial Law Commission Bills was made permanent last year.

As Lord Sassoon said, this Bill has been widely consulted on. We first consulted in 2007 and had 105 responses from across the industry, including from consumer groups and intermediaries, many of which were representing quite large bodies of members; there were association responses on behalf of several. The Treasury consulted again in 2010 with some of the key stakeholders who had participated in those discussions. There have been an awful lot of informal meetings and discussions to try to thrash out the correct response here. I think it is fair to say that the Bill enjoys wide support from all interested parties, including both insurers and consumer groups. It remains uncontroversial in all senses.

The Bill seeks to reform the Marine Insurance Act 1906 as it applies to consumer policies alone. The Act was drafted 105 years ago. It is a piece of commercial legislation, drafted long before consumers existed to any significant extent. It requires the purchaser of insurance to disclose anything that a prudent underwriter might consider relevant when considering whether or not to write the policy. Consumers often buy by internet or on the phone; these days they do not very often buy with the support of any form of intermediary. They are very unlikely to know what a prudent underwriter would consider relevant and, even if they did, it is quite hard, given the mechanisms by which insurance is sold to consumers, to give that information if they are not asked a direct question. The problem is that, under the law, if the consumer fails to make full disclosure, the insurer can avoid the policy and refuse to pay any claims.

It is fair to say that concerns about the Marine Insurance Act have been raised on several occasions over the past 50 years or so, and this is the third time that the Law Commission has looked at it since 1957. As Lord Sassoon said, this is a targeted and limited measure that will apply only to consumers and deal only with the issue of what a consumer must tell an insurer before entering a contract or varying an insurance contract. We are doing work on other aspects of insurance, post-contract and in relation to business, beyond this Bill.

To be fair to insurers, they have long recognised that the Marine Insurance Act is inappropriate for consumers. To mitigate the harshness of the Act, we have various industry codes, the Financial Services Authority rules and the Financial Ombudsman Service. These all aim to deal with the problem that one is seeking to apply commercial marine law to a consumer, in a consumer context, when the law simply was not drafted with that in mind. The problem also is that the various mechanisms by which the harshness of the Marine Insurance Act is sought to be ameliorated are overlapping and inconsistent and add to industry cost and consumer confusion.

In reality, the ombudsman deals with most consumer disputes; such disputes do not generally go into the courts. There has been, and is, a steady stream of complaints to the ombudsman in circumstances where it appears that neither the consumer nor the insurers were clear about their rights. We believe that removing this confusion should increase consumer confidence and protect vulnerable groups such as older consumers and those with serious but latent illnesses, which are the subject of a lot of complaints to the ombudsman. We hope that it also reduces uncertainty for insurers, because all the rules applicable to this particular part of the insurance contract will now be in one place. The Bill seeks to codify current best practice, and part of the consultation we undertook was to pursue that. Doing that should

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reduce the possibility of unintended consequences. It also provides a framework for the FSA and the ombudsman, both of which support the Bill.

The Bill has been drafted to provide high-level overarching principles. It sets out a framework to deal with the problems but does not seek to lay down guidance. We do not deal with, for example, underwriting processes and practices in any particular detail. We were conscious that it is 105 years since the Act was passed and we hope that this Bill might last, if not quite so long, then for a reasonable period of time in future. Our view was that trying to lay down detailed guidance covering every eventuality, particularly those that might relate to scientific and information technology matters, would quickly become out of date and the Bill would become ossified, so we tried to set out principles rather than detailed practices. On the reasonable assumption that detailed rules—for example, around inappropriate questions—should come via guidance from the insurance industry, from targeted legislation such as the Equality Act or, as appropriate, from the FSA.

I will run through the key features of the Bill so that we have them in mind. The key thing is that the Bill abolishes the consumer's duty to volunteer information. The Marine Insurance Act imposes a duty on the consumer to tell the insurer anything that could influence the judgment of the prudent insurer. If the consumer fails to disclose that information, the policy may be treated as void. That is being abolished by this Bill; instead, the consumer must take reasonable care to answer the insurer's questions fully and accurately. If the consumer chooses to volunteer information, they must take reasonable care to ensure that that information is not misleading.

Lord Borrie: Excuse me, Lord Chairman, I am having a little difficulty in hearing Mr Hertzell at the moment. That may be my fault, but would he please speak up?

David Hertzell: I will do. Sorry. It is already accepted good practice that insurers should ask questions about what they want to know. The ombudsman refuses to allow insurers to avoid consumer policies for non-disclosure where no questions have been asked. The Bill also sets out the insurer's remedies where they have been induced by misrepresentation to enter into an insurance contract, and the remedy will depend upon the consumer's state of mind. If the misrepresentation was honest and reasonable—the sort of representation that anyone could make in the circumstances—the insurer must pay that claim. As I said, though, there is an obligation on consumers to answer the questions that they are asked by insurers honestly and reasonably and to ensure that their replies are accurate and complete. The consumer is expected to exercise the standard of care of a reasonable consumer, taking into account a range of factors listed in the Bill such as

the types of insurance policy and the clarity of the insurance questions.

Q3 Lord Eatwell: I am sorry, but could you repeat what you just said?

David Hertzell: Yes. Taking into account a range of factors—

Lord Eatwell: No, before that, about the consumer.

David Hertzell: The consumer is expected to exercise the standard of care of a reasonable consumer, taking into account a range of factors—and I quoted a couple that are listed in the Bill, including the type of insurance policy and the clarity of the question that they were asked. If the misrepresentation was careless, the insurer will have a compensatory remedy based on what the insurer would have done had the consumer taken care to answer the question accurately. For example, if the insurer would have charged more, it will have to pay only a proportion of the claim. If the misrepresentation was deliberate or reckless, the insurer may treat the policy as if it never existed and may decline all claims. It would also be entitled to retain the premiums. It is fair to say that this approach is supported by the ombudsman. It is reflected in the 2009 ABI code on group life, critical illness and income protection, so it is familiar to the industry in a consumer context.

We are abolishing the basis of the contract clauses in the Bill. Under current law, an insurer may add a declaration to a proposal form or policy in which they state that the consumer warrants the accuracy of all the answers that they give. That means that if some of that information is inaccurate, whether or not it was relevant to the claim or the loss, the insurer is discharged from all liability—even if the insurer was not induced to enter the contract by that statement. It is a very harsh remedy. It was recognised by the Statement of General Insurance Practice in 1986 that these clauses should be barred for consumers as they were not thought to treat consumers fairly.

We also deal with group insurance. Typically, a group scheme is where an employer takes out insurance on behalf of the employees. The problem is that the employer is the contracting party and therefore, under the obligation to disclose information, but the information is in the knowledge of the individual employees who are protected by the policy. This is a very important sector to individuals—about 40 per cent of life cover comes through such group schemes—but the law is quite underdeveloped. We have tried to bring it into line with good practice so that, where a misrepresentation is made by a group member, the consequences of that fall on the group member in line with the Bill but do not affect the rest of the members. That is pretty well the approach applied by the industry now.

We are trying to deal with the position of intermediaries. If there is an intermediary between

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the proposer and the insurer, it is not unusual for consumers sometimes to blame intermediaries for the failure to transmit information. The central question is who should bear the risk. Should the insurer pay the claim and then recover from the intermediary, or may the insurer refuse to pay the consumer's claim, leaving the consumer to proceed against the intermediary? It is a question of whose agent the intermediary was when they were acting, and we are trying to set out some guidance to establish that.

This Bill is being prepared in the context of a significant part of the UK economy. Consumer insurance is worth about £40 billion a year to the economy. The FOS receives around 1,000 complaints a year about misrepresentation and non-disclosure, and around half of those complaints are upheld. In the overall context, that is an extremely good record, although, as Lord Sassoon has said, this uphold rate is lower than one might expect if the rules were clear. One would expect the insurers to know what the rules were and the uphold rate to be much higher. By "uphold rate" I mean the claims that are upheld in favour of the insurer. It is also worth bearing in mind that even though the overall number of such disputes going to the ombudsman is relatively small, it affects consumers at a time when they are particularly vulnerable and not in a position necessarily to take on a dispute about whether their claim should be paid.

Looking forward, it is possible that insurance may play a greater role in providing welfare and security—for example, in the funding of long-term care—and it is difficult to see how the current hotchpotch of different rules and fairly antiquated legislation gives us a firm foundation to do that. We sought to codify the current best practice and put the rules into one place so that both parties know what their rights are.

Lord Justice Rix summarised the problem rather neatly in his keynote address to the insurance law conference in 2007 when he said that "in a country that prides itself on its adherence to the rule of law, the opening up of a gap between the law as applied in the courts and the self-regulation that applies as a matter of discretion to the relations between the insurance industry and its consumers might be said to be an unsatisfactory state of affairs". This Bill aims to correct that.

The Chairman: Mr Hertzell, the Committee is very grateful to you for that very clear explanation of what the Bill is doing and why it is needed. I think that we will need at some point to go through the clauses one by one to make sure that the points you covered are dealt with by Members of the Committee and we have your answers to them. First, I want to ask Members of the Committee whether they have any general questions, either to the Minister or to Mr Hertzell, as to the approach that the Bill adopts.

Q4 Lord Eatwell: I have a general question for Mr Hertzell. The Marine Insurance Act basically shifted risk on to the consumer. The risk is now being re-shifted from the consumer to the insurance industry. Is that right?

David Hertzell: The Marine Insurance Act sought to place an obligation on the proposer to volunteer information and we are taking that obligation off the consumer. To that extent you are correct.

Lord Eatwell: So greater risk is being imposed on the insurance industry.

David Hertzell: In practice no, because the rules that we are codifying are the rules that apply in practice now anyway. What we are describing here is what the ombudsman would apply to an insurer. So that is the practical consequence of this shift.

Lord Eatwell: That would not seem to agree with Mr Tyldesley's article in which he points out that that the Financial Ombudsman Service has a limit of £100,000 and therefore claims in excess of that must be shifted on. This must be a shift.

David Hertzell: Yes, if claims are over £150,000 from January this year, and if they involve evidence, or dispute of that evidence, then the ombudsman does not hear them. Whether or not the insurance industry complies with the decisions of the ombudsman is of course an open question. I cannot answer that. Generally, I think it does, but I do not know whether that is the case on every occasion.

Lord Eatwell: I find this very puzzling. Risk is ending up somewhere. As I understand it from your answer, the risk has been mitigated for the consumer in the past and shifted towards the industry by custom and practice.

David Hertzell: Yes.

Lord Eatwell: But if that were so we would not have all these scandalous cases.

David Hertzell: If it were effectively so. The problem we have, to which I have alluded, is that you have four separate sets of rules being applied here. You have the underlying law, you have the industry guidance, you have ombudsman discretion and—that is three, isn't it? There is another one. It is very difficult for insurers in the claims departments on every occasion to be clear as to what they should look at. The problem becomes particularly acute when you have a new risk being introduced into the market, which is why with critical illness we saw a big series of disputes. When people are unclear about the pedigree and experience of the particular class of risk, they tend to look at the rules and tend to look around. They then have these different places in which they can find different rules, which are all inconsistent among themselves. That leads to disputes. It is the lack of clarity that leads to the problem.

Lord Eatwell: Thank you.

Q5 Baroness Kramer: Obviously, nobody wants to come back with new pieces of legislation every time you turn around so it is important that this

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piece of legislation anticipates, if you like, new areas of insurance and potential issues that they might raise. You pointed out that long-term care is likely to be a very large piece of the industry. I wanted to press you slightly on this issue, which is crystallised a little in genetic testing. There is an Association of British Insurers code, but that code is not a legal obligation on insurers, is it? It plays such a significant role. Anecdotally, many of us will have met people who have been told that if they get genetic testing that, for example, demonstrates the breast cancer gene, it would be virtually impossible to get life insurance as a consequence. That is not in keeping with the ABI code, but the code is in no way captured in law through this document, is it?

David Hertzell: No, it is not.

Baroness Kramer: Do we carry on then having this same problem, which is that there is a convention that a large number of insurers observe and that there is a piece of legislation that is meant to have cleaned up that difference but has not caught it? Would it be sensible to try to capture that within this document?

David Hertzell: There are two bits to that. If it is an ABI code, it is binding on ABI members as a condition of their membership of the ABI. That covers most insurers. To that extent it is binding. But you are right that it is not enforced through this particular Bill. We gave some thought to whether or not we should make industry codes of guidance part of the legislation. We were persuaded not to in the end on the basis that the purpose is different. First, the ABI was reluctant to become a kind of second-string legislator on the basis that if it put forward a code it would be binding through this Bill on all its members—and possibly on other insurers, too. The purpose of guidance is a little different, in the sense that it is written more fluidly; it is written purposefully rather than legalistically. The ABI was concerned that it might have to draft things in a fashion that it did not want to do. The feeling was that, as the system was working reasonably effectively, it should be left alone and that we should not seek to introduce rules, regulations and guidance that were written for different purposes into the law.

Q6 Baroness Kramer: Would there be value in linking, for example, these codes and practices with the reasonableness test? They would not become statute, in a sense, but if the behaviour of the insured was in line with that industry code then they would at least have been deemed to have behaved reasonably. Is that worth considering?

David Hertzell: I think that in practice it would be very unlikely that a court would ignore the industry code if there was flagrant breach of it. There is more of a sort of technical concern about introducing industry codes into legislation.

Baroness Kramer: But is there any value in trying to do the link to a reasonableness test, which is slightly different? The reason why I say that is,

again, that we are in a dynamic situation, and unless you constantly keep changing these things, there has in some way to be a mechanism to capture that dynamism.

David Hertzell: You are right that there has to be a mechanism to capture the dynamism because things change considerably—you mentioned IT and genetics in particular. The view of the consultees was that generally they would prefer to keep control of that a little bit loose because they were unsure perhaps of where it was going to develop, and they were concerned about linking guidance too closely to legislation. We reflected that consensus in what we have done.

The Chairman: Are there any other general questions before we move on to the details?

Q7 Baroness O'Cathain: Further to Baroness Kramer's point about catch-alls and the need for these things to be relevant, when you said during your very good explanation that the current legislation was originally introduced in 1906, I immediately thought of that book from the 1970s about the accelerating pace of change. Things have changed and changed utterly, and there is a still greater acceleration in the pace of change than there was in 1906 or whatever. After we finish our work on this Bill, the provisions that we are considering will almost certainly not be current in the year 2106. Is there any precedent—I am not a lawyer, as is patently obvious—whereby the Bill could include a time clause that would require issues such as genetics, IT, or going to the moon or whatever to be looked at again at some point? Would that give some comfort to people that the Government will look at this from time to time to ensure that neither the consumer nor the industry is disadvantaged by rigidity in the legislation? I know that you can always amend legislation, but is there a precedent for a provision saying that we ought to have a look at this again in 25 years?

David Hertzell: Yes, there is. We have sought to do that in one provision in the Bill, where it talks about the way in which insurance is sold and the role of intermediaries. Schedule 2 includes a power for the Treasury to review the particular circumstances that are listed and to update those as necessary. That is a reflection of the fact that, to date, changes in information technology have had had a big impact on how insurance is sold and, I suspect, may have an even bigger impact in the future.

The Chairman: Paragraph 4 of Schedule 2 is the relevant provision.

Baroness O'Cathain: Would that cover my point?

The Chairman: Does the Minister want to respond?

Lord Sassoon: Yes, I think that Baroness O'Cathain's core point has been addressed.

Q8 Lord Eatwell: I want to start with a question of a general sort. Baroness Kramer raised the issue

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of the link to the ABI codes and catch-all questions. I was a little shocked when the Minister said in his introduction that catch-all questions are not excluded, which seems to be slightly at variance with what he wrote to me last June. I examined his letter carefully, which refers to the ABI guidance on this question. The notion of reasonableness and protection provided under Clause 3(1) is based on ABI codes rather than on any legislation. Therefore, the exclusion of catch-all questions simply relies on the ABI code. Is that correct?

David Hertzell: I am not sure that it is. I think that insurers can ask a catch-all question if they want to, but they would need to overcome two hurdles. First, the answer that they got would be judged according to what a reasonable consumer would have said in response. If the question was a completely useless question along the lines of “Have you ever been ill?”, one would need to interpret whatever random answer one got accordingly. Secondly, insurers always have to show that the information with which they were provided had some relevance to their decision to take the risk on the terms that they took it.

Lord Eatwell: Is there any information relative to the contract that you think should be relevant? That would be a catch-all question.

David Hertzell: You would get a completely random set of hopeless answers, and you would have to show that something in the answer that you received induced you to enter into the contract. For very unspecific questions, you have two quite significant hurdles to jump.

Q9 The Chairman: If there are no further general questions, perhaps we should just go through the Bill clause by clause to ensure that any problems have been covered. On Clause 1, the definition of “consumer insurance contract” does not cover small businesses. What is the reason for that?

David Hertzell: Small businesses are part of the second part of our review of insurance laws. We will publish a consultation on small businesses at, I think, the beginning of next year.

The Chairman: Are there any other questions on Clause 1?

Q10 Lord Borrie: I have been worried, although I am not sure that I should continue to be, about the opening lines of Clause 1, which state that a consumer insurance contract is one between “an individual who enters into the contract wholly or mainly for purposes unrelated to the individual’s trade, business or profession”. There may be quite a lot of uncertainty in individual cases where someone in business—in a small business, in all likelihood—takes out that insurance to cover things that are his own private belongings as well as those of his trade. How do you then interpret “wholly or mainly”? The definition seems wide open and could lead to quite a lot of uncertainty.

David Hertzell: I agree. One needs to look at the purpose of the insurance contract that is being taken out, which at the end of the day is, I am afraid, fact specific. Therefore, we were unable to come up with anything that was more precise than that. What we have in mind is business extensions on car policies, dual-use computers and so on, where the main use of the item is for the consumer but people send the odd e-mail from the computer or make the occasional business trip in the car. At the end of the day, it is a question of fact whether the purpose of the insurance policy was mainly for business or mainly for the consumer. That will always have a degree of uncertainty attached to it.

Lord Borrie: In so far as there will be a difficulty in interpreting the “wholly or mainly” point, does that not go back to the Lord Chairman’s initial point that there may be disadvantages in dealing wholly and exclusively with consumer insurance contracts now and small business men—as well as big business men—later?

David Hertzell: There may be, but logistically we could not manage to do it all in one.

Q11 Lord Borrie: I believe that Mr Hertzell—he can tell me if I am wrong—is also dealing in the Law Commission with sale of goods legislation, where problems of a similar kind will arise. Similar problems have arisen when the issue has been debated in the Law Commission and elsewhere in previous decades. Does that make any difference to his thinking about how we deal with insurance matters in Clause 1 or to the idea that we should deal with other matters later?

David Hertzell: This is actually a fascinating topic in its own right. The market has evolved a separate set of rules to deal with consumers—those who are wholly or mainly consumers, if I may use that definition—and businesses. I think that that has happened because the economics of these two areas is actually quite different. Ultimately, consumer insurance is written on a portfolio basis, with the underwriting of a huge pool of individual risks. With advances in IT and with experience, people have a pretty clear idea of what the loss outcome will be on a portfolio of consumer risks; they do not really need to ask anything, other than to find out the individual idiosyncrasies so that they can allocate costs in the risk pool between one consumer and another. That is quite a different mechanism of risk transfer from that of business insurance, which is much more specific around the particular business—the risk pools are very much smaller so the allocation of risk is much more constrained, and the volatility in the pool is much greater because of the variety of risks involved. You can see why the rules have evolved to reflect the underlying activity. We felt that, although this division is not wholly satisfactory, it reflects the way in which the market has developed. In a way, we were influenced by the evolution of practice as much as by our own desire not to try to cover

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everything in one go—let alone the logistics of trying to do that.

Q12 Lord Eatwell: Could I follow up on Clause 1? I am interested in “wholly or mainly” as well and I was intrigued that Mr Hertzell said that the term had developed in the industry because, as I understand it, this is the first time that the term has ever been used in insurance law.

David Hertzell: That is true. It is reflected in the way that the ombudsman deals with consumer issue rights and in the practice of the FSA, although not in the way that it writes things.

Lord Eatwell: So are we really waiting for the courts to define the use of this term in the context of insurance?

David Hertzell: I think that it will be fact specific on the individual claim.

Lord Eatwell: I see, so the individual is exposed in that respect. There are some complicated borderline cases, some of which we discussed in Committee. I would like to go back to the case that I raised there of a ballet dancer whose body is actually their tool—an expression of their art and the basis of their employment. If they take out general health insurance, is that consumer insurance or is it associated with their business or profession?

David Hertzell: You would need to look at the purpose of the policy. To take a ballet dancer, for example, if that dancer took out holiday insurance and bought a standard policy, there would be a disablement clause in it for a fixed sum of money and that, in my view, would be consumer insurance, because you are part of the overall pool of people taking a holiday in that particular destination, so it works like that. But if the ballet dancer specifically went out to insure themselves for the tools of their trade, as it were, you would be looking at a completely different kind of product, because they would be looking at income protection and there would need to be an assessment of how long their career might last. A whole series of factors would be brought in, which makes it a much more complicated piece of underwriting. For many significant performers—I think that we discussed David Beckham last time—this would be handled by their management on a purely commercial basis, rather than by them as individuals, so the risks that one is discussing are inherently different depending on the purpose and the person whose policy it is.

Lord Eatwell: Then is insuring this going to be on the basis of percentage of use, or something like that?

David Hertzell: That would be a very crude measure of doing it, but I guess that one could use that.

Lord Eatwell: For the purpose of the record, “this” was a BlackBerry.

The Chairman: Let us move on to Clause 2, which of course is the core of the Bill, abolishing

the rules relating to nondisclosure in the case of consumer insurance but leaving them alive in relation to commercial insurance and modifying to that extent the doctrine of *uberrimae fidei*. I have no questions on Clause 2, but does anybody else have one?

Q13 Baroness Kramer: It is just a small question on this in subsection (3): “A failure by the consumer to comply with the insurer’s request to confirm or amend particulars previously given”. Given the propensity of insurance companies to lose current addresses, revert to former addresses et cetera, I am wondering whether there is any mechanism or way to be slightly clearer on who has the responsibility for making sure that communications have taken place—in other words, that the request has been received.

David Hertzell: I understand the problem. This is a difficult area because retention of business is popular with insurers and consumers are slightly lazy, as I think we all are, so we are probably quite happy with this kind of automatic renewal process. Legally, it is a new contract and therefore, if they do not ask you any questions, either because they are incompetent and do not send the thing to the right address or because they choose not to, they would not be able to rely upon—

Baroness Kramer: But it is quite hard to demonstrate that this request went to the wrong address, if you see what I mean. I realise that this is getting into minutiae, but I can see a whole host of endless narks over this and I presume that that happens already.

David Hertzell: I fear that that is right.

Q14 Baroness O’Cathain: Is there then a way of overcoming it? I would have thought that the onus on the consumer is to make sure that they are insured. If it therefore went astray and the consumer did not get it, they would not be insured, would they? Surely you have to say, “Yes, I agree about this.” I have one on my desk at the moment for a car and that is an automatic thing—I have not looked at the small print, which I never do—but I would still have thought that I would just ring them up or send my cheque off, or whatever.

David Hertzell: Yes. I suppose what we have done to support consumers here is that, technically, under the law at the moment you would have a duty to disclose things—whatever they might want to know—whether or not you were asked that on renewal.

Baroness O’Cathain: They say it.

David Hertzell: And they say it, even though that does not actually apply any longer with the ombudsman. What we have done here is to say that they have to ask you a question on renewal, which you have to answer honestly and reasonably because it is a new contract. By taking away the onus on you to disclose things, we are making the

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job slightly more consumer-friendly than it currently is.

Q15 Baroness Kramer: I hate to be picky but this does not talk about renewal. This is a request for information at some point during the life of a contract; that is all I was trying to point out. I do not think that this is a major issue, but I am constantly getting letters for the people who used to live in my property because, for some reason, the insurers managed to lose the new address.

Lord Sassoon: Lord Chairman, may I ask Mr Hertzell a question which may or may not help to clarify this? If the insurer has written to the wrong address to ask a question, I am not clear—but maybe Mr Hertzell can clarify this—whether that actually constitutes a valid request by the insurer. If they have been incompetent enough to write to another address, I assume that it does not. It may have other consequences, but in terms of Clause 2(3), if the insurer is incompetent and sends a request to the wrong address, the consumer has not had a request and is under no obligation to answer it. In the particular case here, I think that the consumer is actually covered.

Baroness O’Cathain: But is the consumer insured? Say that there was a debit on your bank account, because you normally paid that way, and you still did not—

David Hertzell: I think that is a slightly different question. What you are asking there is whether the automatic renewal process has effectively taken place because you have moved and have not told them or they have the wrong address, or whatever. I guess that it has, in effect. If they continue to take the money and send out the policy to the wrong address, it is effectively renewed.

Q16 Lord Eatwell: Could I ask about renewal? I am puzzled about it because *The Law of Insurance Contracts*, Clarke, fourth edition, says “the renewal of existing insurance is the conclusion of a new contract of insurance for a further period of time on the same risk and on broadly the same terms as before but perhaps with slight changes concerning, for example, the premium”. This does not seem to refer to slight changes. It refers to the request to provide further supplementary information, or whatever, and the failure to do so. What is the relationship of this to the law as set out in *The Law of Insurance Contracts*?

David Hertzell: I think that Malcolm Clarke is describing a general position, in that a renewal is a new contract and, de facto, they may well decide to change some of the terms and the premium may go up or down, but that is a description of the position under the current law. We are not seeking to alter that. We are saying here that it is a new contract if you renew insurance, automatically or otherwise, and the obligations that you have to answer any questions that you are asked honestly and reasonably would come into being. But if you

are not asked any questions, then nothing can be relied on.

The Chairman: I think that we should move on to Clause 3, on reasonable care. Does anybody have any questions on that?

Q17 Lord Eatwell: I was very struck by the sentence that I asked you to repeat in your introduction. The consumer is expected to exercise “reasonable care”, taking into account “the type of ... insurance”. What does that mean?

David Hertzell: One has to look at what the consumer did in the overall context. Some forms of insurance would be very simple and the means by which they are sold very simple. At one time you could put a card into a machine at an airport to buy a travel policy and hardly any questions were asked. On the other hand, a consumer may be taking out something far more complicated, such as a critical illness policy, where there might be much greater sums at stake. One would therefore expect a greater degree of care to be taken, simply because the logistics of the way in which the insurance product has been sold do not allow you to do so, on the one hand, and allow you to do so on the other hand.

Lord Eatwell: Should that be made clear in some sense?

David Hertzell: Perhaps in the Explanatory Notes, because again it is a question of principle against detail.

Q18 Lord Eatwell: Perhaps I could move on to misrepresentation. These days, a lot of statistical analysis is done on risks and their nature. Some of the correlations are not particularly obvious to consumers. A consumer may therefore be asked a question, the relevance of which is completely obscure to them—yet if you are a statistician, you know where it comes from. There is no clear obligation on the insurer to clarify the relevance of a question, is there?

David Hertzell: No. There is in fact a presumption that if they ask a question, it is relevant. The consumer has the obligation to answer the question honestly and reasonably, even if it seems a bit odd to them, but the insurer still has to show that the question—or the answer that they have given—induced them to enter the contract. What happens sometimes is that they may ask marketing information, so if you renew your car policy they ask lots of stuff about your car. Then they ask, “When are you renewing your household cover?” The assumption would be that that was relevant—because that is the presumption—but the insurer would not be able to show that anything you have told them there led them to take the car policy on the terms that they did, so that requirement of inducement remains.

Q19 Lord Eatwell: Thank you. The other general question of that type is that while issues of

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discrimination are clearly for other legislation, there are racial and gender issues associated with insurance. Clearly, gender issues are there because you are always asked if you are a man or a woman even in a driving contract—women are much safer drivers. Can you ask general questions on race and gender where they have an underlying relevance to a consumer's insurance? As you will have seen, the case that I put in my speech was that of black people and sickle cell anaemia.

David Hertzell: Yes you can. You can ask any question that is pertinent to the risk that one is allowed to ask, if it is not prevented by other rules and regulations. As we know, the Europeans are currently looking at the gender issue, which is very relevant to all of this.

The Chairman: Anything else on Clause 3?

Q20 Baroness Kramer: If I may, very quickly: to go back to my more general point under reasonable care, did you consider putting in under subsection (2)—“The following ... examples of things which may need to be taken into account”—the equivalent of a paragraph (e) that might read something like “terms laid out in relevant industry codes of conduct”, or something along those lines?

David Hertzell: We did consider that, but we still had the same concern about introducing codes as legislation.

Q21 The Chairman: I have an unimportant question on Clause 4. I notice that you use the phrase “a remedy against a consumer”. I have always thought of nondisclosure or misrepresentation as giving rise to a defence on the part of the insurer. After all, the plaintiff is always the consumer, is he not? “Remedy” seems to be a rather odd word to use in relation to the defendant.

David Hertzell: I suppose that it follows from using misrepresentation and looking for the damages that one might have were one to be subject to that and lose as a consequence of it, so “remedy” is derived from that rather than from the defendant as such. I think that is parliamentary counsel drafting.

The Chairman: It struck me as being an odd word but I am sure that it is quite clear what it actually means. Is there anything else on Clause 4?

Q22 Lord Borrie: The definition of “Qualifying misrepresentations” includes Clause 4(1)(b)—“the insurer shows that without the misrepresentation, that insurer would not have entered into the contract ... or would have done so only on different terms”—so it is that particular insurer and not necessarily a reasonable or prudent insurer. It strikes me as a little strange that we should have this subjective phrase brought in here, when one of the basic reasons that the Law Commission has adduced and repeated today for getting rid of the duty of disclosure is, to use Peter Tyldesley's phrase, that you are supposed to peer into the mind of a prudent insurer. Here, you have to peer into

the mind of your particular insurer, who may—unlike other insurers, or not unlike them—refuse to provide insurance, or only want it on different terms compared with the average, usual or normal insurer.

David Hertzell: You are absolutely right.

Lord Borrie: Should we go forward with the two words “that insurer” that are so relevant in Clause 4(1)(b)?

David Hertzell: We were being quite specific about that because we were seeking to put into law the Pan Atlantic case and subsequent cases, which are about the subjective “that insurer”. We did not feel that it caused too much of a problem because we have the presumption that the questions being asked were relevant—they were therefore relevant to “that insurer”, not to a prudent underwriter as such—and then there is the need to show that the questions were in fact relevant to the insurer's decision to take the risk. We have taken out, on the one hand, the need to disclose something to an objective standard to a prudent underwriter but reintroduced two subjective tests about this particular contract by taking out that objective prudent underwriter requirement. That is because we did not want to put any constraints on the market, so that if the insurers want to sell a particular product and have a particular desire to know certain things, we should not test that against an objective standard that is no longer required because we have the need to apply reasonableness to the consumer's disclosure.

The Chairman: I must say that I thought it quite important to leave it as “that insurer”, so that the insurer has to go into the box and say why he would not have insured, had it not been for the misrepresentation. I am trying to see whether that is perhaps what Pan Atlantic decided. I cannot remember now.

David Hertzell: Pretty well.

The Chairman: We should certainly think about that when we come to the detail. Is there anything on Clause 5?

Q23 Lord Goodhart: I have put down a couple of amendments to this. I am afraid that these are entirely pedantic and would have no effect whatsoever on the substance of the Bill, but it seemed to me that they would make the language a little simpler and easier to understand.

The Chairman: Thank you very much. Is that a point on which you wish to comment?

Lord Sassoon: Only to say that I am grateful to Lord Goodhart for saying that his amendment does not make any change of substance to the Bill, which confirms the advice that I had from my officials. We will have a look to see which of the alternatives is clearer. The initial analysis of officials is that the amendment makes things a little less clear because it could bring into doubt the Bill's split between a deliberate or reckless and a careless misrepresentation. I think we agree that there is no

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intention to change the substance here, but these two amendments possibly cause other difficulties.

Lord Goodhart: I do not think that they do, but I will obviously not press them if they are not going to be acceptable.

Lord Sassoon: We are certainly looking at it very carefully.

The Chairman: Clause 6 is the basis of contract clause. Are there any questions on that? I would have thought it is a very good thing that we are getting rid of it.

Q24 Lord Eatwell: I have a question on that. Mr Hertzell said that this abolishes warranties. In his letter to me, which I referred to earlier, the Minister said, “Warranties are rarely if ever used in consumer insurance contracts and do not present a problem beyond that posed by the basis of contract clauses”. It seems that warranties will survive but in some peculiar place in the ether that is relevant to consumer law.

David Hertzell: I am sorry if I gave you the impression that we were abolishing them. That is not quite right. What we are abolishing is the ability of the insurer to take down all the information you provide them with at renewal and convert that into a warranty, because a warranty has stricter outcomes.

Lord Eatwell: Or is it any information that you have provided?

David Hertzell: Any information, yes. So that is what we are getting rid of. Warranties are the subject of another piece of work that we are doing with businesses. The other issue is of post-contract matters.

Lord Eatwell: But are they abolished for consumers?

David Hertzell: They still exist for consumers, other than being introduced through this mechanism, although they are not a problem in consumer insurance.

Lord Eatwell: All right—I will leave it.

The Chairman: Clause 7 on group insurance seems fairly straightforward; you explained it very well earlier. Are there any questions on that? Clause 8 is on insurance on the life of another, which I think is again fairly straightforward. Clause 9, on agencies, might be more controversial because it involves Schedule 2 and how one decides whether an agent is acting for the insurer or the assured. It seems to me at the moment that it reaches the right sort of balance on that. Are there any questions on Schedule 2?

Q25 Lord Borrie: Will there be a problem with certain no doubt unscrupulous insurers saying that so-and-so is your agent when he is in fact their agent, and that being written into the contract?

The Chairman: I am not sure whether I quite follow that.

Lord Borrie: It is if the insurer purports to say that such and such is the agent of the insured when that is not so. You might get a signature saying that he is when that is not really the case, if you look at it more closely.

David Hertzell: Yes, we were concerned about that. In fact, that was suggested to us as a possible solution here. Our concern was that it may not reflect the actual circumstances of what was occurring. I think we tried to set out overriding principles that would decide who was acting for whom, regardless of what they have actually signed.

Lord Borrie: I am happy if you can go behind the signature.

Lord Eatwell: I think that this is a very difficult one, which we ought to come back to. It is not at all clear to me how an agent is defined as acting for the consumer in a particular way, when the objective of the agent is to sell insurance but that agent may not be acting for anybody specific on the industry side.

David Hertzell: If one looks at commercial insurance, the agent is often acting for themselves in reality—if one was being commercial about it.

Lord Eatwell: Acting for themselves?

David Hertzell: Or acting for either party, to take a commercial view. But this is a very complicated area and what we have tried to do is to set out some broad principles, which will assist with consumer issues.

Lord Eatwell: When filtered through the agent, all these issues of misrepresentation, misleading questions and so on and so forth could expose the consumer.

The Chairman: Presumably, if this ever became a question that mattered and had to be decided by a court, the court would look at all the things you have in Schedule 2—and, indeed, at the point made by Lord Borrie—and reach a conclusion as to whether the agent in question was the agent of the insured or the insurers.

David Hertzell: Yes.

The Chairman: But all this is doing is providing a certain background to what would have to be decided.

David Hertzell: A framework, yes.

The Chairman: I think that that perhaps completes the main provisions of the Bill. I wonder whether there are any further general questions that anybody would like to ask at this stage and, if not, whether the Minister would like to add anything.

Lord Sassoon: Thank you, no.

The Chairman: We are deeply indebted to you, Mr Hertzell, if I may say so, for all the help that you have given us today. Thank you very much indeed.

**Letter from David Hertzell, Law Commissioner, to Lord Lloyd of Berwick,
Chairman of the Committee**

Dear Lord Lloyd,

CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) BILL

Further to the meeting of the Special Public Bill Committee on 11 October 2011, I write to provide additional information for the Committee in relation to a number of the issues raised which I hope will assist.

Specifically, I thought it may be of use to the Committee to provide clarification in relation to:

- (1) The interrelationship between the Bill and Codes of Practice.
- (2) The definition of consumer and the interpretation of the words “wholly or mainly”.
- (3) How the type of insurance contract in question might bear on an assessment of whether a consumer has taken reasonable care not to make a representation.
- (4) Why “that insurer” is used in s4(1)(b) rather than “a reasonable insurer”.
- (5) The definition of agent as acting for a consumer when selling insurance.
- (6) Requests to confirm or amend a policy.
- (7) Whether insurers are entitled to ask catch-all questions.
- (8) Why only basis of contract clauses in respect of consumers are included in the scope of the Bill and not all warranties.

Looking at each in turn:

1. THE INTERRELATIONSHIP BETWEEN THE BILL AND CODES OF PRACTICE

I understand that Lord Sassoon is writing to you separately on this issue.

2. THE DEFINITION OF CONSUMER AND THE INTERPRETATION OF THE WORDS “WHOLLY OR MAINLY”.

The Law Commissions, in their 2007 consultation paper, provisionally proposed that consumer insurance should be defined to cover contracts of insurance entered into by individual policyholders for purposes wholly or mainly unrelated to their businesses. This is the essence of the definition adopted in the Bill.

This means that for “mixed use” policies, where the insurance covers some private and some business use, it is necessary to look at the main purpose of the insurance. For example, insurance on a car used mainly as a taxi with only the occasional private trip would be considered commercial insurance. However, an individual who insured their home contents for £30,000 including £3,000 of business equipment would be considered a consumer.

Some insurers urged the Law Commissions to follow the FSA definition exactly, which excludes “mixed use” policies from the consumer regime. The FSA rules define a consumer as a natural person who is acting for purposes that are “outside his trade or profession”. In its guidance, the FSA states: “If a customer is acting in the capacity of both a consumer and a commercial customer in relation to a particular contract of insurance, the customer is a commercial customer”. This would suggest that an individual insuring a home which includes a home office would be classified as a commercial customer. Similarly, car insurance which allows “occasional business use” would be considered commercial insurance.

The Financial Services Consumer Panel argued that the FSA definition was too narrow, and gave insufficient protection to the self-employed. It fully supported the inclusion of “or mainly” in the definition of consumer insurance.

Where possible, unnecessary differences between the definitions used by the Bill and the FSA should be eliminated. The Law Commission therefore held discussions with the FSA to explore this issue further. The FSA said that the new Insurance Conduct of Business Sourcebook (ICOB) rules do not draw sharp distinctions between different types of insured. The principles are high-level standards set out apply to all customers. For example, it appears that their definition is not intended to draw a sharp or legalistic distinction between people who do (or do not) insure a home office. However, the draft Bill will give consumers considerably more protection than business customers with the result that the definition will be more significant.

The only substantive difference between the definition in the Bill and the FSA definition lies in the treatment of mixed-use policies. It is very common for vehicle insurance to cover a limited amount of business use, or for home contents insurance to cover a limited amount of business equipment. It is

important to protect individuals taking out these forms of insurance; indeed, to exclude them would severely reduce the usefulness of the proposed reforms. Furthermore, it is unlikely that FOS would be prepared to adopt such a narrow definition, thereby increasing confusion in this area. The Law Commissions therefore took the approach proposed in the consultation paper, by including within the application of the Bill, individuals who enter into an insurance policy wholly or mainly for purposes unrelated to the individual's trade, business or profession. We understand that the FSA are happy with the Bill as it now stands.

By way of example, the definition in the Bill means that a self-employed window cleaner who uses a van mainly for window-cleaning would be taking out insurance in a business capacity. However, a self-employed contractor who used a car mainly for private use would insure the car as a consumer. An individual who takes out insurance to protect his or her income would generally be considered a consumer, whether the income was gained through employment or self employment. However, if an individual were to insure an employee's health this would normally be for business purposes.

3. HOW THE TYPE OF INSURANCE CONTRACT IN QUESTION MIGHT BEAR ON AN ASSESSMENT OF WHETHER A CONSUMER HAS TAKEN REASONABLE CARE NOT TO MAKE A REPRESENTATION.

The level of time, trouble and care a consumer is expected to take in completing a proposal form must depend on the type of insurance and the way in which it was sold. Clause 3 of the Bill provides examples of matters which should be taken into account when considering whether a consumer acted reasonably. The Explanatory Notes confirm that this is a nonexhaustive list and that "additional factors may be taken into account when suitable".

For example, greater care would be required if an insurer told consumers to take an hour to check their records before completing the form, than if an insurer advertised the insurance as "quick to complete". Similarly, a higher level of care might be expected if insurance was only sold through specialist brokers who were able to guide the consumer through the process.

In the Law Commissions' survey of Ombudsman cases, a consumer was taken through an application for household insurance over the phone. Her answers were recorded. When asked about previous claims, she mentioned a claim for a burst pipe. She was asked when it was and hesitated: she thought that it was about two years ago. She was then asked how much it was for. Again she hesitated, and eventually suggested that it was "about £7,000... £8,000". When it later transpired that the claim was for £12,800 the insurers avoided the policy. In a case like this, the standard of reasonable care should take account of the fact that the insurer did not ask the consumer to check her records. Although her hesitations should have alerted the insurer to the fact that she was uncertain as to the amount, the insurer continued to accept an answer given from memory.

4. WHY "THAT INSURER" IS USED IN s4(1)(b) RATHER THAN "A REASONABLE INSURER".

The current law provides that a misrepresentation is only actionable if it is "material", in that it would influence the judgment of a hypothetical prudent underwriter.¹ In addition, an insurer is entitled to bring a claim for misrepresentation only if it can show that it has been "induced" to enter the contract. This test was first set out in the case of *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*.² It means that an insurer must show that without the misrepresentation it would not have entered into the policy, either at all or on the same terms. In other words, had the insurer known the truth, at least one term of the policy would have been different.

Most consultees agreed the inducement test should be retained. Clause 4(1)(b) of the Bill requires the insurer to show that without the misrepresentation it would not have entered into the contract at all, or would have done so only on different terms. This preserves the current law, and it is expected that the courts would interpret the provision in light of existing case law. It is expected that in most cases the insurer would provide underwriting guidelines or evidence from an underwriter to show what had been done in similar circumstances.

However, we have not preserved the current concept of materiality under the Bill. A reasonable consumer is unlikely to know what a prudent underwriter needs to know. Under the Bill, an insurer must show that it was induced by a misrepresentation and that a reasonable consumer would have provided the information. The insurer does not also have to show that the misrepresentation would also have influenced other underwriters in the market.

In removing the duty on consumers to volunteer information and replacing it with a duty to take reasonable care not to make a representation, it is not necessary to retain a test which considers the actions of insurers objectively. To do so would make it necessary for an insurer to show not only that a

¹ Marine Insurance Act 1906, s20(2).

² [1995] 1 AC 501.

consumer should have known an inaccuracy or omission was relevant to them, but also that the inaccuracy or omission would have been relevant to the “prudent insurer”.

Such an objective test (a “reasonable insurer”) test may cause problems for innovative insurers. Some insurers may wish to develop niche markets, by selecting which risks they underwrite on the facts that seem irrelevant to the generality of insurers. For example, an insurer may set premium rates on the basis that all their policyholders are members of a particular profession or union. This means that a question about occupation may be crucial to them, even if it is irrelevant to most prudent underwriters.

Therefore, under the Bill there is a presumption that if an insurer asks a question it will be information an insurer needs to know and a reasonable consumer should answer it. An insurer does not need to show that other underwriters in the market would have considered such information relevant.

5. THE DEFINITION OF AGENT AS ACTING FOR A CONSUMER WHEN SELLING INSURANCE.

It is often difficult to determine for whom an intermediary acts. The case law on this issue stretches back over a hundred years and Ombudsmen frequently struggle to apply these cases to an ever changing and increasingly complex market. Intermediaries now come in a wide variety of forms and their relationship with the consumer and insurer varies greatly. At one extreme they may be very closely linked to the insurer—for example, an intermediary may be recruited by the insurance company to solicit customers. At the other extreme, an intermediary may be an independent agent, chosen and approached by the consumer and able to offer impartial advice on the market. In the middle lies a broad spectrum of diverse arrangements.

New methods of selling insurance are constantly being introduced. For example, an intermediary may be a retailer which offers a limited range of insurance products (such as extended warranties) as a sideline; or an intermediary may be a large recognised brand (such as a supermarket or a bank) which distributes insurance products under its own logo (known as “white-labelling”). Information technology has prompted considerable change as internet selling and price comparison sites have become increasingly important.

After significant consultation, the Law Commissions concluded that it was not possible to have a single test to determine for whom an intermediary acts in transmitting pre-contract information. The issue of who an intermediary acts for must depend on a range of factors. Therefore, a new statutory code is proposed, based largely on the existing law.

The aim was to find a balance. Insurers should bear responsibility for those intermediaries within their control, and have appropriate incentives to exercise that control in a way that prevents problems from occurring. However, insurers should not be liable for the actions of many small intermediaries with whom they do not have a close relationship. The Law Commissions agreed with the statement in the ABI Code of Practice that: “Whether an intermediary was acting as an insurer’s agent in a transaction will depend on the facts and circumstances in each case”. It was thought helpful to provide further guidance on which factors and circumstances were relevant to the decision.

A list of the factors that were relevant to the decision are set out in Schedule 2 of the Bill. However, any such list needs to be indicative and non-exhaustive. Market practice in this area has changed rapidly with the increased use of technology and regulatory developments, and may well change again. The law will need to adapt to such changes. The ABI specifically agreed with us on this point, stating that “the main benefit of the indicative approach is flexibility”. To mitigate this concern, clause (4)(1) of Schedule 2 provides a power to the Treasury to review and amend the list if it becomes outdated.

In the absence of any factors indicating a close relationship between insurer and intermediary, the intermediary is deemed to act for the consumer. Even if some factors do indicate such a close relationship, they may nonetheless be outweighed by other factors indicating that the intermediary acts for the consumer.

The starting point under the Bill is that the agent acts for the consumer, unless there are circumstances which show that the intermediary acts for the insurer. This reflects the current law. Because a consumer has some control in selecting their intermediary it is presumed that the intermediary acts for the consumer. This presumption can be overridden by factors which suggest the intermediary was not in truth acting independently.

Take an example where the intermediary undertakes to give a consumer impartial advice and selects a panel of insurers each year after a fair analysis of the market. If the panel includes (say) five different insurance firms, the fact that the panel was selected after a fair analysis of the market would strongly suggest that the intermediary acts for the consumer. The fair analysis is likely to outweigh the limited number of insurers. However, if the intermediary had a single tie the court may look much more sceptically at the intermediary’s claim to give impartial advice.

6. REQUESTS TO CONFIRM OR AMEND A POLICY.

The issue of “misrepresentation by omission” is particularly acute on renewals. On renewal, consumers are often asked whether there has been a change in circumstances.

How does the Bill apply if the insurer writes to the consumer with a clear letter asking about recent changes, but receives no reply? May the insurer assume that nothing has changed? The ABI thought that the renewal process should be made as easy as possible, so as to prevent lapses in cover. It pointed out that, under the Government’s new proposals on uninsured vehicles, a vehicle owner who allows a motor insurance policy to lapse commits a criminal offence. Therefore, an insurer should not have to wait for the consumer’s response before renewing a policy: it is better to ensure continuity of cover.

The Bill therefore includes clause 2(3), which states that a consumer’s failure to comply with the insurer’s request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of the Bill. This would apply where an insurer writes to a consumer on renewal with a statement of the information it holds about the consumer, asking if anything has changed. It would also apply where the insurer takes information from the consumer over the phone, and then sends the consumer a statement of fact, asking the consumer to contact them if the statement is incorrect.

This provision simply states that a failure to respond to the request to amend particulars may amount to a misrepresentation. It will then be a question of fact, in all the circumstances of the case, whether the consumer’s failure to respond is or is not reasonable according to the principles set out in clause 2(2). A failure to respond may be considered reasonable, for example, if the letter is confused or unclear, if the insurer has failed to provide an adequate means of response or if the consumer did not receive the letter.

In this context it should be noted that the FSA’s Insurance Conduct of Business Sourcebook (ICOBS) is designed to protect consumers so that they do not unknowingly sign up to new contractual arrangements. For general insurance products there are stipulations about the renewals policy that the FSA expect firms to adhere to. This includes the fact that firms must treat a renewal transaction in the same way as a new contract. ICOBS requires a firm that is proposing to renew a contract to provide appropriate information, in good time, to enable a customer to make an informed decision about the arrangement proposed at renewal time.

7. WHETHER INSURERS ARE ENTITLED TO ASK CATCH-ALL QUESTIONS.

Insurers may use general “catch-all” questions if they wish, but if they do they run the risk that consumers may act reasonably but still fail to give relevant information. Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in light of all the relevant circumstances, including how clear and specific the insurer’s questions were (clause 3(2)(c)). Thus, if the insurer wishes to know whether the consumer has ever consulted a doctor about a mole, it would be better to ask a specific question than to rely on a general question about whether the consumer has sought medical advice about “any ailment”

An example may assist. This was raised by a broker during the Law Commissions’ consultation: a buildings policy might ask “are there any other hazards we should know about?” A consumer who makes fireworks at home would be required to mention this fact. The hazard is so obvious and extreme that it is the sort of thing that a reasonable consumer would mention. However, it may not be reasonable to expect consumers to state that they lived near rivers: if insurers want information to assess flood risk, they should ask for it.

In his letter to Lord Eatwell of 15 June 2011, Lord Sassoon stated that “we do not think this will cause such questions to be asked and the ABI have agreed with this analysis”. Insurers already have well developed practices in the area of consumer insurance and a good understanding of which questions to ask in order to capture the information they need.

Further, given that the Bill reflects the current FSA guidance and FOS decision making, we would expect that the majority of insurers would not substantially change their existing practices and rely on catch-all questions where they had not previously done so.

8. WHY ONLY BASIS OF CONTRACT CLAUSES ARE EXCLUDED FROM THE SCOPE OF THE BILL AND NOT ALL WARRANTIES.

Clause 6 of the Bill abolishes the basis of contract clauses. It prevents representations from being turned into warranties by means of a policy term or statement on a proposal form. The Bill does not reform the law of warranties save to this extent. As explained in the Law Commissions’ summary of consultation responses, the reform of consumer warranties has been postponed to deal with them alongside the proposed business reforms.

The main reason for postponing the issue is that the need is less pressing. As stated in Lord Sassoon's letter to Lord Eatwell of 15 June 2011, as far as we are aware, specific fact warranties are not a major problem within consumer insurance policies. And if they are used in an unfair way, consumers have remedies not only under the FSA rules but also under the Unfair Terms in Consumer Contracts Regulations 1999. Clause 6 of the Bill is aimed at the main evil.

The Law Commissions are currently reviewing the issue of warranties and plan to release a consultation paper in April 2012.

I hope this information is of assistance to you and the Committee.

Yours sincerely

David Hertzell
Law Commissioner

18 October 2011

**Letter from Lord Sassoon, Commercial Secretary to the Treasury, to Lord Lloyd of Berwick,
Chairman of the Committee**

Dear Tony,

Following my evidence at last week's Special Public Bill Committee meeting I thought the committee might find it useful to have some further background on the Government's position regarding the role of industry codes.

Industry codes are already taken into account by the Financial Ombudsman Service (FOS) and, in future a court may find that a consumer acted reasonably when complying with Codes. When the Law Commission conducted its consultation, consideration was given to inserting a provision in the Consumer Insurance (Disclosure and Representations) Bill, which would have ensured that the Courts did refer to codes of practice in dealing with claims.

The arguments in favour of doing so are that it would prevent the confusion caused by two sets of rules: one potentially applied by the courts and another by the FOS. It would also ensure that flexibility is maintained as the market updates.

However, there are strong arguments against including such a provision:

- it would effectively give the ABI and other industry bodies the power to bind non-members, which may not be appropriate;
- it may introduce uncertainty. It may be hard to determine whether a code or industry guide fell within the scope of such a provision. The various codes and forms of guidance are not necessarily written as legal documents, which means they may be difficult to apply in a court of law; and
- the provision may discourage industry representatives from putting guidance in writing.

The ABI argued strongly against including such a provision. They considered that elevating industry guidance to legislative status would mean that their flexibility would be lost. The ABI suggested that if such a provision were to be included in legislation, it would "raise questions over the future status, role and appropriateness of the Code." It would, be highly unusual for a trade body to be able to bind non-members and it would "also make it more difficult for guidance to be agreed, with the obvious consumer detriment."

Given the force of the arguments against including such a provision, it was omitted. Industry codes and guidance are not intended to have the force of law.

In addition, it is worth noting that the FOS can make non-binding recommendations in cases above its jurisdictional limits. Under the Bill, the FOS and the courts will apply the same basic legal framework. An insurer will no doubt take this into account when considering whether to pay any excess above the FOS award.

Lord Sassoon

19 October 2011

WEDNESDAY 19 OCTOBER 2011

Present	Lord Borrie Lord Davies of Stamford Lord De Mauley Lord Goodhart Lord Hodgson of Astley Abbotts	Lord Lloyd of Berwick (Chairman) Baroness Kramer Baroness O’Cathain Lord Sassoon
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Examination of Witness

Witness: PROFESSOR MALCOLM CLARKE, St John’s College, Cambridge, examined.

Q26 The Chairman: We express a warm welcome to Professor Clarke and Lord Justice Longmore for attending this, our third, meeting and the last at which we are going to be taking oral evidence. We had a meeting last week with David Hertzell and it is possible that you, Professor Clarke, have read the transcript—I do not know whether you have. You have not? It matters not. At that meeting, we discussed a number of detailed points. Today I thought that we might start with your views and the views of Lord Justice Longmore on the more general question of the need for this Bill and whether the Bill meets that need. Having said that and having expressed our welcome to you, perhaps I could ask you to say what you would like to on that subject.

Professor Clarke: The main plus about the proposed Bill is that it turns the tables round. At this point in time, if any applicant for insurance, whether a consumer or a non-consumer, wants insurance, we are supposed virtually to guess what the insurers want to know. We are supposed to disclose all the information that insurers deem to be material to the risk that they are being asked to cover. What this Bill does is turn it round, in the sense that they are no longer under any duty of that kind to disclose. Effectively, the duty becomes a duty on the insurers to ask questions—in other words, to tell people what they want to know. In some cases, of course, it will be dreadfully obvious; if I have a broken leg or whatever it is, it is clear that I am a risk on travel insurance, say. But in most cases people really do not know what they are supposed to tell the insurance industry. This should be changed completely. Incidentally, if it matters, this brings English law much more in line with the law in other Commonwealth countries and indeed Europe. I think that that is the principal virtue of what the Bill puts through—not the only one, but the principal one.

The Chairman: I think that we are all grateful to you for that introduction. Is there anything that members of the Committee would like to ask on the more general questions about the subject? I should say that we are very grateful for the paper that you sent us in advance.

Q27 Lord Borrie: I have a general question for Professor Clarke. How does he see in future the relationship between the Bill, which will be an Act, and the codes of practice within the insurance industry?

Professor Clarke: I think that that has been a source of confusion in the past because there have been inconsistencies between various codes and the advice that people have received on this question—and the black-letter law itself, indeed. In future, obviously, interested bodies cannot be prevented or forbidden from drafting codes of conduct. One would hope that the Bill that goes through will be clear enough for people that those who might draft codes of conduct will stay away from that area of insurance activity, but clearly it must be possible for codes to be produced in future. So there is potential for confusion, as we have had in the past, but I would expect that it will not be as great.

Q28 Lord Davies of Stamford: I think that we can all see that, at least theoretically, the removal of the obligation of absolute good faith in the area of consumer insurance is a major change—a revolutionary change, you might say. But I am trying to get a focus on how much difference it is going to make in practice. For many years, in accordance with the industry codes and the practice of the ombudsman, absolute good faith has not actually been enforced in the consumer insurance areas, so what I would like to know from you is whether you have made any study, are aware of any study or can give us or summarise the approximate results of any studies that indicate how many consumer insurance contracts have been voided by the courts on the ground that the consumer concerned was in breach of the absolute good faith requirement in seeking and purchasing that insurance policy.

Professor Clarke: That is a difficult question. The short answer is probably none at all, because consumers cannot afford to go to the courts in the first place.

Lord Davies of Stamford: Would it be the other way round? You mean that consumers simply accept their insurance company’s voiding of their contract without it leading to any litigation at all.

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Professor Clarke: In many cases they have no choice because of money. Then came the Insurance Ombudsman's Bureau, then the ombudsman service. That is an important underlying feature of what we are talking about this morning: people should be aware that if they are very unhappy with the way in which they are being treated by insurers, there is an ombudsman service to which they can go at virtually no cost. I think that the Bill will only work on the premise that people are aware that this is a possibility. Have I answered your question?

Lord Davies of Stamford: Not entirely. Can you give us any idea at all—any estimate—of the practical difference that the Bill, if it passes into law, will make?

Professor Clarke: Only the one that I tried to outline at the beginning, that instead of applicants for insurance—an American phrase—having to work out what they are supposed to say and, if they can afford it, asking brokers or intermediaries to tell them what they should say, they now sit back and they wait for the insurers to ask them their questions.

Lord Davies of Stamford: I understand entirely what the effect of the Bill is going to be. All I am trying to get a focus on and get some understanding of is what practical difference it is going to make. As far as you know, there is no quantified information or assessment of the extent to which consumers have been losing up till now as a result of the absolute good faith rule and the application of the Marine Insurance Act to consumer insurance.

Professor Clarke: As far as I am aware, the only answer to that question would lie with the ombudsman bureau now; it has records of the cases that come before it. Likewise the records of 'small claims' in the County Court.

Lord Davies of Stamford: Well, I could ask the Government the question. I assume, and rather hope, that before the Government prepare legislation they ask themselves questions about the practical impact of that legislation and look at whether such studies have been made. At least you as an academic are not aware of such studies.

Professor Clarke: I am not, no, other than what has been published by the bureau and the County Court.

Q29 Baroness O'Cathain: Professor, surely one of the big things from the consumer's point of view is that they will not feel uneasy every time they look for insurance. Anecdotally, a lot of friends of mine have said, "You go into insurance and you never know whether you have managed to ask the right questions of your broker about what is actually covered." It is a very uneasy area. It is not something that consumers normally go into feeling very confident, unless they are insurance brokers themselves, so I would have thought that this was a case of being much better for the consumer. It makes a huge difference, because it takes the onus

off the consumer and puts it right where it should be, with the people who, after all, are paid to operate the whole thing—the brokers and the insurance companies.

Professor Clarke: I would simply say yes.

Q30 Lord Hodgson of Astley Abbotts: On reasonable care, which you have in your note to us, for which we thank you, one of the things that have infuriated consumers is questions to which there is not sufficiently clear answer in relation to their particular circumstances. When I was asking about the proceedings of this Bill, a case was brought to my attention of a man whose wife teaches music at school and from time to time, particularly in the run-up to exams, gives tuition at home—additional tuition, for which she charges a fee. Her household insurance has a question: "Is your home used as a business? Yes or no." For five, 10 or 20 sessions of business a fee is charged, but there is no room in the insurance policy for "Maybe", "I don't know" or "Further particulars". When we come to reasonable care, what is the position of this man, his wife and their household insurance?

Professor Clarke: The Bill does not answer that question. I do not think that it can. In some countries, a lot of subordinate information comes with legislation, but that is not the British tradition and I am not suggesting that it should be. I try to make the point somewhere in that paper that on that sort of question—the "mainly or wholly" question—of how you draw the line between consumer and non-consumer insurance, there could be lots of cases on the borderline like the one that you have just outlined. On your specific point, I think that that question would now be regarded as insufficient by any tribunal in this country. When they do get a borderline case, with all the sorts of possibilities that one can think of, in the end it would come back to the ombudsman service. If a determined insurer for whatever reason takes against a particular claimant and says, "That's not consumer insurance," what does the consumer do? The only thing that they can do in a case like yours is to say, "Hey, let's go and ask the ombudsman service." That is very important for the effective working of the Bill.

Q31 Baroness Kramer: I have a couple of questions. First, to follow up on Lord Davies's question, would you be aware of significant numbers of—I do not want to use the word "anecdotes" because that suggests that they are just empty stories that have not been investigated—cases, recognised by charities or organisations such as Which?, that have demonstrated instances where people have been caught under the existing legislation? When I was an MP, there was a case in my constituency in which mortgage insurance was denied. The husband, who was the breadwinner, had a heart attack and died. Some years before, he had filled out the insurance applications forms and

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under “Medical disclosure” had not mentioned that on one occasion his doctor had suggested that he might be depressed and had given him a single prescription for a few weeks of Valium. On that basis, the payment of the claim was denied. Had my constituent not had parents who enabled her to stay in her house and to contest the decision, she would certainly have lost the house even if at a future point she had been able to get the courts to recognise her situation and make a payment on the claim. Are there not a lot of anecdotal stories that indicate the need for this legislation, even if we do not have a properly tallied set of numbers? Is your understanding similar to mine?

Professor Clarke: With respect, that is not anecdotal. There have been many cases like that with the so-called pre-existing condition clause in many insurance policies. You can understand why the insurers put it there. That is not evil on the part of the insurers; on the contrary, they have every reason to want to know as much as possible about the physical condition of the applicant in a situation like that. Indeed—I am going slightly sideways, if I may—if the Bill works out with a turning of the tables, as I tried to outline, that situation will be much improved. The insurers will have to ask much more prominent and specific questions about my health on my travel insurance or whatever. So that is far from anecdotal; it is precisely the sort of situation that we hope and indeed expect that a Bill like this will improve.

Baroness Kramer: Would it be your reading of the new Bill that where an applicant had failed to mention the instance that I just described, which clearly did not bear in any way on the cause of death, under the Bill the insurer would have to make payment—indeed, if the condition were relevant, simply to recast the insurance as it would have been had the disclosure been made?

Professor Clarke: Unless the applicant were fraudulent.

Baroness Kramer: Precisely. Then we have the same reading of the Bill. The area where I have significant concerns is around the industry code of practice. This Bill is intended to provide genuine clarity to consumers. Are you in any way concerned that, with the codes and the Bill running in parallel but not identical, we are losing an opportunity to get real clarity? Would you welcome some mechanism that tied codes back into the language—for example, as a test for reasonable care?

Professor Clarke: The short answer must be yes, I would welcome it. I cannot for the moment work out how it would be done; it would be very difficult. As I tried to indicate earlier, the existence of too many pieces of advice in the codes in the past was a source of confusion for consumers. One would only hope that the Bill was so effective in its operation in the future that industry bodies—Which?, the ABI or whatever—did not spend too much time adding codes of conduct to the same

area of consumer activity. That, though, must be only a hope.

Q32 Baroness Kramer: Lastly, one concern that I have—I think that many people in the field of insurance have it—is around genetic testing, particularly as insurance moves even further in the direction of the provision of long-term care. An insurer could understandably be asking very significant questions about underlying conditions or genetic predisposition. At present, at least those who belong to the ABI are prohibited from exploring that territory so long as they remain members of the ABI, because of the code of guidance. As far as I can see, though, there is no mechanism that would prevent that from being changed. Would you consider the Bill as one that ought to pick up that set of concerns, or would you not consider it appropriate within this legislation?

Professor Clarke: I think the latter. It is not appropriate. This question could be a can of worms—such a big can of worms that it should be addressed quite differently. It is an issue of public policy as far as analysts and theorists are concerned, which is a completely different chapter in the book on the subject of insurance. If they want to know about Huntington’s disease or anything of that kind, I can well understand why they might wish to do so, but it raises wider and different concerns.

Q33 Lord Sassoon: Professor Clarke, in your opening remarks and the helpful note that you provided to the Committee, you referred to this legislation bringing UK rules into line with that generally favoured by European countries. I just wondered whether you could shed any further light on how this has worked in practice in Europe, from the perspective both of the consumer and of whether the insurer gets the information that is required under this approach, or whether there were any serious debates in Europe about going in some other direction.

Professor Clarke: Let me answer the last question first. Yes, there has been serious debate; I shall be on an aeroplane tomorrow morning to Zurich to carry on that debate, but that does not answer your question. You will find a reference—I think that I footnoted it—to the European project that I am working on tomorrow. The idea of a specific question—interrogation, almost—by insurers came most strongly from France, where they have experience of this. To try to answer your main question, yes, there is information about this and I know whom to ask, but I do not have it in my head. It has been studied in France, if not in other countries as well.

Lord Sassoon: But you are not aware of any significant issues in Europe that would undermine our move to this approach.

Professor Clarke: No.

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Q34 Baroness O’Cathain: Professor Clarke, you said Commonwealth countries as well as Europe, did you not? To follow Lord Sassoon’s question, is there any evidence from Commonwealth countries where the law is more akin to ours than to central European countries?

Professor Clarke: Certainly. Straight to my mind comes Australia, for more than one reason. My impression is that the Supreme Court in London is now paying more attention to the High Court of Australia than to any other foreign Supreme Court—for good reason; I think that they are right to do that. There was a Law Reform Commission of Australia that published a Report in 1982, and which discussed these issues. Certainly, my impression again, although I cannot quote chapter and verse this time, is that one can pick out provisions in the Australian Insurance Contracts Act 1984, which would move much more in the direction of this Bill than existing English law.

Q35 Lord Hodgson of Astley Abbotts: I wonder whether I could go back to Lord Sassoon’s point about differences between practices here and on the continent. I am told, although I am sure that you will correct me if I have got this wrong, that the process for resolving difficulties in this sort of field on the continent, instead of the adversarial nature of our system here, relies much more on mediation processes, which are quicker and easier to understand and can be rather user-friendly. Am I right in that assumption? If so, would you think that there was some value in our finding some way to consider a mediative process as opposed to the legal process as we know it, which has proved to be quite long-winded and can be quite unpredictable, expensive and difficult for the man in the street to understand?

Professor Clarke: I think that you may have in mind the interrogatory approach that is adopted in some countries—again, France comes to mind—in which a court official takes the initiative, rather than the adversarial process of argument in front of judges. On the other hand, if you were to ask someone such as Lord Mustill, the retired judge, he would tell you that they are indigenous to this country and he is very much a fan of this type of approach: mediation, or rather—I have forgotten the exact words; he picks them very carefully—a non-adversarial way of solving civil problems of the kind that we are talking about here. In my opinion, the Financial Ombudsman Service in many ways is providing that kind of informal resolution where it feels that that is necessary and desirable.

Q36 Lord Davies of Stamford: To follow up on your comment to Lord Sassoon that there are lively debates going on in the European Union and on the continent on these matters, what principles are being contested? Can you summarise the active controversies that are going on in our partner nations on the continent?

Professor Clarke: Gosh. That is a difficult question to answer. If I had to try to focus on a particular point that was close enough to this morning’s business, I would say that they are extremely wary of warranties in English law. English law is regarded as much too severe—all or nothing, absolutist—in its approach to legal issues. I apologise for repeating, but one of the things that the Bill does in my opinion is to alleviate that; it softens the hardness of English law. The consequence is, if I can focus on one particular thing, that if an applicant is careless or not careful enough in his or her evidence answers, instead of there being no insurance, there is some insurance—the consequences are not rescission or nothing.

Q37 Lord Davies of Stamford: To your knowledge, has the European Commission considered legislating on this area and producing its own directive? It occurs to me that it is not entirely consistent with the principle of a single market that an insurance policy that is sold to a consumer in one member state may be an effective policy but in another member state it may be ineffective and voidable.

Professor Clarke: Very much so. The Commission is currently concerned not so much with being harmonious, but “harmonisation” is probably the right word. There are certain areas of activity where it would be possible, for example, for a person who works in various parts of Europe to have life insurance that is valid in the same way wherever that person and his family find themselves working. That kind of push is very much before the Parliament and the Commission at this time. The latest that I heard was that general contract harmonisation might be too difficult. One of the first things that they are thinking of working on is insurance contract law, so that people, whether in work or as tourists, can find themselves in a similar situation if things go wrong in France, Italy, Germany or wherever.

Lord Davies of Stamford: So we may have EU legislation in this area very soon and therefore will have to revisit this area in order to implement the EU legislation in this country.

Professor Clarke: I am not an expert on this, but my understanding is that there will be no legislation but what is called optional law. What they are working on is not law that they want all countries to legislate for but optional instruments that Parliaments may or may not choose to take as a parallel, second law. If the UK Parliament were to do this—personally, I do not think that it will—there would be common law operative or an optional instrument that insurance companies could make their policies subject to. For the insurance companies, the big advantage would be that they could sell the same policies in different countries. They would not have to look at the law in each country or in many countries before drafting policies and seeking custom. It would suit

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both the consumer, especially, and the insurance industry if it worked.

The Chairman: It remains to us to express our great thanks to Professor Clarke for answering our

questions so clearly and carefully. I hope that members will remain while Lord Justice Longmore is put through the same process.

Professor Clarke: Thank you.

Examination of Witness

Witness: LORD JUSTICE LONGMORE, examined.

Q38 The Chairman: Lord Justice Longmore, we are very grateful indeed to you for coming today. First, I hope that you will express some general views about the need for this Bill from your point of view and comment on any of the answers or questions that you have already heard from members of the Committee.

Lord Justice Longmore: Thank you. I echo Professor Clarke's enthusiasm for the Bill. It has been a long time since the law of insurance has really departed from what has been accepted by respectable insurers as being good practice. It has always seemed to me to be a very undesirable state of affairs that the law on any topic should in effect be sidelined by adopting practices that are inevitably more beneficial to the consumer than the law is at present. Quite apart from the fact that good practice cannot always be relied on, it gets worse and worse as the years go by. The law set out in 1906 has been with us for a very long time, of course. It was only after the Second World War that the consumer situation really began to rear its head, but I think that it was back in the 1950s that respectable insurers felt impelled to adopt what were called the statements of insurance practice. They have been updated over the years, but they are effectively an acknowledgement that the law is defective in the areas that the Bill covers. The Law Commission has now done sterling work—on two separate occasions, back in 1980 and now—in bringing this to the attention of Parliament and strongly urging it to do something about it.

It might also be worth saying that the United Kingdom—England in particular, but the United Kingdom as a whole—is recognised worldwide as being a very major centre of insurance, and what we do here is looked at with great interest by other countries, particularly in the Commonwealth. In this respect, as Professor Clarke said, Australia is well ahead of us, in the sense that it has enacted an Australian contracts law that echoes some of these proposals.

As far as the EU is concerned, I fear that I cannot answer any detailed questions. I do not know what the situation is; Professor Clarke knows much more about it than I do. However, if one waits for a harmonisation from the EU of insurance law, one is liable to wait for ever. That is one reason why nothing happened on the first occasion when these matters were discussed in 1980; it was said then by Parliament, "Is it really worth while having law

reform here when a directive is impending?"—but it never came. We ought to have the courage of our own convictions about what is right for us.

The Chairman: That, if I may say so, is very helpful, Lord Justice.

Q39 Lord Sassoon: That is enormously helpful, Lord Justice Longmore. Can I press you, though? As you have heard in our previous discussions this morning, the Committee has been very interested in the question of codes of practice and how they relate to the protection of consumers under the present law and the prospective legislation. It is quite clear that the Financial Ombudsman takes into account industry codes of practice—here, of course, we are talking principally about the ABI code of practice—but I would be interested to hear a bit more, as I am sure the Committee would, about the approach of the courts to codes of practice. In particular, I am picking up Baroness Kramer's point about genetic testing. If, for example, an insurer asked a genetic testing question, essentially in breach of the code about genetic testing, and the consumer either failed to answer or gave an incomplete answer, what sort of approach would the courts take? So there is both the general question of the industry codes of practice and reliance on them by the courts, and the specific question of the difficult area of genetic testing.

Lord Justice Longmore: The formal answer to that is that the codes of practice are not the law of the land whereas the Marine Insurance Act is. As has been said, it applies to insurance other than marine in all the areas that we are talking about here. A court is obliged to apply the law of the land. It cannot say that the law of the land is one thing but the code of practice says that a respectable insurer should not take this point, or something like that. If push came to shove, the court would just have to apply the law. If, therefore, an unreasonable question were asked and a false answer given, the question being contrary to the code of practice, a court would have to accept that. Of course, there are ways in which these things tend not to come to court. If there is a clear breach of the code of practice, it will be thrashed out before it comes to court; almost invariably, the insurer will say, "Actually, it's not a breach of the code of practice because if you look into it in detail then it isn't." Also, we have all known cases in which judges have

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leant on insurers. Some cases come to court; I remember Mr Justice Donaldson, later Lord Justice Donaldson, the Master of the Rolls, leaning very heavily on an insurer that he thought was taking a non-respectable point. The force of his authority was such that if he said, “I think that you ought to go away and settle it; I will give you 20 minutes,” that often happened. But even he could not disregard the law of the land.

Q40 Lord Goodhart: What is likely to be the effect of this Bill if it is enacted on the overall cost of litigation involving consumers?

Lord Justice Longmore: That is very difficult to predict, is it not? I would hope, with some grounds for that optimism, that overall there would be less litigation as a result of the Bill. If an honest representation was made, insurers will have to pay. If it is careless, there will have to be an adjustment, let us call it. It is quite difficult to mount a case of dishonesty unless the evidence is there. It happens now to some extent that insurers will accuse a consumer of being dishonest, and usually they will not do it without fairly solid grounds, and those can be difficult and expensive cases to fight. However, I hope that this Bill will make litigation less likely and therefore the overall position will be beneficial.

Q41 Lord Davies of Stamford: Lord Justice, how much litigation has come before the courts in the past few years in the area of consumer insurance that has turned, among other things, on the issue of full disclosure and absolute good faith?

Lord Justice Longmore: Well, a bit. It happens mainly in the county courts as far as consumers are concerned and I am afraid that I do not have very much experience of county court litigation; I had a bit at the Bar, but since being on the Bench I have not sat in the county court. I think that there have been cases, not an enormous number, where insurers have stuck to their rights, and occasionally cases from the county court do come to the Court of Appeal. The difficulty as I see it is not so much to pinpoint cases that have come to the court where an injustice has been done on the present law—it happens, but quite occasionally—as the fact that, and I think that this is fleshed out in the Law Commission’s report, the current law gives the insurers a very strong negotiating position and the consumer, faced with an argument on the law, will not necessarily give up right at the beginning but will readily accept a compromise offered by the insurers, so the courts do not see such cases. Certainly, the Law Commission has given two or three examples in its summary of that report of where this has happened. So although one cannot say that there have been an enormous number of cases where the law has been applied unjustly, it is what one might call the submarine effect that is so damaging.

Q42 Lord Hodgson of Astley Abbotts: I wonder whether I could turn back to reasonable care again. In Clause 3(2), the Bill provides four examples of things that may be taken into account in making a determination of whether a consumer has acted reasonably. I see nothing there about the proportionality of the questions that are being asked. My concern is that, as the insurance companies are not allowed to ask open-ended questions, you will get lengthy questionnaires of highly specific questions. I quite understand that if you are insuring someone’s life for £10 million, that is one thing, while if you are renewing the insurance on my motor car for £400, that is another. Do you think that it would be better and more helpful to the consumer, whom this Bill is trying to assist, if there were a proportionality sentence relating to the seriousness or the quantum of the insurance sum being sought?

Lord Justice Longmore: Proportionality as to the number of questions being asked? Well, I do not see anything wrong with that. I slightly hesitate, because it would be very prescriptive to say that a proposal form may not ask more than 15 questions. It would be an odd thing for an Act of Parliament to say, really, but I would not be against it, no.

Q43 Baroness Kramer: I wonder whether I could go back to the question of the Bill and codes of practice. If I understood correctly what you said earlier, judges would pay attention to codes of practice, either on the ground that the Bill is silent on them or, frankly, despite the Bill, because they are sensible people. However, that seems a rather unsatisfactory way to leave a new piece of legislation.

The objections that I have read from the ABI to having any reference in the Bill to codes of practice have been on the ground that it as an organisation does not feel that it should be put in the position of making law—it seeks flexibility, it does not want to have to draft things in a particularly legalistic way and so on. I can understand where it is coming from in taking that kind of position. I would like to ask you for your view, looking again at the reasonable care provision in Clause 3. As my colleague said, it has four examples of things that may need to be taken into account in making a determination under subsection (1). It proposes four answers, as it were, including how clear and specific the insurance questions were. If there were something in there that added to those examples of items that could be taken into account and that were relevant industry codes of practice, would that have the effect of making those codes of practice law? Would it put on the ABI and others the kind of burden that I described earlier as the heart of its resistance, or do you think that it would continue to have the more relaxed status that it currently has?

Lord Justice Longmore: I think that it would put a bit of a burden on the ABI or whoever was drafting

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Lord Justice Longmore

the codes of practice if one started referring to codes of practice in an Act of Parliament.

Baroness Kramer: Even if it were only as an example of reasonable care?

Lord Justice Longmore: I still feel hesitant about putting it into a statute. There would be no objection, no doubt, if a case came to court for the court to be informed about what the code of practice was at any particular time; there is nothing here, I think, prohibiting a court from taking codes of practice into account. If it were relevant to have regard to a code of practice in assessing whether an insured has answered a question with reasonable care, I do not see why a court could not take that into account if it so wished. If there were a reference to it in the statute, that would quickly mean that the code of practice would itself become embalmed in the way that statute does, and that would not be a terribly good idea.

Q44 Baroness Kramer: Let me follow that up slightly. The other direction from which I have a concern about this clause is that, because it gives four examples and not others, the question is whether those four examples then have a standing over and above, so that a judge reading this would say, “These four are the ones; Parliament has indicated very clearly that this is where our attention should be,” and therefore other matters that in the past might have been treated by judges as on an equal standing would then drop into a secondary role. One of the examples in Clause 3(2)(c) is how clear and how specific the insurance questions were. That now has a particular status, having been provided for in the legislation. Would it now, from the point of view of the judges, be a far more significant item than, say, prohibited questions on genetic testing?

Lord Justice Longmore: I do not think so. Judges are free agents. They look at what statute says. It is only examples that are given.

Baroness Kramer: But you said a moment ago that if the industry code were used as an example, that would have all kinds of ramifications. I am just trying to probe a bit.

Lord Justice Longmore: I see that there could be an advantage in referring to a code of practice as an example—something that you could take into account. I still remain of the view that it would be unfortunate if the statute actually said so, for the reasons that I have given. I do not think that that is inconsistent with saying that the four things given there are only examples and judges will feel free to look at the position as a whole. You raise quite an interesting point, because it has become a recent feature of statutory drafting that Parliament gives examples of things that judges ought to take into account. Judges are not terribly keen on that, in a way; from their point of view, if you have a discretion, you want an unfettered discretion. As long as they are examples, though, I do not think that judges’ discretion is unfettered. Obviously you

look at what statute says and derive assistance from it, but you look at other things as well. I do not think that there is any serious risk of a two-tier situation arising.

Q45 Lord Davies of Stamford: This is a double question. I take it that English courts will always accept jurisdiction where there is a dispute involving a contract of insurance sold in this country to a resident in this country, irrespective of the provenance of the insurer.

Lord Justice Longmore: Certainly.

Lord Davies of Stamford: That is the answer to the first part of my question. On that assumption, which I was making, is it not right that the present situation constitutes a considerable anomaly in the single market and that the Bill will go some way towards removing that anomaly or obstacle? As I understand it, if you have an insurance product that is sold to a consumer in this country by a member of the ABI, a different legal regime applies and members of the ABI are setting aside the protection that they had under the 1906 Act. However, the consumer could purchase the identical insurance product but from a continental insurance company elsewhere in the single market—including, indeed, from a parent company of members of the ABI—by going directly to the Alliance, Generali, AXA or what have you. All these companies of course have subsidiaries in this country that will be members of the ABI, but I think that the parents themselves will not be members. There is an obvious anomaly here because the unadvised consumer may not appreciate this danger and find that he faces a different legal regime if he purchased from a subsidiary in this country that was a member of the ABI from that which he would face if he purchased from the parent company elsewhere in the single market. That is not how the single market should work, is it? The effect of this Bill will be, as I think you or Professor Clarke have already told us, to make the regime here much closer to—perhaps identical with—the regime that applies elsewhere in the single market.

Lord Justice Longmore: That is not an easy question to answer in the abstract. If you made your contract of insurance with a foreign insurer, even if it were an EU insurer, obviously you would not have quite the same security as you would if you did it with an English insurer, in the sense that—

Lord Davies of Stamford: A member of the ABI. That is the important thing, not the residence of the insurer.

Lord Justice Longmore: Yes, I follow that. I do not know if there is any code of practice on the part of ABI insurers that says that if someone is insured by an EU entity rather than a British entity then they will accept jurisdiction in England. I am afraid that I do not know the answer to that. If there were, that would be a good thing. In the absence of that, though, there will be two questions. First, what is

the law governing that insurance? Usually it is the law of the insurance office—that is, where the main office of the insurer is.

Lord Davies of Stamford: But that is the opposite of the answer that you gave to my first question. I asked whether English courts would accept jurisdiction where a product was sold to an English resident and you said that, yes, the courts would. You are now saying that the law that was applied would be not English law but the law of the insurer, which could be the law of China in the event that the insurer was located there.

Lord Justice Longmore: You are quite right to pull me up on that. As I say, there are two questions. One is what the law of the insurance contract is and, as English law was, I think that I am right in saying that unless you have a clause in the contract—as you might—then that law usually is where the insurer has his main place of business. Now you have to look at some financial services regulations made in 2001. That is an entirely different ballgame from the matters grappled with by this statute, and that can be a difficulty. The second problem is whether you can actually get the insurer, if he is a foreign insurer, before the court here. There would not be much trouble if he was an EU insurer, I think I am right in saying, because you could get the insurer before the court here, although there would still be the question of which law would apply. In the draft Bill presented by the Law Commission, I think that I am right in saying that there was a clause that said that you could not get out of the provisions of the statute by saying that some foreign law governed the contract, but I think that that has been dropped in the form that the Bill before your Lordships is in now.

Lord Davies of Stamford: So what would be the position? That is the obvious question, although I am grateful for your answer. What would be the position, once the Bill becomes an Act of Parliament, where a foreign insurer claims on the principle that you have just explained that the law to be applied should be the law applying in the

location where the insurer is? You would then have a British court trying to apply Chinese law—or, maybe more realistically, German or Italian law. Is that right?

Lord Justice Longmore: That can be right. I think that that is more realistic; not many consumers, at any rate, will sign up with a Chinese insurance company, one assumes, but they can find themselves with a French or German insurer. No doubt it might be a question—although a very different question from that which the Bill tries to grapple with—of whether one should be able to say that any English consumer should be able to sue in England. That would not have universal agreement from foreign insurers, of course.

Q46 Lord Borrie: I wonder, Lord Justice, if, in addition to the doubts that you have expressed about absorbing codes of practice or putting some reference to them in the legislation, there is also the point that that could be regarded as an abnegation of responsibility to a body over which Parliament has no control and which is controlled by insurers—in other words, by one side of the contract—and that for those reasons it is generally undesirable that one should have a reference of this sort in the Bill.

Lord Justice Longmore: I think that there is some force in that, if I may so, yes. Although, it is hardly for me to say so, Parliament should surely face up to its responsibilities and not delegate them, so to speak, to outside bodies. Traditionally, at any rate, that is how Parliament has proceeded.

The Chairman: Lord Justice Longmore, I think that we are all extremely grateful to you for your very helpful answers to our questions. It must be a long time since you have had to answer examination questions on the laws of insurance. If I may say so, you have done extremely well.

Lord Justice Longmore: If I did so, it was usually in the Committee Room down the corridor.

The Chairman: Thank you.

Note submitted by Professor Malcolm Clarke, St. John's College, Cambridge

The Bill seeks to reform long standing problems in this branch of the law.

As mentioned in paragraph 7 of the Explanatory Notes, the 1906 Act, stating 'dry' insurance as well as marine insurance, "requires that the insured person must disclose every matter that would be material to the insurer's decision to insure. Failure to do this permits the insurer to avoid the contract and refuse all claims under it, even where the insured person is not aware of what the insurer would consider material". Given that currently consumers are treated like non-consumers, paragraph 7 points up 3 difficulties about current law.

First it is sometimes difficult to draw the line between disclosure, which in other areas of the law is not required, and (mis)representation.³

Second, many if not most people, especially consumers, do not know what they should disclose, what is 'material', unless (unlikely in the case of consumers) they employ a competent intermediary to advise them. As mentioned in paragraph 8 of the Notes, a series of guides and codes have been produced over the years by various bodies, most recently the Financial Services Authority and the Financial

³ Clarke, *The Law of Insurance Contracts* (6th edition, London 2009) 22–2F.

Ombudsman Service, but, in the unlikely event of consumers studying this material, they would find them inconsistent and thus confusing.

Third, in these circumstances it is not difficult for a determined and defensive claims handler to refuse to pay a claim and, assuming that there has indeed been non-disclosure, avoid the insurance cover. This 'all or nothing' rule has been widely felt to be unfair—to all insured persons not least consumers.

In this situation the Bill replaces the duty of disclosure, the duty to volunteer material information, with a duty to take reasonable care not to make a misrepresentation during pre-contractual negotiations. In other words, consumers are not obliged to say anything (except of course state their name, and describe the house, car or whatever they want to insure). In practice they will have to answer with care the insurer's questions, 'directly' or on a proposal form, and that is all. This is the kind of rule found and favoured in many other countries in Europe,⁴ and thus more in line with the 'reasonable expectations' of consumers at large.

Moreover, if a consumer breaches this duty (and his or her misrepresentation induces the insurer to enter the contract), the insurer will have a remedy, but one better tailored to the particular case.⁵ Instead of getting nothing even the careless consumer may get something.

In short, the Bill seeks to simplify and clarify the law, in many respects it does this and, in my view, should be supported.

⁴ *Principles of European Insurance Contract Law (PEICL)* (Munich 2009) Article 2:101; and <http://www.restatement.info/>

⁵ In practice this may be the case under current law by the 'grace and good nature' of the insurer but, surely, consumers's rights should not depend on this factor.

Written Evidence

Memorandum submitted by Peter Tyldesley, Manchester University, on the behalf of Age UK, the British Heart Foundation, Consumer Focus, Macmillan Cancer Support, the Multiple Sclerosis Society, the Trading Standards Institute, Which? and UNLOCK, the National Association of Reformed Offenders.

1.1 We support the enactment of the Consumer Insurance (Disclosure and Representations) Bill in its present form.

1.2 Insurance contract law has long been criticised as archaic, unclear and unfair. It is unsurprising that rules developed in the 18th and 19th centuries, to govern face-to-face commercial insurance transactions between parties of equal knowledge and bargaining power, have the potential to cause injustice when applied to modern consumer insurance policies. Such policies are frequently purchased over the telephone or internet by individuals who have little or no knowledge of underwriting requirements and practice.

1.3 We acknowledge that many insurers do not routinely rely on their strict legal rights. However, the purpose of insurance is to transfer risk away from the consumer. We do not believe that consumers should remain exposed to any possibility that an insurer will rely on bad law. Reform is essential to protect consumers and maintain confidence in the insurance industry.

1.4 The Law Commissions are to be commended on producing recommendations for reform that are supported by all sides. When brought into force, the new law will fairly balance the need of insurers to obtain the information required to underwrite risks with the desire of consumers to be confident that the insurance they have purchased will not be invalidated on a technicality.

1.5 The Bill deals with disclosure and representations by the consumer and basis of the contract clauses. In doing so it draws heavily on the work of the Financial Ombudsman Service. Consequently the reform proposals are not a leap in the dark—they are based on tried and tested solutions. Enactment will give these solutions the force of law, introduce clearer and more precise terminology and end the confusion created by overlaps and conflicts between the law, self-regulatory codes, regulatory rules and ombudsman guidance.

1.6 In this paper we briefly raise some issues related to the Bill. We have, as requested, limited our comments to matters not raised elsewhere. To assist we have included examples of application forms currently used by insurers. We would stress that these examples have been chosen at random and the issues raised are not restricted to the insurers concerned.

COMMENCEMENT

2.1 The explanatory notes indicate that the Act will not be brought into force for at least one year and a day after enactment. We would not wish to see this period extended. General insurance contracts, such as motor and household policies, typically renew annually. It will therefore be at least two years and a day after the Act comes into force before all such contracts are subject to the new law.

EXISTING LONG-TERM INSURANCE CONTRACTS

2.2 Understandably, the Act will not be retrospective. Long-term contracts already in place when the Act comes into force will therefore continue to be subject to the old law. In the case of, say, whole-of-life policies or even some term assurance policies this will mean the old law surviving for many years. Insurers will be unable to impose unilaterally the new law on existing policyholders. However, we would ask whether the industry might wish to update and amend the ABI Code on Non-Disclosure and Treating Customers Fairly so that any existing policyholder is treated in an equivalent manner to the new law where this is to the policyholder's advantage. We think this may avert unnecessary referrals to the Financial Ombudsman Service and deter the "churning" of existing policies to gain the benefit of the new law.

ADVERTISING AND APPLICATION FORM DESIGN

2.3 To be entitled to a remedy for careless, deliberate or reckless misrepresentation, an insurer must satisfy the subjective test that the misrepresentation induced it to enter into the contract. However the Act removes the current need for an insurer to show that a misrepresented fact was "material" in the objective sense that it would have had an effect, not necessarily decisive, on the mind of a prudent insurer

in assessing the risk. Accordingly, it is essential that a consumer answers all questions on an application form correctly, even if certain questions viewed objectively appear to be irrelevant.

2.4 We do not believe that any change to the Bill is required in this respect but would suggest that insurers can assist consumers in two ways:

APPLICATION FORM DESIGN

- (a) Some online applications reduce the number of questions asked by providing a set of assumptions which can be confirmed or rejected with a single click (page 28). We question whether this is as effective in obtaining accurate information from a consumer as a traditional set of questions requiring individual answers. In some cases assumptions are presented after a premium is quoted (page 29). We believe this is unlikely adequately to convey to the consumer the importance of carefully checking that all such assumptions are valid. It will be noted that the example given on page 29 also includes a basis of the contract clause—these are commonly inserted in application forms (see also page 27), though it appears that in practice insurers rarely rely upon them.
- (b) Some forms include cross-selling marketing questions. In the example we attach, a motor insurance application asks for the date the prospective policyholder's home insurance is due for renewal (page 30). Once the Act is brought into force it would in our view be preferable for such questions to appear clearly separated from the questions which are relevant to the insurer's decision-making.

ADVERTISING

(a) When designing advertising insurers should bear in mind the need for consumers to understand the seriousness of the application process. For example advertisements offering "Car insurance quotes in 60 seconds—more time to ride" (page 27) do little to stress to potential applicants how vital it is that all questions are answered carefully and correctly.

IMPLIED REPRESENTATIONS AND WARRANTIES

2.5 We would not wish our relatively minor concerns on the following two points to impede the progress of the Bill in any way but the Committee may conclude they merit comment.

2.6 Representations made when a policy is effected, varied or renewed may be implied into subsequent periods of insurance without any reminder being given to the consumer of the questions originally asked or the answers given. See for example *Re Wilson and Scottish Insurance Corporation Limited* [1920] 2 Ch. 28. We are reassured to note, however, that in a commercial case involving a representation of intention Lord Justice Longmore stated that a court should not struggle "to hold that everything said at inception is to be impliedly repeated on renewal" (*Limit No. 2 Ltd v Axa Versicherung AG* [2008] EWCA Civ 1231). Where consumers are concerned we would hope the courts would take a stronger line and reject any suggestion that a representation should be implied forward in this way. To do otherwise would undermine the protections given to consumers by the Act.

2.7 A similar position may exist with warranties formed by basis of the contract clauses, though the argument is largely based on the dissenting judgment of Lord Justice Winn in *Magee v Pennine Insurance Co. Ltd* [1969] 2 Q.B. 507. This is likely to be a rapidly diminishing issue - no new warranties of this type will be formed after the Bill is enacted, the judgment recognises that such warranties will not be implied indefinitely through successive renewals and in any event many consumers switch insurer at renewal. However, we would hope that the courts would refuse to imply warranties in this way for consumer contracts since - as with representations - to do otherwise would undermine the protections provided by the Act.

FURTHER WORK

2.8 The Bill addresses three of the worst aspects of current consumer law, but there are many other aspects of this area of law where reform would benefit consumers and insurers alike. Having gained the confidence of all sides with the quality of their work on these initial issues, we hope that the Law Commissions will continue their work in this area despite recent reports of funding cuts.

COMPLEXITY

2.9 The structure and phrasing of the Bill is such that consumers will not readily understand its effect. This is unfortunate, but perhaps inevitable given the need for the Parliamentary Draftsman to carve out and address just three aspects of the law. We ask whether the Law Commissions might be encouraged to produce a comprehensive consumer insurance law code which could both be more accessible to

consumers and give the UK influence in the slow but inexorable move towards European harmonisation of insurance contract law.



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Once you've completed your quote we'll send it to you via email, together with all the details you'll need to retrieve it.

*required field

About you

Title *

First name *

Surname *

Date of birth Day Month Year *

Marital status *

Gender Male Female *

Email [Help?](#) *

Confirm email *

Telephone [Help?](#) *

Your address

Please enter your House number/name and Postcode and click 'find address'. If your address is not found, please choose to enter it manually from the drop down list.

House number/name *

Flat number

Postcode *

[Find address](#)

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Assumptions

We are able to provide you with a quote if you have exchanged contracts, have an agreed completion date that is within the next 30 days and can agree to the following assumptions.

The home for which insurance is proposed:

- is my main residence
- is built of brick, stone or concrete
- has a roof built of slate, tile, asphalt or concrete
- is self contained having its own separate lockable front door
- is occupied solely by me, my family permanently living with me, or any joint named policyholder as permanent residence
- is used as a private residence and not as business premises
- is in a good state of repair and will be maintained in this state
- is not occupied as a holiday home
- is not a listed building
- is not regularly unoccupied throughout the night
- is not unoccupied for a period in excess of 30 consecutive days
- has never been damaged by flood
- has never been damaged by subsidence, heave or landslip

I or any member of my family living permanently with me or any joint named policyholder have not:

- made any claims on home insurance or suffered any loss or damage within the last 3 years
- had any claim(s) made against us within the last 3 years
- had a burglary at the address being proposed for insurance within the last 3 years
- had home insurance cancelled, refused or renewal refused
- been asked to pay an increased premium (other than normal rating increases) or asked to accept any special conditions or had any special terms imposed
- been convicted of any criminal offence (other than motoring convictions) or have any prosecution or police enquiry pending
- received a police caution in connection with an insurance policy/claim
- got one of the following occupations: actor, actress or presenter in films, stage, TV or radio, music or other performing arts, professional sportsperson including trainers and managers, non UK armed forces diplomatic staff, or connected with gaming, nightclubs, circuses, fairgrounds, amusements, street trading, scrap waste, second hand dealing, jewellery or antique dealing, licensed premises

Assumptions after premium quoted



Car Insurance
IMPORTANT STATEMENTS

1: Your Details | 2: Premium | 3: Breakdown Cover | 4: Important Statements | 5: Payment | 6: Summary | 7: Finish

IMPORTANT STATEMENTS

Please ensure that the information provided by you and the statements on this page are correct. Should you decide to buy this policy, these details will form the basis of the insurance contract between us. Incorrect information could invalidate all or part of the policy. This contract will be governed by English Law unless you and we agree otherwise. Our cancellation and complaints procedures are detailed in the policy and our cancellation procedures are as follows:

- If you cancel before your policy is due to start, we will return any premium paid in full.
- If you cancel within 14 days of the policy starting or within 14 days of receiving your documents (whichever occurs later), we will return any premium you have paid less an administration fee of £26.50 (including Insurance Premium Tax where applicable)
- or;
- If you cancel after those 14 days have passed we will return any unused premium less the administration fee of £26.50 (including Insurance Premium Tax where applicable)
- or;
- If you have made a claim or if one has been made against you during the current period of insurance, you will not receive a refund.

If your circumstances change between the date you purchase the policy and the date when you require the policy to commence, please call us. Incorrect information could invalidate all or part of the policy.

If you wish to purchase this policy, details of the payment options available to you and the purchase procedure are displayed on the following pages. We will securely store your payment details so that we may automatically renew your policy for subsequent years. Each year we will write to you before we take any payment to remind you that this is happening.

Insurance cover is subject to our standard policy wording.

View the full [insurance policy wording](#)

Mid term adjustments to your policy may result in an administration fee of £15.90 (including Insurance Premium Tax where applicable) as well as any additional premium incurred as a result of the amendment.

Please read the [insurance policy summary](#) before purchasing this product.

- All drivers are at least 17 years of age, and hold a valid UK or EU driving licence and are permanently resident in the UK.
- The total number of accidents or claims for all drivers does not exceed 5 in the last 3 years.
- The total number of convictions, fixed penalties or disqualifications for all drivers does not exceed 3 in the last 5 years.
- Your No Claims Discount (NCD) must have been issued by an insurer from an EU/EEA country or one of the following agreed countries:- Australia, Barbados, British Virgin Islands, Canada, Faroe Islands, Gibraltar, Isle of Man, Japan, Jersey, Monaco, New Zealand, Republic of Korea, Singapore, South Africa, Switzerland, USA or Zimbabwe. All NCD must be written in English and the NCD level shown in years and not as a percentage.

We may be able to obtain proof of your No Claim Discount. If you do not want us to do this, please tick this box.

- The car is owned and registered by you, your spouse, partner or civil partner (not business partner) at your address and has not been modified or altered in anyway (including wheels, suspension, bodywork and engine) and you or your spouse, partner or civil partner (not business partner) will be the main driver. Please note your documents will state that the policyholder is the legal owner and registered keeper of the car.
- You confirm that the main driver of the car is either, you, your spouse, partner, or civil partner (not business partner). Any misrepresentation made by you in order to obtain a lower premium could result in cancellation of your policy and rejection of any claims.
- If you selected one of the following occupations when obtaining your car insurance quotation then the car may only be used for Social, Domestic or Pleasure purposes: occupations involved in the Motor Trade, Driving occupations, Retired, Housewife, Househusband, Students and Unemployed.
- For all other occupations the car may be used by you or your spouse, partner or civil partner (not business partner), if a named driver, in connection with your business or the business of your spouse, partner or civil partner (not business partner). If you require any other driver to have business use that is not your spouse, partner or civil partner (not business partner) or are uncertain about the type of use you require, please save your quote and contact us.
- Your business or the business of your employer is not in anyway connected with any of the following: the entertainment and fashion industry, professional sports, foreign service, foreign diplomatic personnel, mini-cab drivers or mini-cab controllers.
- Driving other cars is restricted to policyholders only and will not apply to policyholders aged under 25, and/or policyholders engaged in the motor trade. Please refer to your Certificate of Motor Insurance for confirmation. If unsure if you have this cover please contact us on 0845 246 8701
- The annual mileage of your car does not exceed 50,000

I confirm that the above statements are TRUE and that I have read the insurance policy summary and cancellation fee information.

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NO, I DISAGREE
YES, I AGREE

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1: Your Details
2: Premium
3: Breakdown Cover
4: Important Statements
5: Payment
6: Summary
7: Finish

Tell us about yourself

Already saved a quote? [Retrieve a saved quote here.](#)

Please complete all the mandatory fields marked with an *

* Title

* First name

* Surname

* Date of birth (DD,MM,YYYY)

* Occupation (Show full list)

* Type of licence

* Period licence held

* Email address

Telephone number

Is this number

Mobile number

House name or number

* Postcode

* When do you want cover to start?

* Additional Drivers? Yes No

* Have you made any claims in the past 3 years? Yes No

* Have you had any convictions in the past 5 years? Yes No

* Are you a named driver on another policy with Direct Line? Yes No

* Do you or anyone living at your address insure another vehicle with Direct Line? Yes No

Please tell us about your Car

Car Registration

* Estimated annual mileage?

* Estimated car value?

Please tell us about your additional details

* No Claims Discount entitlement

* Do you or your partner have a Direct Line Home or Business Insurance policy? Yes No

What month is your home insurance due for renewal?

* Please enter the characters shown in the **Marketing question**

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And we would also like to keep you informed by email but if you don't want us to do this, just click 'No' below.

Yes No

To assess your insurance application and the terms on which cover may be offered, we may obtain information about you from credit reference agencies to check your credit status and identity. The agencies will record our enquiries. This will not affect your credit standing.

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Memorandum Submitted by Financial Ombudsman Service

EXECUTIVE SUMMARY

1. The House of Lords Special Public Bill Committee has invited the Financial Ombudsman Service to give written evidence to the Committee on the Consumer Insurance (Disclosure and Representations) Bill. This memorandum outlines why the ombudsman service welcomes the Bill.

2. The Financial Ombudsman Service worked closely with the English and Scottish Law Commissions in the preparation of their report. That included an in-depth review of a large number of cases that ombudsmen had decided involving questions of disclosure and (mis)representation. We welcome the intention of the Bill to reform the law in this area, as this will bring it in line with the fair and reasonable approach that we apply in our work and with generally accepted good practice within the industry. We therefore hope that the Bill will be enacted, as both insurers and consumers will benefit from making the law clearer and more equitable.

ABOUT THE FINANCIAL OMBUDSMAN SERVICE

3. The Financial Ombudsman Service is the statutory-based scheme for the resolution of complaints between financial businesses and their customers. It was established formally under the Financial Services and Markets Act 2000 but is based on several predecessor schemes, most of which were established by industry—including the Insurance Ombudsman Bureau, which in 1981 was the first such scheme to be established. The ombudsman service's principal function is to resolve disputes between financial businesses and their customers quickly and with minimal formality. It is an impartial body, which provides an informal alternative to the courts and is funded entirely by the industry through an annual levy and individual case fees.

4. The Financial Ombudsman Service is required by statute to determine complaints by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case. In these determinations, the ombudsman may make an award of such compensation as he or she considers fair for loss or damage, and may give a direction to the respondent business to take such steps as he or she considers just and appropriate (whether or not a court could order those steps to be taken). In this way the ombudsman service has a flexible jurisdiction which is not bound by the strict law in the decisions it makes. This enables it to carry out its function of resolving disputes quickly and with minimum formality.

5. General insurance has always been, and remains, a significant element of the Financial Ombudsman Service's work. In 2010–11, of the 206,121 new cases that the service received, 20,978 related to insurance (other than payment protection insurance, which accounted for 51% of our cases overall). Of that number, 5,784 related to motor insurance, 3,469 to buildings insurance, 2,536 to travel insurance and 1,697 to contents insurance. Overall, 75% of insurance cases involved complaints about sales and advice and 20% about claims—both areas where the issues addressed by the Bill do routinely arise. We upheld 43% of non-PPI complaints from consumers.

THE BILL

6. The Bill principally covers the issue of what a consumer should tell an insurer before taking out insurance. The current law requires a consumer to volunteer information about anything which a “prudent insurer” would consider relevant. However, as the Law Commissions have noted, most consumers are unaware of this requirement. As a result, generally accepted good practice within the industry now is that insurers ask consumers questions about the things that they want to know. The purpose of the Bill is therefore to codify this by replacing the duty to volunteer information with a duty on consumers to take reasonable care to answer insurer's questions fully and accurately, and to make a distinction between mistakes which are “reasonable”, “careless” or “deliberate or reckless”.

7. As the Law Commissions note, these ideas are not new. They reflect the long-standing approach that we have taken at the Financial Ombudsman Service.

8. The Financial Ombudsman Service has a statutory duty to determine complaints according to what is fair and reasonable in all the circumstances, which means that we are not bound to determine them according to the strict law. The law in question here is the Marine Insurance Act 1906, which itself was a codification of case law developed in the 18th and 19th centuries. We have found this ill-matched to the realities of the modern consumer insurance market. Instead, the “fair and reasonable” approach we have developed does not require consumers to volunteer information where the insurer failed to ask. Equally, where we are satisfied that the consumer has approached a question honestly but somewhat carelessly, we will not support an insurer that has sought to avoid the policy in its entirety. Rather, we apply a compensatory remedy based on what the insurer would have done had it known the truth.

9. If enacted, the Bill will make the law simpler and clearer and allow all parties better to understand their rights and obligations. This should enable fewer claims to be turned down unfairly by insurers and thus enable consumers to have greater confidence in the industry.

CONCLUSION

10. The ombudsman’s “fair and reasonable” basis of decision has thus enabled the unfair consequences of the widely recognised shortcomings in the law to be addressed—at least in cases of dispute. But this cannot by itself provide a permanent solution to the problem of outdated or inadequate law. There are three main reasons for this.

11. First, in determining what is fair and reasonable the ombudsman must (amongst other considerations) take into account the law, as well as industry codes and good industry practice. Generally, the ombudsman’s determinations follow closely the legal rights of the parties, and our ombudsmen will only diverge from the legal position after careful thought and with clear reasoning. Whilst, as Lord Justice Rix noted,⁶ the ombudsman can be valuable in providing an opportunity for the development of new ideas befitting financial service industries operating in consumer markets, systematically adopting an approach that is distinct from the law (albeit a widely discredited law) is not a position the ombudsman readily adopts. And it is not the role of the sectoral ombudsman to set standards or rules for industry behaviour generally.

12. Second, unlike the general law, the ombudsman service’s approach can only be applied to those cases referred to it, which not all cases are—although regulatory guidance does say that financial businesses should take into account guidance from the ombudsman in their complaint-handling. Whilst in our experience most insurers in practice adopt an approach that is broadly compatible with the way they handle complaints, a firm could draw attention to the legal position to justify a very different stance.

13. Third, where the amount in dispute exceeds £100,000 (soon to be £150,000), the ombudsman service can only recommend—but not require—the insurer to pay the balance above that limit to our awards. Buildings insurance and many life and health insurance policies can involve disputes significantly in excess of these sums. And of course courts themselves cannot take into account the approach the ombudsman takes in circumstances where the law is codified.

14. For these reasons, we welcome the intention of the Bill to reform the law in this area. This will provide a permanent solution by bringing the law in line with the fair and reasonable approach that we apply in our work and with generally accepted good practice within the industry.

Financial Ombudsman Service

October 2011

Memorandum submitted by the Financial Services Authority (FSA)

1. We welcome the opportunity to submit this memorandum to the Special Public Bill Committee on the Consumer Insurance (Disclosure and Representations) Bill. Our memorandum sets out:

- The FSA’s role in relation to consumer insurance
- Our view on best practice, and the definition of ‘consumer’ in the Bill.

2. We support the Bill and have been closely engaged with the Law Commission on this subject. The FSA welcomes steps to improve consumer protection by introducing a duty for consumers to take reasonable care to answer their insurer’s questions fully and accurately. This replaces what is currently a duty on the consumer to volunteer material facts.

THE ROLE OF THE FSA

3. The FSA is an independent non-governmental body, given statutory powers by the Financial Services and Markets Act 2000 (FSMA). FSMA gives us four statutory objectives: market confidence; financial stability; consumer protection; and the reduction of financial crime.

4. The FSA is responsible for regulating all general and life insurance firms carrying out regulated activities under FSMA. There are 829 such firms which are regulated by us and will be affected by this Bill.

⁶ *R (Heather Moor & Edgecomb) v Financial Ombudsman Service* [2008] EWCA Civ at paragraph 89.

SPECIFIC ISSUES

5. The Bill proposes that insurers must ask consumers for information they want to know. This reflects what is generally considered to be best practice adopted by firms and the approach taken by the Financial Ombudsman Service (FOS). Under the 1906 Marine Insurance Act the responsibility for disclosure is on the consumer. We see benefits in the law being amended to make best practice legally enforceable and to provide clarity for consumers.

6. The Committee may be aware that the proposed definition of ‘consumer’ in the Bill is “an individual who enters into the contract wholly or mainly for purposes unrelated to the individual’s trade, business or profession”. This definition differs from the relevant part of the definition of consumer (that is, in relation to retail insurance conduct of business) in the FSA’s Handbook, which follows the definition in the Distance Marketing Directive (2002/65/EC), as “any natural person acting for purposes outside his trade business or profession”.

7. These definitions have different aims, and we do not believe that the difference between them creates a difficulty. The Bill’s definition prescribes a class of person to whom specific contractual rights are given. The definition in the FSA’s Handbook identifies a class of person to whom specified disclosures must be made.

17 October 2011

Memorandum Submitted by the Association Of British Insurers

INTRODUCTION

1. The UK insurance industry is the third largest in the world and the largest in Europe. It is a vital part of the UK economy, managing investments amounting to 26% of the UK’s total net worth and contributing £10.4 billion in taxes to the Government. Employing over 290,000 people in the UK alone, the insurance industry is also one of this country’s major exporters, with 28% of its net premium income coming from overseas business.

2. Insurance helps individuals and businesses protect themselves against the everyday risks they face, enabling people to own homes, travel overseas, provide for a financially secure future and run businesses. Insurance underpins a healthy and prosperous society, enabling businesses and individuals to thrive, safe in the knowledge that problems can be handled and risks carefully managed. Every day, our members pay out £147 million in benefits to pensioners and long-term savers as well as £60 million in general insurance claims.

3. The ABI is the voice of insurance, representing the general insurance, protection, investment and long-term savings industry. It was formed in 1985 to represent the whole of the industry and today has over 300 members, accounting for some 90% of premiums in the UK.

4. The ABI’s role is to:

- Be the voice of the UK insurance industry, leading debate and speaking up for insurers.
- Represent the UK insurance industry to government, regulators and policy makers in the UK, EU and internationally, driving effective public policy and regulation.
- Advocate high standards of customer service within the industry and provide useful information to the public about insurance.
- Promote the benefits of insurance to the government, regulators, policy makers and the public.

GENERAL COMMENTS

5. The ABI welcomes the opportunity to present evidence to the House of Lords Select Committee on the Consumer Insurance (Disclosure and Representations) Bill (“the Consumer Insurance Bill”).

6. The ABI supports the Consumer Insurance Bill. It is the result of several years’ in-depth consultation by the Law Commissions of England and Wales and Scotland. It gives legal status to existing industry good practices, bringing them together in one place in a clear format, making it easier for both insurer and insured to know their rights and obligations. It reflects the approach already taken by the Financial Ombudsman Service (FOS) and generally accepted good practice within the industry.

7. Insurance industry practice has been developing over time, with a gradual shift of responsibility from the insured to the insurer. As mentioned in the Law Commissions’ 2009 report, the insurance industry has long accepted that many of the rules set out in the Marine Insurance Act 1906 are outmoded and inappropriate for a modern consumer market. We accept that the operation of two regimes in

parallel—one reflecting the strict letter of the law, the other good market practice—is incoherent and potentially confusing to the customer. Insurers want to be as clear as possible as to the information they require the customer to disclose.

8. The primary objective of the Bill is to give clarity to insurers and insureds about their respective rights and obligations. If the Bill is to achieve this aim, it is important that all parties follow the law as closely as possible. As such, the ABI should like the FOS to provide reassurances that it will use the new law as the basis for all decisions that it makes on consumer insurance non-disclosure or misrepresentation cases.

Our main points are set out below.

Please also find attached two annexes addressing previous issues raised by the ABI (Annex 1), and points mentioned by Lords during previous evidence sessions (Annex 2).

INSURANCE INDUSTRY GUIDANCE

Background:

9. In January 2008, the ABI issued formal written guidance on non-disclosure in protection insurance. The guidance was designed to prevent insurers from automatically trawling through medical records when they received a claim in order to identify discrepancies between the policyholder's medical notes and the information given on the proposal form. In January 2009, the guidance was upgraded to that of a code of practice.⁷ Compliance with the Code is a condition of ABI membership.

10. The FOS has suggested that the ABI publish similar industry guidance for all other insurance products, in order to ensure a smooth transition for the adoption of the changes enshrined in the Consumer Insurance Bill. We do not believe such guidance to be either necessary or pragmatic, for the reasons set out below.

A Code of Practice on non-disclosure for other insurance products:

11. The ABI Code of Practice on Long-term Protection Insurance Products was developed in a very specific context. It was published partly in response to public concern, and was driven in a large part by insurers themselves. It would not make sense to draft similar guidance for other insurance products when the Consumer Insurance Bill is expected to be adopted at the end of this year with a transitional period of twelve months. Most general insurance contracts are for no longer than a year, so any changes necessary as a result of the Bill will have a direct and immediate impact on consumers. Where it does appear that certain questions for particular products are not specific or clear enough (for example based on evidence from FOS), the ABI is working with its members to find a solution.

12. The Code was also designed for a particular type of product, where non-disclosure/misrepresentation carries great significance. Long-term and protection insurance products are paid over a long period of time. Avoiding claims on the basis of non-disclosure or misrepresentation can have more serious financial consequences than for other general insurance products. For example, in 2010 the average claim pay-out for long-term care policies was around £15,000, whilst the average claim for motor was around £2000 and for property £1100.⁸

13. It is also important to place the issue of non-disclosure in context. In 2006—2007, the FOS received 1047 complaints related to non-disclosure. 376 (36%) of these were for critical illness and income protection⁹, an issue which was soon addressed by the ABI's Code of Conduct. Based on ABI statistics available for this same period, this means that even if the other 64% of complaints regarding non-disclosure had been for motor and property policies alone, they would still have represented less than one in 10,000 claimants.¹⁰

14. The ABI's Code includes recommendations for procedures for insurers to use when assessing claims, such as taking into account how clear and concise the questions were, whether or not an intermediary was involved, and whether the customer had the opportunity to check their answers. These procedures fit for products where disclosure (usually for health-related circumstances) plays a greater role in the individual risk assessment of a premium or a claim. Requiring the same level of investigative detail for cases of non-disclosure or misrepresentation for other general insurance claims would carry a disproportionate cost, resulting in increased premiums for customers.

⁷ ABI Code of Practice, "Managing Claims for Individual and Group Life, Critical Illness and Income Protection Insurance Products" (January 2009), http://www.abi.org.uk/Information/Codes_and_Guidance_Notes/44593.pdf

⁸ ABI claims statistics for long-term protection, private motor, and property insurance

⁹ Law Commissions' 2009 Report, paragraphs 1.31 and 1.32.

¹⁰ In 2006, over 4 million claims were notified for private motor car insurance alone, and over 2.8 million claims for household insurance

15. Questions asked by health insurers often involve the disclosure of sensitive personal data. It is therefore vital that such questions are clear, proportionate and properly targeted. Other general insurance products cover a wide variety of risks which do not necessarily involve sensitive personal data.

16. Individual insurers have their own specific risk allocation and assessment profiles that will be particular to their own commercial strategy. It would be extremely difficult—if not impossible—to standardise questions across the wide range of general insurance products¹¹. From our experience, guidance would, by necessity, be very high level and add little value.

Association of British Insurers

October 2011

Annex 1

Issues previously raised by the ABI

In November 2010, the ABI raised concerns regarding three aspects of the Bill in a letter to HM Treasury. Those three concerns have all been addressed, and the ABI is now able to fully support the Bill in its current form.

Imputed knowledge of the insurer

The ABI was concerned about Clause 3 (4), which states that an insurer, when determining whether or not a customer has taken “reasonable care” to answer questions to the best of their knowledge, should take into account what they “ought to have been aware of”. Insurers were concerned that this might be interpreted very broadly and could be taken to mean disclosures the customer may have made for other unrelated policies, perhaps even to other firms in the same group. This would be extremely costly and impractical to implement¹².

The Law Commissions have confirmed that this is not the intent of this clause. Instead, Clause 3(4) is supposed to apply where a consumer has particular problems in understanding the questions being asked of them, for example, if they do not speak very good English or are mentally disabled. However, if the insurer is aware—or should have been aware—of the problem, it looks at the situation from the point of view of a reasonable person in those circumstances. We are reassured that two paragraphs from the Law Commissions’ original explanatory note, but not in the Bill currently before parliament, will be reinserted when it moves to the House of Commons. They read:

“29. The ABI Code of Practice states that insurers should pay the claim in full where:

The customer has acted honestly and reasonably in all of the circumstances, including the customer’s individual circumstances but only where these were known to the insurer.

30. Clause 3(4) reflects this but, in respect of the factors that may need to be taken into account in determining whether the customer has taken reasonable care not to make a misrepresentation in respect of the insurance policy, goes further in adding those particular characteristics or circumstances of that customer of which the insurer “ought to have been aware”. This “ought to have been aware” test is not intended to impose onerous duties of inquiry on the insurer but is intended to catch those particular characteristics and circumstances that the insurer should have noticed as a result of that customer’s responses to that insurer’s questions but failed to (or should otherwise, for other reasons, have been aware of).”

Life insurance

The ABI raised concerns that Clause 8—which applies to contracts for life insurance on the life of another—lacked clarity. We initially suggested that Clause 8 should be restricted in scope to insurance contracts *which pay out upon the death of an individual*. However, after further discussion, our members could not reach agreement on this point, so we do not wish to pursue it further.

Status of intermediaries

Schedule 2 outlines the factors that tend to indicate when an intermediary is acting on behalf of the consumer, and when it is acting on behalf of the insurer. Some of the factors listed in Schedule 2,

¹¹ The variety of general insurance products range from standard motor, and household, and travel products to specialist products which include extended warranties, GAP insurance, BTE legal insurance, breakdown cover, pet insurance, van insurance, motorcycle insurance, gadget insurance, holiday home insurance, motorhome insurance, student insurance, tenants insurance, buildings insurance etc. New products are being developed all the time, and each insurer has specific question sets for their products in order to identify the risks involved. Even the “standard” products have different variations according to the needs of the target consumer group and/or the nature of the risk that the insurer is willing to take on.

¹² Insurers should not be deemed to be aware of everything that appears in their ledgers. In *Mahli v Abbey Life Insurance* in 1986, Lord Justice Rose ruled that “Information will not give rise to such knowledge unless it is received by a person authorised and able to appreciate its significance”

paragraph 4, of the Law Commissions' 2009 report were considered by insurers to be beyond their control. It would therefore be unreasonable to expect intermediaries in these circumstances to be acting as the insurer's agent. Schedule 2 in the Bill published on 16 May 2011 has been amended, resulting in a text that we can accept.

Annex 2

Issues raised in the House of Lords during evidence sessions

Why industry codes should not be referred to in the Bill

There are several arguments against inserting a provision into the Consumer Insurance Bill that refers to industry codes, as highlighted in the Law Commissions' original report.

- It would effectively give the ABI and other industry bodies the power to bind non-members, which may not be appropriate.
- It would introduce uncertainty, as it may not always be clear which guidance is “generally recognised by insurers”, and which is not. Furthermore, the various codes and forms of guidance are not drafted as legal documents (i.e. in legal text and with legal counsel), which means they may be difficult to apply in a court of law.
- The provision may discourage the development of future or other industry guidance.

One of the major advantages of industry guidance is that it is not as rigid as primary legislation. Its flexibility allows it to adapt and respond to the changing needs of the market. This will be lost if it is elevated to legislative status. Including a provision in legislation that refers to industry guidance would raise questions over the future status, role and appropriateness of the Code. It would be highly unusual for a trade body to be able to bind non-members and it would also make it more difficult for guidance to be agreed in future, with resultant detriment to consumers.

The FOS and the limit of £100,000

In the interests of clarity, the ABI would like to draw attention to the fact that the FOS *can* accept and adjudicate for cases involving claims over £100,000 (£150,000 from January 2011). The ombudsman's decision *is* binding on the insurance firm. However, it is not binding on the consumer, so they may decide not to accept the ombudsman's decision and take the dispute to the courts if they so wish.

The definition of 'consumer insurance', particularly where something can be for both business and consumer use

As mentioned previously by the Law Commissions, the FSA makes a distinction between consumer and business insurance, and this definition has been recognised by the insurance industry for several years. It is now reflected in the Consumer Insurance Bill, and ensures consistency with other regulation in this area.

Whether microbusinesses should be included within scope

The ABI believes all businesses should be treated the same under the law, as any attempt to distinguish between businesses on the basis of size would be arbitrary and overly complex. Including microbusinesses under the Consumer Insurance Bill would have a number of unintended consequences, which would increase costs and cause detriment for those very businesses that the law is designed to help. We agree with the Law Commissions that microbusinesses should fall outside the scope of the Bill.

The smallest businesses (annual turnover under €2 million and fewer than 10 employees) are already afforded a degree of protection, as they fall within the jurisdiction of the FOS. Insurance is no different from any other professional service that a business may need to procure, such as accountancy or legal advice, and around half of all micro-businesses purchase insurance through an adviser. This demonstrates that advice is widely available to those who want it. If a micro-business is concerned that it is unable to make an informed decision about insurance, they can refer to an intermediary.

With regards to pre-contractual information, it is good industry practice to ask consumers specific questions on matters material to the risk and this will be a requirement of the Act. This is not overly onerous on insurers because there is some homogeneity of risk between consumers applying for the same product. Therefore the same questions are applicable to most consumers. The same is not true of micro-businesses, where the type and size of risk will differ considerably. By way of illustration, it is often the case that two businesses may have a similar size turnover and/or number of employees, but would present very different risks to an insurer (e.g. a hairdresser compared to a small builder or an oil refinery compared to a retail chain).

Requiring insurers to treat micro-businesses in the same way as consumers in this respect raises the potential for moral hazard, removing any incentive for the business to volunteer information that is essential to enable the insurer to set the right premium.

Extending the consumer insurance law regime to micro-businesses would increase the risk of covering them, making the provision of insurance to micro-businesses less attractive than it is currently. This could lead to some insurers withdrawing from this section of the market, reducing competition and customer choice and leading to higher premiums for other policyholders.

Should insurers still be allowed to ask catch-all questions?

Lord Eatwell has expressed concern about insurers' use of 'catch all' or 'memory test' questions. In fact, the ABI's Guidance for Non-Disclosure on Claims for Long-Term Protection Insurance Products recommends that very little weight should be given to these questions. The insurance industry already has well developed practices in the area of consumer insurance and a good understanding of which questions to ask in order to capture the information they need. After all, the changes at the core of the Bill are necessary because it is generally the insurer who is best placed to know which information is material. Further, under the Consumer Insurance Bill, it could be argued that a catch-all question disadvantages the insurer, because they may well be unable to rely on the answers provided. This is because in the event of a misrepresentation, in order to have access to the remedies listed in Schedule 1, the insurer would need to demonstrate how the (incorrect or lacking) information provided by the consumer had "induced" them to take on the risk. This would be difficult to establish where catch all questions had been asked.

In addition, Lord Eatwell's concerns are addressed by Clause 3 of the Bill. In deciding whether or not the consumer has taken reasonable care not to make a misrepresentation when answering a question, all relevant circumstances will be taken into account, including 'how clear and specific the insurer's questions were'.

Questions that cannot be asked

The Lords raised concerns about the fact that insurers may use information on race or genetic make-up to raise premiums for certain consumers. The ABI and the UK government have a Concordat and Moratorium on Genetics and Insurance that prohibits insurers asking any applicant to take a genetic test and bans the use of predictive genetic test results in insurance, with the single exception of applications for more than £500,000 worth of life insurance, whilst at the same time recognising that insurance companies should have access to all relevant information to enable them to assess and price risk fairly in the interest of all their customers. Insurers, as with medical professionals, may ask questions about existing medical conditions and family health backgrounds where it is relevant to determine the level of risk a particular consumer presents.

Under the Equalities Act 2010, insurers are prohibited from direct, indirect and dual discrimination on the basis of religion or belief, marriage and civil partnership, race, or sexual orientation. With regards to gender (until December 2012) and disability, insurers must be able to objectively justify any different treatment they make on these grounds.

Whether a consumer continues to be on risk if the insurer has sent renewal papers to the wrong address

On renewal, insurers often ask consumers whether there has been a change in their circumstances. In order to prevent lapses in cover, insurers try to make the renewal process as user-friendly as possible. For example, under UK law motor insurance is compulsory. Driving an uninsured vehicle constitutes a criminal offence. In these cases it is better to ensure continuity of cover than to wait for the consumer's response before renewing a policy.

If a consumer doesn't confirm or amend previously given information that is no longer valid, this can be deemed a misrepresentation according to the Consumer Insurance Bill. This also applies when a customer is sent a statement of fact after they have given information to the insurer on the phone. Of course, sometimes the consumer's failure to respond may be considered "reasonable", for example, if the letter is unclear, or if the consumer did not receive the letter.

According to the FSA's Insurance Conduct of Business Sourcebook (ICOBS), firms must treat a renewal in the same way as a new contract, i.e. they must provide appropriate information, and in good time, to enable a customer to make an informed decision about whether they wish to buy the policy or not.¹³

¹³ FSA Insurance Conduct of Business Sourcebook (ICOBS) 6.1 can be found here: <http://fsahandbook.info/FSA/html/handbook/ICOBS/6/1>

Why insurers don't explain to consumers why the questions they ask are relevant for the risk

It can generally be assumed that every question posed by an insurer is relevant to the risk at hand. The Consumer Insurance Bill requires insurers to ask relevant questions because when accessing the appropriate remedies in the case of misrepresentation/non-disclosure, an insurer must demonstrate that they would not have taken on a particular risk, or that they would have charged a different premium depending on the answers to specific questions.

In providing information for consumers, insurers must strike a balance between ensuring the necessary information is available, and not overloading the consumer with information so that they cease to pay attention to the more important aspects of their insurance policy. There are many requirements regarding the information that must be provided and explained to consumers before a product is sold. Many consumers do not read their policy document. It is unrealistic to expect that consumers would be willing to read or listen to a lengthy explanation for why certain questions are being asked of them, particularly if they are buying insurance on the phone or online.

Why, when determining the relevant remedy applicable, the reference is to "that insurer" instead of any underwriter?

As the Law Commissions stated, each insurer uses different factors to determine what risk they are willing to take on, and although certain factors may lead to a similar result for several insurers, there are plenty of specialist insurers who may calculate that particular risk differently. Therefore, in practical terms it is more reasonable to place the responsibility on the individual insurer to demonstrate how they would have behaved differently had the relevant information been disclosed, or represented correctly.

Agency, and the fact that, in cases of misrepresentation or non-disclosure, agency will be determined based on the actual circumstances, despite what may be written in a TOBA

Schedule 2, which concerns the status of agents, has given rise to concerns for insurers over the course of the Law Commissions' consultations on this Bill. Some intermediaries are clearly the agent of a particular insurer, where there is a close business relationship that allows the insurer to feel confident that any sales made by the intermediary are the responsibility of the insurer. However, there are many other types of intermediary arrangements where the relationship is not so close, and where the insurer has far less control over the sales process or how the information may be collected and recorded by an intermediary. This may be the case where the intermediary is regulated independently, or for insurance policies sold via banks or on comparison websites.

As mentioned earlier, the ABI is now satisfied that the factors listed in Schedule 2, paragraph 4 tend to show that an intermediary is acting on behalf of an insurer. However, it is important to recognise that each of these factors is rebuttable if there is enough evidence to show that an intermediary is not acting as the agent of the insurer.

Timing of implementation

The ABI has no concerns about the projected timeline for the adoption of the Consumer Insurance Bill. As mentioned above, the Bill brings consumer insurance law up to date with current good market practice.

Part II—Consideration of the Bill

Special Public Bill Committee

Thursday, 10 November 2011

Consumer Insurance (Disclosure and Representations) Bill [HL]

Committee

4 pm

The Chairman of Committees (Lord Brabazon of Tara): The clock strikes four. Good afternoon, my Lords. Before the start of the proceedings on the Consumer Insurance (Disclosure and Representations) Bill, it may be helpful if I say a word about the procedure that we will follow today. In nearly all respects, our proceedings will be identical to those of a Grand Committee. Any Member of the House may attend and speak. As we are in Committee, Members may speak more than once to each amendment or Motion. The main difference from Grand Committee procedure is that the Committee may vote on amendments or the questions that clauses stand part of the Bill. If, when I collect the voices, it is clear that there is no agreement, I will announce that a Division will be held. Only the named Members of the Special Public Bill Committee are entitled to vote in the Division. If all the Members are present, we will proceed to the Division immediately. However, if Members are absent, which I know they are, there will be a pause for eight minutes to allow Members time to reach the Moses Room, after which the Doors will be locked. Members should note that Divisions will be notified in the rolling text on the Annunciators. The procedure for Divisions will be that the Clerk will read out the names in alphabetical order; Members should reply “Content”, “Not content” or “Abstain”; and I will announce the results of the Division. We will then proceed to the next amendment or Motion.

Title postponed

Clause 1 agreed.

Clause 2: Disclosure and representations before contract or variation

Amendment 1

Moved by Lord Hodgson of Astley Abbotts

1: Clause 2, page 1, line 22, at end insert—

“() It is the duty of the insurer to make it clear whether they comply with industry codes of practice.”

Lord Hodgson of Astley Abbotts: My Lords, since the backgrounds to Amendments 1 and 1A are vaguely similar, I shall take a moment to explain

them so that I can be briefer on the second amendment. Before doing so, since we are starting the next stage of proceedings on this Bill, I should declare an interest. I am chairman of a company that is called an IFA network firm. That is, it provides compliance services to independent financial advisers. In this, it provides insurance to individual consumers, which falls within the purview of the Bill. It provides insurance for people’s lives, homes, as part of their mortgage requirements and so on. It will have particular resonance when we come to Amendment 8. I may refer to it again then.

My first amendment would add a further subsection to Clause 2, which is headed “Disclosure and representations before contract or variation”. Here I seek to add a further requirement about disclosure, which will provide additional information to the consumer. As I understand it, the purpose of the Bill is, in non-legal terms, to achieve greater equality of arms between what are predominantly large, well sourced and, at times, bureaucratic companies and the man or woman in the street who is taking out insurance. This is to be achieved by changing the legal background because the Marine Insurance Act 1906 confusingly applies not only to marine insurance but to all forms of insurance, including consumer insurance; and by some operational background changes. Some of these are statutory, through the Financial Services Authority, and some are—one might say—quasi-statutory, through the Financial Ombudsman and the Financial Services Compensation Scheme. They are also partly self-regulatory, through the use of industry codes. These three threads provide a tangled mixture of redress for the consumer.

If we were debating a conventional Bill, we would ask the Minister to bring forward some draft regulations—statutory instruments—for the Committee to get some idea of the practical implications of the architecture and structure of the Bill that we were being asked to approve. In essence, I would argue that the industry codes or detailed regulations are equivalent to the statutory instruments. However, the Bill as drafted does not even mention the existence of the possibility of codes. I have raised this before and Mr David Hertzell and his team have been extremely courteous. They gave me a lot of time when I went to see them. Nothing that I say should reflect on the time that I was given and the courtesy that I was shown.

However, as we look through the transcript of the evidence sessions, we find ourselves flirting with the importance of these codes. On page 6 of the evidence session of Tuesday 11 October, Mr Hertzell says:

“The Bill has been drafted to provide high-level overarching principles. It sets out a framework to deal with the problems but does not need to lay down guidance”.

He goes on to say that guidance should come via the insurance industry and, on page 8, says:

“It is reflected in the 2009 ABI code on group life, critical illness and income protection”.

He also quotes Lord Justice Rix, who, when speaking to an insurance law conference in 2007, said that,

“in a country that prides itself on its adherence to the rule of law, the opening up of a gap between the law as applied in the courts and the self-regulation that applies as a matter of discretion to the relations between the insurance industry and its consumers might be said to be an unsatisfactory state of affairs”.

It seems that what we are doing here is opening up that gap by proposing to have these overarching principles with no reference to the underlying codes that will provide much of the day-to-day guidance and show the practical implications of this.

This is clearly not an open-and-shut case; I understand that. Clearly, the ABI has said several times—including in a letter sent out today—that it does not want to be bound by this. However, my amendment does not bind anyone to anything. It just says:

“It is the duty of the insurer to make it clear whether they comply with industry codes of practice”.

It does not say that they must comply, merely that they must let the consumer know whether they do or not. That would enable the insured party to say, “Look, I see this. What does this mean? What are the codes? What protection do they provide? What further do I have to do to be protected by them?”

I am sure the Minister will say, because he will also have received a copy of this letter, that we got a real savaging from Mr David Sanders, the principal trading standards officer from the Vale of Glamorgan. Rowing in behind him to give us an equally big beating is Peter Tyldesley. They have pointed out that this will add uncertainty to the law. That is the essence of their case. That may be but I submit to the Committee that without some cross-referencing, there is a risk that the statute law we are now setting out—which is very broad in principle—will become out of date and confusing. It will be left behind by events, as the Marine Insurance Act was, and the codes will become more and more important. In conclusion, without in any way binding anyone, we should make reference to the codes in the Bill and give the consumer a piece of information that he may or may not choose to use. I beg to move.

Lord Borrie: May I propose something? Do I need the Chairman’s permission? I cannot remember whether I do on these occasions. The microphone was not very good for the previous speaker; it whistles and so on.

The Chairman of Committees: If the noble Lord, Lord Borrie, could carry on, we will try to sort this out with the sound engineer.

Lord Borrie: I want to oppose the amendment moved by the noble Lord, Lord Hodgson, for this reason: during the long period when consumers and their organisations understood that the law was very unsatisfactory, reliance on industry codes, especially that of the ABI, was extremely useful. Many disputes were settled informally on the basis of codes of practice. If they went to the ombudsman, they were settled on the basis of best practice, which included reference to the ABI codes. However, when the Bill is passed we will be in a completely different situation, in which the consumer will have the benefit of law. No longer will he be required by the old duty of *uberrimae fidei*—the duty of disclosure. He also has the benefit of a range of remedies if there is a so-called qualifying misrepresentation. The world of the insurance consumer will be much improved if the Bill passes.

However, would the Bill benefit by having, as the noble Lord, Lord Hodgson, suggests, just a reference to industry codes of practice? It is not surprising that the ABI referred to this as nebulous and undefined. There is no definition of industry codes of practice, nor does the noble Lord, Lord Hodgson, propose one. A reference to industry codes of practice is nebulous because, whereas some are in existence at the moment, others might emerge, and who knows which one will be thought appropriate and be activated by this amendment, if it is agreed to?

My own view, which I expressed at an earlier stage of the Bill, is that it would not be helpful to have this amendment. It would damage the clarity of the law as laid down in the Bill as it stands. Of course, industry codes of practice are what the phrase implies: they are industry codes of practice and they are proposed, and imposed, by the industry. Just because they have been very good to the consumer over the years in the way that I have described, that does not mean that that will always be the case. The Bill, once enacted, is surely intended to last for some considerable time. It would be terrible if we had to come back to it and, because of some reference to industry codes of practice, had to amend it so that it did not apply to this or that code of practice. Therefore, I am not inclined to support the amendment.

Lord Lloyd of Berwick: I express my complete agreement with the noble Lord, Lord Borrie. The Bill was based on the codes, as has been pointed out by the noble Lord, but it was also intended to replace the codes. If we reintroduce the codes in this way, it seems to me that we will reintroduce uncertainty, the elimination of which was the whole object of the Bill. To take one example of that, according to the ABI letter which we have just had, there are apparently—this is entirely news to me—70 codes to which there might be reference. Clearly, we

would want to identify which codes they were. Therefore, this will not work.

Lord Eatwell: My Lords, just to show what a bipartisan Committee this is, I am going to be more sympathetic to the noble Lord, Lord Hodgson. The problem that we face is that Mr Hertzell told us that the codes were fundamental to the way that the Bill was drawn up. I quote from his evidence:

“Our view was that, in trying to lay down detailed guidance covering every eventuality, particularly those that might relate to scientific and information technology matters, it would quickly become out of date and the Bill would become ossified, so we tried to set out principles rather than detailed practices on the reasonable assumption that detailed rules—for example, around inappropriate questions—should either come via guidance in the insurance industry, from target legislation such as the Equality Act or, as appropriate, from the FSA”.

So we have been told in evidence that the fact that industry guidance would be available was a component in the design of the Bill. Therefore, I am very sympathetic to the intention behind the amendment of the noble Lord, Lord Hodgson, particularly given that the noble Baroness, Lady Kramer, who cannot be here this afternoon, was very concerned about this, as we can see from the evidence proceedings. We had extensive discussion about the role that codes and the ombudsman’s activities played in the development of fair practice within the insurance industry.

I was puzzling over the various ways in which we might be able to incorporate some reference to the codes of practice without turning them into quasi-legislation while retaining the flexibility which Mr Hertzell claims was fundamental background to the way in which the Bill was drafted. Therefore, I think that we should be more sympathetic to the intention behind the amendments of the noble Lord, Lord Hodgson, even if we are not happy with the precise formulation.

4.15 pm

Lord Goodhart: My Lords, to begin with, I take the view that Amendment 1A is not appropriate to these proceedings. It seems to me that Amendment 1 would not be seriously damaging to the Bill but my view is that it is not really necessary here. However, I should say that my noble friend Lady Kramer, who is unable to be here today, asked me to pass on to the Committee her view that the industry codes of practice should be included. As I said, my view is a definite “no” to Amendment 1A, and I am not prepared to go forward in support of Amendment 1.

The Commercial Secretary to the Treasury (Lord Sassoon): My Lords, just to be clear, I do not think that Amendment 1 is grouped with Amendment 1A, so, if that is correct, I shall address my remarks just to Amendment 1. I am sure that we will move on to Amendment 1A afterwards.

I, too, am sympathetic to the intentions behind the amendment of my noble friend Lord Hodgson of Astley Abbots because it is clear that industry codes have an important role to play. They are taken account of, among other places, in false determinations, but they occupy a rather anomalous position, which is both a strength and a weakness. So far as I am aware, they are not directly linked into any financial services legislation that I have been able to turn up. The fact that they are not officially endorsed by the FSA but are seen by the FSA when they are worked up means that they are in an unusual position. However, that is also a strength because it means that they can be adapted flexibly over time, and we should not underestimate the effect of their being endorsed by a powerful body such as the ABI.

To step back for a moment, I buy some of the arguments in the ABI’s recent letter on this point but I certainly do not buy into all the arguments that it makes. However, it is worth stressing that the strength of the ABI opposition to this is relevant to the way that we are handling this Bill. Of course, we are going through the special procedure which is applicable to Law Commission Bills, and this means that the Bill has to remain non-controversial. This is a very important point that we should discuss, but I stress as a general point that, as we go through the Bill, we have to be cognisant of the fact that, if we move into what the usual channels might deem to be controversial territory, we will be putting the passage of the Bill at risk under this procedure. I do not know what would happen then, but the Bill would have to come back in some other form. I think that every amendment that we are discussing this afternoon raises an important topic. I assure the Committee that I am not going to resist every single one of them but I make the general point that we need to be careful about the nature of the Bill.

Turning to the specifics of the amendment, what we have not previously discussed in this Committee is that the Law Commission gave very careful consideration to a reference to industry codes in the Bill and specifically consulted on that. This is discussed in paragraphs 10.29 to 10.43 of its 2009 report and it suggested a draft clause, which read:

“The insurer may not take advantage of any remedy provided for under this Schedule if, or to the extent that, it would be unreasonable to do so according to written guidance generally recognised by insurers providing the type of insurance in question”.

There was a consultation very directly to this point and detailed consideration was given by the Law Commission. Following the consultation, its recommendation was that it was not included in the Bill. It was concerned that the clause would discourage the industry from agreeing codes, which would also be a consequence of any amendments along the lines of the one suggested.

I do not want to labour the point about self-regulation, or undermine the nature or the practical points made by noble Lord, Lord Borrie, about how the definition would be and how it would link to which particular codes out of the many that the ABI has. I certainly will look, as a practical matter, at whether it would be possible for the codes themselves to reference the fact that an insured party should be aware of the existence of the code, which would at least go some way to close the loop. But I do not know whether that is possible or practical.

I certainly do not buy into the argument of having another line somewhere in the detail along the lines of "We are FSA-regulated". I do not see why it would be burdensome necessarily to have a confirmation online or in the written material that refers back to the industry code. I do not know whether anything will be possible but I say to my noble friend and the Committee that I will continue to look at non-legislative ways of handling what is a substantive point.

However, one important point is to be made in respect of the specific reason, which was originally brought up by my noble friend Lady Kramer, in relation to genetic testing. It is important and relevant to explain to the Committee what else is in place to help consumers in this specific area. The *Concordat and Moratorium on Genetics and Insurance* is in place between the Government and the insurance industry. It is working well and is perhaps an exemplar of how self-regulation can work in an area such as this. It was explicitly recognised by your Lordships' House in its 2009 inquiry report on genomic medicine.

The Government believe that compliance with this code is very important. We are working to strengthen how it is enforced. A new form of the agreement is being developed, which will see the ABI commit to publish a list of firms which have confirmed compliance on its website and to provide annual reports to the Government on the number of complaints received about the operation of the concordat and moratorium.

On the specific point, I do not know whether it was behind my noble friend specifically bringing forward this amendment, but I know that in relation to my noble friend Lady Kramer's concerns, there is a specific backstop to which the Government and the industry are party and which we will continue to operate. Of course, as this law develops over the next decades we will have the ability to backstop the Bill, or the law as it may become, in this way.

My final point is that during consultation on this Bill, which supported the inclusion of a provision on codes, there was concern about how the clause was to be drafted so as to ensure that only codes which benefited the consumer at the time of entry into the contract were included. Again it comes very much to the point made by the noble Lord, Lord Borrie, that a wholesale reference to industry codes

would not be able to ensure that only elements in favour of consumers should be included. On the basis of what I have said, I ask my noble friend to withdraw his amendment.

Lord Hodgson of Astley Abbotts: I am grateful to my noble friend and all other noble Lords who have participated in this debate. Perhaps I may respond to the points made, first, by the noble Lord, Lord Borrie. I agree that the Bill improves the situation. I am just trying to make the situation still better with this amendment. I think he indicated that I was making the Bill worse, which I am not. I am trying to make the Bill better. He made a point about it being from the industry, which I understand. The industry is providing the insurance. I am trying to get into the Bill something that tells the consumer, "This is an industry code. These are the people from whom you are getting your insurance. You need to find out about what it implies and what it requires". That is important. I do not mind the fact that it may be one-sided so long as the person knows from whence it comes.

The noble and learned Lord, Lord Lloyd of Berwick, said that we are replacing the codes. That is not what the evidence said. Mr Hertzell said:

"The Bill has been drafted to provide high-level overarching principles. It sets out a framework to deal with the problems but does not need to lay down guidance".

The consumer will be forced back to the code for his protection in the future. These are five principles, but we do not get any further into the detail, which of course is where it affects individuals. I am grateful to the noble Lord, Lord Eatwell. I am not in any way wedded to the wording I used. This was to try to get the issue on the table and I suspected that I had not managed to draft this in a parliamentary way.

I am grateful for the Minister's reassurance that he will do what he can to build awareness of codes along the lines of the concordat on genetic testing. It is very important that we should try to do that. I accept entirely his argument that more clauses and more paper are unlikely to benefit the consumer. It may well confuse him more. I refute the idea that doing this will discourage the industry from agreeing new codes. That is just an attempt to avoid having to accept this because new codes will be produced whether this is in here or not.

The Minister referred to the uncontroversial nature of our proceedings. The uncontroversial part is whether it is drawn on political lines. That is the problem with Law Commission Bills. It is not that we disagree about them. The noble Lord, Lord Eatwell, and I are on different sides of the political spectrum. It is uncontroversial in terms of politics but not uncontroversial in terms of impact and effect. That having been said, I sense that noble Lords would not support this amendment if I pushed to test the opinion of the Committee. I beg leave to withdraw the amendment.

Amendment 1 withdrawn.

4.30 pm

Amendment 1A

Moved by Lord Hodgson of Astley Abbotts

1A: Clause 2, page 1, line 22, at end insert—

“() It is the duty of the insurer to make clear whether they will provide informal resolution procedures.”

Lord Hodgson of Astley Abbotts: My Lords, I will be briefer on this because already the noble Lord, Lord Goodhart, has had a shot at my fox even before it came out of the trap. Clause 2 is headed “Disclosure and representations before contract or variation”. This amendment would draw the attention of the consumer to the informal resolution procedure for which mediation obviously is the most common. Mediation, compared to legal processes, may be, should be or can be user-friendly, less oppressive, quicker and less costly. All that my amendment seeks to do is require insurance companies to make it clear whether mediation services would be available. It is further information that I wish to put before the consumer so that he or she can decide whether or not they wish to make use of it.

My new-found friend from the Vale of Glamorgan says that this is equally unnecessary because the Financial Ombudsman Service is a mediation facility. While I agree that it is certainly one form of mediation, there are at least a couple of drawbacks to the FOS. First, it is limited to awards of £100,000—surely it should be £150,000—so serious claims could not go to FOS. Secondly, the name of the Financial Ombudsman Service means that most consumers think of it in terms of purely financial redress. Of course, financial redress has and will be important in most cases. However, from time to time—more often, perhaps, than we might expect—people are looking for an apology: “We got it wrong. I’m sorry”. They want somebody to say that actually it is not quite good enough and that they will do something to improve the situation in the future. This approach of saying “I’m sorry” does not fit well with legal proceedings. Indeed, there are cases where people’s insurance has been voided because they have admitted responsibility by saying sorry after a road accident had taken place.

All my amendment is designed to do is to provide information about a wider range of options available to resolve disputes rather than the sledgehammer of legal proceedings. Mediation is one such, in which the FOS represents one strand. I beg to move.

Lord Borrie: I have a lot of sympathy with what the noble Lord has been saying in moving his amendment. I disagree with him, in so far as he suggests that the Financial Ombudsman Service is a form of mediation. Surely mediation is a procedure whereby you bring opposing parties together and the

parties themselves resolve the outcome. The ombudsman is different because, when he has heard all the evidence from both sides and so on, will come up with his or her proposal as to how to resolve the dispute.

I am not very happy about the wording of the amendment referring to a,

“duty ... to make clear whether they will provide informal resolution procedures”,

because “informal resolution procedures” can cover ombudsmen, mediation and other things as well, if one lets one’s imagination run wild. Is that helpful to the prospective insuree, to be told simply that there are informal procedures? Any tinpot insurer, if there are such, could say that they had such a procedure and it would not really mean anything.

Baroness O’Cathain: My Lords, while I am in sympathy with my noble friend’s amendment, I agree with the noble Lord, Lord Borrie, that this really is a question of “How long is a piece of string?” The amount of detail that one would have to get into to make sure that everything was covered under the heading “informal resolution procedures” would be quite off-putting and probably not comprehensive. I worry about that. It is much better to know that there is a sort of mediator and then an ombudsman if necessary.

I worry about the comment that somebody’s insurance could be invalidated, or that they were guilty before they had actually been proven guilty if they had said sorry after a car crash. I worry that, by trying to cover some of it, you would not cover all of it. It is probably better not to cover any of it and to make sure that there are just one or two steps in the Bill that would give the consumer protection.

Lord Lloyd of Berwick: My Lords, I hope that the brevity of my contribution on Amendment 1A did not give the impression that I am unsympathetic to the noble Lord, Lord Hodgson of Astley Abbotts; of course I am not. Once again, however, I find that I cannot really agree with this amendment for the reasons, again, set out by the ABA in its recent letter. Since insurers are already obliged to inform the assured about the procedure through the ombudsman, it seems that the amendment is basically not needed. This is exactly the same point which seems to have been taken independently in the e-mail that was received only this morning from David Sanders. I agree with their views and therefore could not feel able to support the amendment.

Lord Sassoon: My Lords, I join with the chorus of sympathy for my noble friend’s intention underlying the amendment, but it will not surprise him that I nevertheless do not think that it is appropriate to adopt it in the Bill. I will come back to the FOS and say a bit about that in a moment. What the FOS offers, and the evidence of the

number of disputes in this area that are going through, is highly relevant.

The other area that I wanted to touch on, which we have not discussed this afternoon, is the position of the FSA rules and what they already require of insurers. The FSA rules already cover information about complaints handling, including informal resolution procedures. For example, firms are under an obligation to,

“publish appropriate information regarding their internal procedures for the reasonable and prompt handling of complaints”.

This includes making consumers aware of their right to take a complaint to the FOS. There are already, in the FSA rules, measures to substantially cover this area.

Moving on to the FOS’s dispute resolution service, as the Committee well understands, it operates as an alternative to the civil courts. Its role is to resolve disputes between individuals and financial firms quickly and with minimum formality on the basis of what is fair and reasonable in the circumstances of a case. Indeed, it has said that its, “preference is to resolve complaints informally—getting both sides to agree at an early stage”.

Looking at some of the data and evidence on what they are handling, last year four in five of the complaints received by the FOS did not progress to a formal dispute, almost half of complaints were resolved within three months and three-quarters were resolved within six months.

At present, the FOS receives and deals with around 1,000 complaints a year about non-disclosure and misrepresentation. We estimate that only about 20 complaints out of that 1,000 are about disclosure which exceeds the FOS compensation limits each year. Of those 1,000 complaints, around half are upheld. It is rare for complaints to proceed to the court; we estimate that only around three non-disclosure cases exceeding the FOS limit each year are taken to court. It is worth stressing that the service provided by the FOS is free to consumers, whereas other forms of mediation are not necessarily free to the parties, who often bear their own costs and share the costs of the mediator.

Again, I am sympathetic to the aims of my noble friend’s amendment. However, between the FSA rules and the way in which the FOS operates, there is adequate consumer protection in this area. I ask my noble friend to withdraw his amendment.

Lord Hodgson of Astley Abbotts: My Lords, I am grateful for the sympathy that I have had from all around the Committee. I did not think that the wording I have chosen would be felicitous or commend itself to the parliamentary draftsman. I say to the noble Lord, Lord Borrie, that I was quoting from the Vale of Glamorgan letter when he said that the second amendment seems to be irrelevant as such a requirement is already there through the

Financial Ombudsman Scheme. That was his comment on mediation, not mine; it was just a strand.

I am grateful to my noble friend the Minister. He has put forward some powerful arguments about the positioning of the FSA—treating customers fairly and complaints handling procedures—some helpful FOS statistics about numbers and value and how they have proceeded, and his not insubstantial last point that it is a free service which is, of course, of great value to consumers. On that basis, I beg leave to withdraw the amendment.

Amendment 1A withdrawn.

Amendment 2

Moved by Lord Eatwell

2: Clause 2, page 2, line 6, at end insert—

“() Subsection (3) applies only when the insurer has made clear to the consumer that such renewal of an insurance contract constitutes a new contract, and that questions asked at renewal constitute the set of questions relevant to the new contract.”

Lord Eatwell: My Lords, one issue that became clear during the taking of evidence and the earlier discussions we had on this Bill was that most consumers do not realise that the renewal of an insurance contract is in fact a new contract and that therefore the posing and answering of questions, whether at an initial proposal or at a renewal, have equivalent status. The purpose of my amendment is simply to ensure that consumers are well aware at the time of a renewal that they are entering into a new contract and that therefore the questions asked at renewal constitute the entire set of questions relevant to the new contract.

In the drafting, an erroneous word “such” entered the second line which, if I were allowed a manuscript amendment, I would withdraw, since sometimes a request to confirm or amend particulars may not have anything to do with renewal. I want to focus simply on the issue of renewal and to incorporate this clause into the Bill to ensure that there is clarity about the status of questions and the stage at which questions are asked. I beg to move.

Lord Davies of Stamford: My Lords, I intervene very briefly in support of the amendment proposed by my noble friend Lord Eatwell. It seems entirely reasonable that an ordinary consumer buying a consumer insurance product from an insurance company and then renewing that product in subsequent years or subsequent periods would assume that the declarations made at the outset were still valid and still recorded by his or her insurance company. It seems to me that even if that assumption is wrong, a lot of the responsibility for that mistake lies in the hands of the insurance company, which should keep good records of its clients or, if it is not prepared to do that, should at least ask one of the relevant questions—and we provided for insurance

companies to take responsibility for asking the right questions—or should make it clear in the application form that it is a new contract and therefore the assured has to begin *ab initio* to think of what might be relevant or declarable. To void a contract on the grounds of non-declaration when a declaration has previously been made by the customer to the insurance company, perhaps several times, over several years or for several periods, would be quite unreasonable and unfair, and quite contrary to the purposes of this Bill.

Lord Hodgson of Astley Abbotts: I have some sympathy with this amendment too. I do not think I have ever realised that when I renew my motor car insurance once a year, I am entering into a new contract. I have just assumed that it is an extension of what I have done before. Although this may not be relevant in terms of the way the forms are completed, I suspect that everybody thinks that motor car insurance just rolls on from year to year and that an existing contract just goes on. I think that is what one would assume, and with household insurance likewise. There are a series of policies that we individually undertake, and we would be under the misapprehension that they are just a continuation of an existing contract. I think there is a substantive point here which I support.

Baroness O’Cathain: I, too, support this amendment. It was quite a revelation to me to realise that insurance contracts do not just roll on. I never for one moment thought that they were new contracts, particularly on motor cars. If you add or subtract something—household items, pictures or something—you would be aware of that, and you would make a statement to that effect to the insurer, but a motor car is a motor car. If you have insured it for three or four years, you keep on insuring it. I think this is a very good point.

Lord Goodhart: I, too, was persuaded by the noble Lord, Lord Eatwell. I am happy to support this amendment.

Lord Lloyd of Berwick: I, too, have been persuaded. All I would say at the moment is that I cannot see any harm in the amendment proposed. As to whether it is strictly necessary, well, it may not matter, but I cannot see any harm, and unless the Minister can persuade me that there is some harm, I will be supporting the amendment.

4.45 pm

Lord Sassoon: My Lords, let me try to persuade the noble and learned Lord, Lord Lloyd of Berwick, on a technical legal matter such as this. I am not sure that I am up to it, but I will try.

There is an important point here. I, too, would not have the faintest idea whether a renewal of any of my insurance policies was or was not a new contract. This is an important question, but as a consumer, where would I be if I did know or was

told that I was entering into a new contract as opposed to a continuation of the old contract? What would flow from that? What am I supposed to do about it?

There is a technical issue here but, as I will attempt to persuade the Committee, it has already been considered by the FSA, the commissioners and others, and the position is that rather than confusing consumers by drawing their attention to this point, we need to make sure that they are protected through the way that this Bill will operate in relation to this very simple but important question of misrepresentation that we are trying to address. The point is very much recognised, but let me try to take the Committee through the logic of the position, which is to end up saying that we do not believe that this amendment is necessary or appropriate.

The amendment would have two effects. The first is that insurers would be required to make consumers aware that renewal constitutes a new contract, and the second is that the questions they ask at renewal would have to constitute the set of questions relevant to the new contract. It may be easiest if I take the second effect of the amendment first and suggest that it is already achieved by the existing provisions of the Bill. Let me set out to the Committee how it is already covered.

First, in order to have any remedy, the insurer must ask a question. If it fails to do so or chooses not to do so, there can be no misrepresentation by the consumer. It follows that any questions insurers ask are the relevant questions for the new contract. Secondly, consumers must take reasonable care to answer any questions they are asked. However, a failure to respond, for example, may be considered reasonable if the insurer’s questions were unclear or if the consumer did not receive the insurer’s letter—a point that was raised in previous discussions in this Committee. In these circumstances, the insurer may not have a remedy. Clause 3 sets out examples of matters that should be taken into account when deciding whether the consumer has acted reasonably. These include in Clause 3(2)(b) how clear and specific the insurer’s questions were. Thirdly, even if the consumer has made a misrepresentation, Clause 4(1)(b) means that the insurer has to show that the misrepresentation caused it to provide the insurance on the terms it did or at all. The questions an insurer asks at renewal will need to be relevant to a new contract, otherwise an insurer will not have a remedy. I suggest that that deals with the second effect of this amendment. If we turn back to the concerns that have been raised in discussion—

Lord Davies of Stamford: I am grateful to the Minister for giving way. What I think he is saying is that essentially he agrees in principle with the idea behind the amendment tabled by my noble friend Lord Eatwell, but that its purpose is equally well met by the general provisions of the Bill, that the

insurer has to ask the right questions and so forth. I put it to him that that is not the same thing. To say that the remedy is in the general provisions is nothing like as good as providing a specific remedy. In the case of a dispute, the assured would have to argue that the general provisions adequately cover his or her case. If you put in a specific provision we can cover the point much more effectively, and instead of using the subjunctive, which the noble Lord has just used in saying that the assured “may” have a remedy, the assured then would have a remedy. There is a great difference between those two positions.

Lord Sassoon: My Lords, perhaps I may move on to the second part of my response to the discussion, which may help the noble Lord, Lord Davies of Stamford. I want to establish first of all that the Government firmly believe, as indeed must the Law Commission have believed, that there was complete protection for consumers at renewal in relation to questions asked, just as there is protection clearly relevant to any contract being entered into for the first time. However, I want to come on to the specific concern about consumers being in a position where they may not understand the precise legal nature of a renewal and the fact that it is a new contract. A number of us have agreed as we have spoken that we ourselves would not understand that point. Having considered it, I certainly agree that most consumers are unlikely to take the point or, indeed, as I said in my introduction, are unlikely to understand the significance of being told that a renewal is a new contract. We must make sure that we protect them in the circumstances of both a totally new contract and of a renewal, and I would suggest that that is what the purpose of the Bill must be rather than doing anything that might unnecessarily confuse consumers in consideration of the nature of the contract they are entering into at any stage.

The critical point here is that the understanding consumers need to have of their position at renewal is already regulated by the FSA. In this respect, the insurer’s obligation under FSA rules is to ask clear questions as outlined above, which I believe addresses the concern. Of course, the conduct of the insurer when renewing a contract of insurance is itself subject to regulation by the FSA and there is existing FSA guidance for firms on explaining to customers what they must disclose and the consequences of any failure to make such disclosure. In addition to that general requirement, the FSA also requires that on renewal of a contract, firms should, “take reasonable steps to ensure that a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed”.

The FSA requires that all communications with customers, including renewal documents, be clear, fair and not misleading. So I believe that it is

unnecessary for this clause to require insurers to make it clear that a renewal is a new contract. They are already required to disclose anything that is relevant and, as I have explained, if they fail to ask questions, there is no obligation on the prospectively insured party to answer them.

I shall address the specific question that came up in previous discussions. Under the provisions of the Bill, a failure to respond to an insurer’s request because a letter was lost in the post or delivered to the wrong address is capable of not being a misrepresentation. There may always be circumstances where communications between the insurer and the policyholder break down, and one of the benefits to consumers under this Bill is that in such circumstances it is open to the policyholder to argue that failure to confirm or amend particulars because this has occurred may be considered reasonable in all the circumstances.

In conclusion, requiring that insurers make it clear that a renewal is a new contract is unnecessary because insurers would not be able to refuse a claim unless the duties around disclosure were made clear to the consumer. Existing regulation also addresses some of the concerns expressed by the Committee, and the other consequences of this amendment are covered by existing provisions. I suggest that the amendment is unnecessary and risks confusing consumers, and therefore I request the noble Lord to withdraw it.

Lord Lloyd of Berwick: Does the noble Lord happen to know whether this particular point was considered at all by the Law Commission or, indeed, in the further consultation carried out by the Government?

Lord Sassoon: My Lords, I have to say that I am not immediately aware of whether the commission did consider it, although I am sure that it would have considered everything relevant—and this is highly relevant. In fact, I can confirm that it did explicitly consider this point.

Lord Eatwell: My Lords, I am enormously grateful for the support I have received around the Committee for the amendment, but I regret to say that I am rather unconvinced by the Minister’s arguments against it. For his second argument on the issue of confusion, clarification and so on, he quoted the FSA rules. He said that those rules provide the assurance that everybody will be clear that a renewal of insurance is a new contract. But he himself admitted that he did not know this. Indeed, virtually everyone in the Committee has admitted that the existence of the FSA rules had not provided them with this piece of information and that they did not know it. So I am afraid that the idea that there is existing protection for the consumer either in FSA rules or elsewhere is demonstrated by the opinion poll taken around this Committee to be false.

Lord Sassoon: It may be helpful if I intervene, and I am grateful to the noble Lord for giving way. I think the implication he reads into my absolute confirmation that neither I nor other Members of the Committee understand or know whether a renewal constitutes a new contract or not means that perhaps he is taking a different conclusion from it than the one I was seeking to draw, which is this. We should expect consumers not to understand or, even if they are told, not to be able to assess the implications of knowing that fact, and therefore I was trying to suggest that the construction of the Bill and the FSA regulations taken together is precisely to protect the consumer and ensure that he is held harmless, if you like, against a background where we cannot and should not expect consumers either to know that a renewal is a new contract or what the legal consequences of that knowledge would be.

5 pm

Lord Eatwell: I am grateful to the noble Lord because I think he has just defeated the first part of his own argument. His first argument referred to whether sufficient protections are already in the Bill with respect to the questions which on renewal a consumer might answer or not answer. The problem here is that the potential for the catch-all question of whether circumstances have changed is very high. If that question were to be asked and the reasonable consumer, not realising that this was a new contract, did not feel that they had to answer all of the points they had made already, they might be disadvantaged.

The Bill gives consumers significantly more rights than they had before. We are all delighted by that and pleased by the construction of the Bill, but it imposes responsibilities on consumers with respect to the answers that they give to questions and we ought to provide a firm foundation on which the consumers can exercise that responsibility. I am very taken with the argument by the noble and learned Lord, Lord Lloyd, that this would do no harm. If it would do no harm and clarify the issue of renewal, I believe it would be worth while. I am also persuaded by my noble friend Lord Davies, who referred to the need to argue this case with respect to the clauses in the Bill, rather than have a clear right specified as I have proposed. Given the arguments made, in which I regret that the Minister did not manage to convince me, and the support which I have heard around the Committee, I beg to test the opinion of the Committee.

The Chairman of Committees: Because of the change in its wording, theoretically I should read the amendment out. In fact, I shall just say that, with the exception in line 2 of the removal of “such”, the question is that Amendment 2 be agreed to.

Noble Lords: Content.

Lord Sassoon: Not content.

The Chairman of Committees: My Lords, in that case we have to go to a Division and as not all Members are present, we have to allow for a pause of eight minutes while those who are not present are able to reach this Room. However, I know that two Members of the Committee are not here at all—I am looking at my Clerk for guidance here—and that there is therefore only one Member of the Committee, the noble Baroness, Lady Wheeler, who is not here in the Room and whose whereabouts I do not know. Is it possible to go to a vote, and only if that is within one vote would we have to go to the eight minutes? Perhaps I am being too revolutionary. I understand that there is no guidance to do that in the *Companion* but if both Front Benches agree to do so, it could be the will of the Committee. Would the Committee agree that that is the procedure?

Lord Lloyd of Berwick: Is the question not whether if there are other amendments which need to be voted on, we can in some kind of way vote on them all together?

The Chairman of Committees: No, my Lords, we cannot do that. All I am trying to do is to avoid us having to wait eight minutes, so perhaps the Committee could then go to the vote. I explained how it was going to be. The Clerk is going to go around the Committee and take one of these options: content, not-content or abstain.

5.03 pm

Division on Amendment 2

Contents 7; Not-Contents 1.

Amendment 2 agreed.

Division No. 1

CONTENTS

Borrie, L.		Hodgson of Astley Abbots,
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NOT-CONTENTS

Sassoon, L.

Clause 2, as amended, agreed.

Clause 3: Reasonable care

Amendment 3

Moved by Lord Hodgson of Astley Abbots

3: Clause 3, page 2, line 26, at end insert—

“() how proportionate in relation to the sum insured the insurer’s questions were”

Lord Hodgson of Astley Abbots: My Lords, this might be titled “What happened next?” We have moved to Clause 3, which is headed “Reasonable care”, and which is one of the central issues and

concerns that we have about the new structure and the equality of arms situation in consumers' position in the new world. However, this will not be a static situation. As we discussed earlier on codes of conduct, there will be an equal and opposite reaction to what we are doing. The insurance companies must be expected to react to the fact that they will no longer be able to ask open-ended questions. As a result, this may drive them to increase the length of the questionnaires that they require to be completed, with all the difficulties and problems with possible inaccuracies that this may cause. So the question is: should we be concerned about "Reasonable care" in respect to this possible development?

Paragraphs (a) to (d) in Clause 3(2) lay out the four examples,

"which may need to be taken into account in making a determination",

as to whether reasonable care has been taken. None of these deals with the length of the questionnaire and the number of questions being asked, which is the background to my amendment. If you were insuring a life for a very substantial sum, you will obviously wish to ask a large number of questions about the individual's health and so on, but if you were insuring my car it is a question of the average and that is a different matter.

My new best friend, Mr David Sanders, the principal trading officer in Glamorgan, has had at me again on this one on the grounds that the issue of motor insurance is spurious and that consequential loss would be considerable: in the case of the Selby train crash, it was reported that the claim against the unfortunate driver of the vehicle that caused the crash, Gary Hart, could reach £50 million. I fundamentally disagree with what he is saying there, because motor insurance is about averages and probabilities. Of course, there are occasions when huge claims take place—he mentioned Mr Gary Hart as being one—but an insurer would call that a one-in-25-year event, or whatever. They are therefore very rare and are not expected or anticipated, except on very unusual occasions. By contrast, insuring an individual's life is a highly specific issue relating to that person's health, age, genetic inheritance and various factors such as when their parents died, and so on.

I am encouraged to persevere with this amendment because of the response that Lord Justice Longmore gave to a question that I asked him on Wednesday 19 October about whether we ought not to have some proportionality test. He said on page 16 of the transcript:

"Proportionality as to the number of questions being asked? Well, I do not see anything wrong with that. I slightly hesitate, because it would be very prescriptive to say that a proposal form may not ask more than 15 questions. It would be an odd thing for an Act of Parliament to say, really, but I would not be against it".

We should be saying not that there should be a specific number of questions but that there should be some discretion, in deciding whether reasonable care had been taken, as to the total number of questions that had been asked. I am not trying to say that there should be 12, 15, 20 or however many.

The only serious argument I have seen in the papers that we have received about this is that it is redundant and unnecessary because competitive pressure will ensure that people are not able to put forward long forms. It will just drive them out of business, because consumers will want to have short forms. Well, that may be but I am not sure that I wish to leave it to that particular chance. I am trying here to guard against a future problem. Again, I am not suggesting that my wording is felicitous but there is an issue here whereby if we are to have better equality of arms, the size of the questionnaire and the amount of questions being asked should bear some relationship to the type and quantum of the risk being insured against. I therefore beg to move.

Lord Lloyd of Berwick: My difficulty with the amendment is, again, the one pointed out in the ABI letter: in many cases different sums are insured, and in some cases, the sum is unlimited. It would be very difficult to know how one would apply the amendment in such a case.

Lord Sassoon: My Lords, again, I thank my noble friend for his amendment. I of course agree that it is undesirable for small, straightforward contracts to require burdensome or excessive disclosures from consumers. However, the amendment is unnecessary, as it is already one of the effects of the Bill, as I shall attempt to explain. It is perhaps redundant, but I will say anyway that the factors listed in the clause are merely examples which may need to be taken into account, and the discretion of the court remains unfettered. Of course it is important that wide discretion remains to ensure that the infinite factual circumstances of each case can be adequately addressed and that the Bill remains relevant as the market develops. It is very unlikely that, as a result of the Bill, insurers would begin to generate long questionnaires—for reasons of their own cost efficiency, not least. The Bill is, after all, only bringing the law into line with best practice, so the questions that insurers ask should not change as a result.

To consider one or two of the difficulties that the amendment would bring, it is unclear what it is about the questions which must be proportionate. It might mean the number asked or it might mean something less easily measured about the burden that the questions impose on consumers.

As has already been identified—my noble friend used the argument one way and the noble and learned Lord, Lord Lloyd of Berwick, used it another—there is the problematic link to the sum insured. The sum insured is not always calculated. Some policies cover more than one sum insured; it

will be calculated differently by different insurers; and the size of the sum insured does not tend to correlate well with what we intuitively feel about the complexity or size of the insurance contract itself. Let us take the example of a car insurance policy, on which generally the insurer needs to ask relatively few questions. As has been said, there are relatively few questions but a policy that covers risks of multi-million pound personal injury claims and, under the Road Traffic Acts, must include an unlimited sum insured for third-party death or personal injury. On the other hand, one might take the example of an annuity contract, which is far more complex and generally requires much more detailed information for underwriting purposes, but which is highly unlikely to result in cover for the sort of sums that the car insurance policy must cover.

As I said, I agree with my noble friend that insurers should seek to be proportionate in the questions they ask. The level of time, trouble and care that a consumer is expected to take in completing a proposal form should relate to the type of insurance and the way it is sold, but there is no need to draft further provision to achieve that, as it is already included in the effect of the Bill. I suggest that the proportionality concern is specifically addressed to Clause 3(2)(a), which provides that when determining whether a consumer has taken reasonable care, the type of contract in question and its target market may need to be taken into account.

To take an example, if an insurance product which was advertised as quick to complete had a disproportionately long form, it is expected that that might bear on whether a consumer has exercised reasonable care. Similarly, if an insurer who advertised insurance as quick to complete asked few questions but they were incredibly general—the catch-all question problem that was identified in debate on the previous clause—that may also bear on the question of whether a consumer had exercised reasonable care. Taken together, that will mean that, where relevant, the proportionality of an insurer's questions is taken into account. I hope that that addresses the understandable concerns of my noble friend and again I request that he withdraw the amendment.

5.15 pm

Lord Hodgson of Astley Abbotts: My Lords, I am grateful for the reassurances that my noble friend has given—in particular, his statement that Clause 3(2)(a) implicitly contains a proportionality test, which I think was the thrust of his reason for not accepting my amendment. That is very reassuring.

However, slightly to bite the hand that has fed me, on the case of motor insurance being unlimited, motor insurance is about averages. You take a pool of risks—a large number. Some people will do mad things and be very expensive; but most will have no

crashes or a small bump. That is a different sort of risk. You do not need to know a lot about individual cases. You need to know a great deal when you are insuring an individual risk, because that does not have the average attached to it in the way that motor insurance does. That is just my picking at the Minister's speaking note, and I beg leave to withdraw the amendment.

Amendment 3 withdrawn.

Amendment 4

Moved by Lord Eatwell

4: Clause 3, page 2, line 26, at end insert—

“() that the questions were such as to be deemed relevant to the contract by a reasonable consumer”

Lord Eatwell: The amendment addresses a concern discussed when Mr Hertzell was giving evidence. I asked him whether, given that in many instances of risk-taking these days, statistical analysis is done by insurance companies and credit card firms which would not be obvious to the consumer as relevant to the risks that they take, there was a clear obligation on the insurer to clarify the relevance of the question. The answer was no, there was not. Therefore, given the responsibility which the consumer has to answer the questions asked, it should be clear to the consumer that questions are relevant, even though they may be derived from some form of statistical model which identifies relevant factors which might not immediately, to the ordinary, reasonable consumer, be deemed relevant. The questions should be such as to be deemed relevant to the contract by a reasonable consumer. If they involve some more arcane form of analysis, that should be made clear, so that a reasonable consumer can be suitably protected and informed and can discharge his or her responsibility to answer questions appropriately.

I apologise to the Committee, in that I failed in tabling the amendment to realise the inconsistency that would be created with Clause 5(5)(b), which is the power that supports Mr Hertzell's position: that the consumer should deem any question to be relevant simply because it has been asked. That is unsatisfactory; it puts an excessive burden on the consumer. I should have tabled a consequential amendment to delete Clause 5(5)(b). I apologise to the Committee for not having done that, but we still have Report, when such tidying up could be done.

My amendment provides a framework within which the reasonable consumer is suitably informed with respect to the responsibility that he or she has in answering questions. I therefore beg to move.

Lord Lloyd of Berwick: My difficulty with the amendment is that if all Clause 3(2) does is give examples of things that a court must take into account in deciding whether reasonable care has been exercised, one could add a lot of other

examples of things that might be taken into account. Surely we can rely on the court to reach a sensible conclusion in the light of the points that the noble Lord made. It does not have to be spelled out in statute. I would be much more worried if, as is now accepted, it required an amendment to Clause 5(5). Deleting that would raise much more serious questions and I would be very concerned.

Lord Hodgson of Astley Abbotts: My Lords, my slight concern about this is that if, as the Minister argued, Clause 3(2)(a), which covers the type of insurance contract in question and its target market, deals with proportionality, it probably also deals with relevance, because that is in the same area. Therefore, if we accept the Minister's argument in respect of that, it should apply here as well.

Lord Sassoon: My Lords, I find this almost the most difficult amendment of the afternoon when it comes to disentangling the intention from the possible consequences. As the noble and learned Lord, Lord Lloyd of Berwick, said, we are talking about a list of factors that may need to be taken into account by the court in making a determination. On the other hand, we risk confusing that aspect with the question of what the consumer is supposed to know or take into account at the point of entering into the contract or answering questions, which is a rather different matter.

The main thrust of the Bill is that consumers should not be expected to know what information is relevant to an insurer. We are trying to protect consumers and to make it as simple as possible for them. We do not want them to have to step into the shoes of an insurer and make all sorts of complicated judgments and assessments that would flow from that. That is the position—that the consumer should not be expected to know what information is relevant to the insurer—under the Marine Insurance Act, which this Bill updates. Therefore, my starting point is that the likely views of a reasonable consumer, whoever he or she may be, as a benchmark of relevance, is not an appropriate test.

It is important that, when seeking remedy against a consumer, insurers should be required to defend their rationale for asking certain questions of the consumer. However, they should not be bound to consider the likely views of a reasonable consumer when deciding which questions to ask. Ultimately, the insurer will be in the best position to know what information needs to be provided in connection with the particular insurance policy. In the event that an insurer attempts to take remedy against a consumer, the insurer will need to demonstrate the relevance of the questions asked. At that point, it will be for a court or another relevant adjudicator to make a judgment on the validity of this demonstration. It would not be appropriate to limit the decision-making capability of the court or adjudicator by requiring that, in making a judgment, they should

consider in particular whether a reasonable consumer would have considered the question relevant.

Rather, it is for the court or the adjudicator to decide whether they agree with the insurer's demonstration of relevance, which should encompass a range of factors. There could be many instances where, if an insurer, a court or an adjudicator were to consider whether a reasonable consumer would consider the question relevant, they might conclude that such a consumer would not. However, this does not necessarily mean that the question was not relevant. It would be more likely that even a reasonable consumer would not be in a position to know what information was relevant to an insurer. I suggest to the Committee that that is very much in line with the overarching principle of the Bill.

The noble and learned Lord, Lord Lloyd of Berwick, immediately picked up on the point about Clause 5(5). Any change to Clause 5(5) would be a major change to the balance of the Bill. It would change the definition of "deliberate or reckless" actions. As well as suggesting that Amendment 4 is inappropriate, I will add that the fact that the noble Lord, Lord Eatwell, was good enough to point out the linkage to Clause 5(5) goes to the heart of the construct of the Bill. Therefore, I ask the noble Lord to withdraw his amendment.

Lord Eatwell: My Lords, I am grateful for the comments that were made on the amendments. I will take up two points. First, the noble and learned Lord, Lord Lloyd of Berwick, asked whether we could not rely on the courts to reach a reasonable conclusion about relevance. No, we cannot, because Clause 5(5) prevents them from doing so. It states that, unless the contrary is shown, it is presumed,

"that the consumer knew that a matter about which the insurer asked a clear and specific question was relevant".

That is the theme that was presented to us by Mr Hertzell in his evidence, and which I find objectionable.

I have done some work in this area and will give an example to the Committee. If one asks a question, for example in respect of somebody's income, and says, "How much do you earn every year?", and they say, "£19,532", statistically that answer will be believed. If they say, "£20,000", it will not be believed. When anybody presents their income as a round number, the weighting of that answer is much lower than if they present a number that is precise. However, there is no way that a reasonable consumer would know that unless they had worked in the risk analysis business. There is a real issue here with respect to Clause 5(5) that I was attempting to deal with—very inexpertly, I admit. Therefore, it would be quite unreasonable at this stage for me to do anything other than withdraw the amendment. However, I hope to pursue the matter

at a later stage. I beg leave to withdraw the amendment.

Amendment 4 withdrawn.

Clause 3 agreed.

Clause 4 agreed.

Clause 5: Qualifying misrepresentations: classification and presumptions

Amendment 5

Tabled by Lord Goodhart

5: Clause 5, page 3, line 5, at beginning insert “A misrepresentation which is”

Lord Goodhart: I do not propose to move Amendment 5. I will go straight to Amendment 6.

Amendment 5 not moved.

Amendment 6

Moved by Lord Goodhart

6: Clause 5, page 3, line 15, leave out subsection (3)

5.30 pm

Lord Goodhart: My Lords, the amendment states simply that there is a provision in Clause 5 that is completely unnecessary and should not be there. I will start with Clause 4(2), which defines a misrepresentation. It states:

“A misrepresentation for which the insurer has a remedy against the consumer is referred to in this Act as a ‘qualifying misrepresentation’”.

Clause 5(1) states:

“For the purposes of this Act, a qualifying misrepresentation ... is either ... deliberate or reckless, or ... careless”.

Leaving out subsection (2), we go on to subsection (3), which says:

“A qualifying misrepresentation is careless if it is not deliberate or reckless”.

Subsection (3) simply repeats, more or less word for word, everything that is in Clause 5(1). It is not a significant matter, but it is inappropriate to have that in here. Subsection (3) is wholly unnecessary and possibly confusing, because people will look at subsection (1) and then subsection (3) and think that there must be some difference between them—but there is none. I simply ask for the deletion of subsection (3).

Lord Borrie: My Lords, speaking from my advantageous position here, opposite the Minister, I cannot tell whether he accepted the argument that has just been put. It seems irrefutable that there is no point in subsection (3). It is redundant; we already have it very clearly at the beginning of the clause.

Lord Eatwell: My Lords, I support the arguments advanced by the noble Lord, Lord Goodhart.

Lord Sassoon: My Lords, as it happens, I believe that Amendment 5, which my noble friend Lord Goodhart did not move, would have been a useful tidying-up of the drafting, which I would have been happy to accept. I shall have to think now whether the Government should bring something forward to that effect at the next stage. It was not a big point, but it would have been helpful.

On this amendment, I understand that noble Lords might consider that Clause 5(3) is otiose, because courts might conclude, as Members of the Committee have already done, that the same effect is achieved, as my noble friend points out, by a combination of subsections (1) and (2) alone. I assure the Committee that, just as we will look very carefully at the now withdrawn Amendment 5, we will look very carefully at the drafting of Amendment 6. If I did not believe that there was some merit in keeping this subsection in, I would be delighted to take it out. However, I do not think that we should take it out. I think that I heard my noble friend say that at best it was redundant and not damaging.

I suggest that we should consider that this Bill is intended to be a deregulatory measure, clearly up an existing area of legal and regulatory uncertainty. Having thought carefully about it, we feel that the retention of subsection (3) is important in so far as its removal would make the Bill much more difficult to understand. Members of the Committee have spent many hours considering the detailed drafting of the Bill; we feel that even if it is considered otiose in its construction by those who have looked at the Bill for many hours, in the context of a Bill that is intended to be deregulatory, this is a measure for the avoidance of doubt. It may be that, having worked through it all very carefully, people would get to the same answer. But our view is that if, as has been suggested by my noble friend, it does not create difficulty and is merely redundant, the Government’s position is that it not only causes no difficulty but, in quite an important—or very important—respect, makes it absolutely clear beyond peradventure at a first reading what the nature of a qualifying misrepresentation is and when it is not careless.

I feel that the amendment is unlike the previous one, which would have helped clarify the drafting; it goes significantly in the other direction and I request that my noble friend considers withdrawing it.

Lord Goodhart: I think that we might have a vote on this. Or no—perhaps it would be better not to. I think that the Government’s position is unmaintainable on this. Frankly, I hope that the Minister will go back and consider this really very simple little point again and decide that it would be perfectly sensible to accept this amendment.

Therefore, I will withdraw the amendment on this occasion.

Amendment 6 withdrawn.

Clause 5 agreed.

Clause 6: Warranties and representations

Amendment 7

Moved by Lord Eatwell

7: Clause 6, leave out Clause 6 and insert the following new Clause—

“Warranties and representations

No consumer warranties will be associated with a consumer insurance contract.”

Lord Eatwell: This is an attempt to clarify the issue of warranties with respect to consumer insurance. Again, I turn to the evidence hearings of this Committee and to a letter written to me by the Minister about warrants earlier in our proceedings. The Minister said:

“Warrants are rarely if ever used in consumer insurance contracts and do not present a problem beyond that posed by the basis of contract clauses.”

Warrants are still surviving in some form, but it is not at all clear in what form they are surviving. I asked Mr Hertzell at the evidence stage whether they were being abolished for consumers, and he replied:

“They still exist for consumers, other than being introduced through this mechanism, although they are not used in consumer insurance”.

I am completely befuddled by that, and no example was produced of when a warrant might be relevant. Given that Mr Hertzell said that they were not used in consumer insurance, I thought that we could simply end the whole discussion of warrants here by simply saying that no consumer warrants would be associated with a consumer insurance contract. That is straightforward; it clears up the matter and removes all confusion and, I think, improves the Bill. I beg to move.

Lord Sassoon: My Lords, I am grateful to the noble Lord, Lord Eatwell, for drawing attention to an important issue—the one of warranties in insurance contracts. Because it is important, as the noble Lord knows, it is something that the Law Commission has committed to examining in its project on business insurance next year.

It is the case that warranties are rarely used in consumer insurance contracts and, indeed, since 1986 the ABI statement of general insurance practice has barred their use. But because of the ongoing work to look at this area of insurance law, I do not believe that it would be appropriate at this stage to impose a wholesale ban on their use, because it is not something that has properly been bottomed out in the proper way by the Law Commission. On the other hand, there is no practical consumer detriment in leaving the Bill as it is

because of the rarity of the use of warranties. Other than on the basis of the contract clauses, which are abolished by the existing wording of Clause 6, warranties in the strict sense are rarely, if ever, used. The one area, the basis of contract clauses, has been specifically addressed in Clause 6, but otherwise there is no identified problem.

The Law Commission conducted a survey of 50 FOS consumer cases specifically concerned with policy terms and found no consumer policies that used warranties in their strict sense. Many insurers confirmed this position in their responses to the Law Commission’s consultation. In the absence of a widespread or specific consumer problem, it was considered unnecessary for this short-targeted and universally supported Bill to go beyond its current scope on warranties. I know that the noble Lord’s response is that if they are not used we should get rid of them now—and it is a perfectly logical argument. However, warranties are widely used in business insurance contracts and need further consideration in that context. The position under the Marine Insurance Act 1906 sets out very clearly the series consequences of breaching a warranty and it provides only a very broad definition of what a warranty is. So there are some issues hanging around here that need to be very carefully looked at, and that is what the Law Commission is addressing; it is considering the use of warranties for both business and consumers more generally in its wider project on business insurance. My understanding is that it intends to release a consultation paper considering warranties applying to business and consumers next year.

I suggest that the Bill should not import a clause such as the one proposed by the noble Lord, Lord Eatwell, and pre-empt a considered review of this complex and important issue at a time when there is no identified consumer detriment under the Bill as it stands. In addition, on a belt and braces principle, if in the rare case a warranty was used unfairly, consumers currently have remedies, not only under the FSA rules but also under the Unfair Terms in Consumer Contracts Regulations 1999, with which I am sure the noble Lord is intimately familiar. On that basis, I suggest that the amendment is not required and ask him to consider withdrawing it.

Lord Borrie: Will the Minister deal with this point, which is really my noble friend’s point? This amendment, which is only one line, refers twice to consumer warranties. Therefore, the point that the Minister makes about further work being done on business contracts and warranties in business contracts is not affected at all by the amendment being proposed by my noble friend. While it is true that there are the Unfair Terms in Consumer Contracts Regulations 1999—I recall them quite well—and while that is a remedy for the consumer, and it is clever of the Minister’s researchers to dig it out, we have a deal here that specifically deals

with consumer insurance contracts. Why not have a provision in this Bill?

Lord Sassoon: The noble Lord, Lord Borrie, puts me on the spot perfectly fairly. Although I introduced this Law Commission work quite correctly, which starts off being driven from a consumer angle, I did say—and I shall repeat it, because this is critical—that if it was only warranties for business I agree that it would be incomplete. But the work extends to warranties for both businesses and consumers, and my clear understanding is that the Law Commission will release a consultation paper that covers warranties on both businesses and consumers next year. So although the project may have started from business insurance, it is going to consider consumer warranties as well, and I believe that we should wait until that has been consulted on. This Bill is not the appropriate time to pre-empt that work.

5.45 pm

Lord Borrie: I am sorry to intervene again, but surely that work will not reintroduce what the Minister has himself said is not current at all in practice—namely, warranties in consumer insurance contracts. So why not deal with those contracts as my noble friend suggests?

Lord Sassoon: Because, my Lords, as I said, under the law as it stands in the Marine Insurance Act 1906, the whole question of what a warranty is is very broadly defined. Rather than dealing with the warranty issue, in the absence of a full consultation and bottoming out of the issue we should leave it to the Law Commission to do its proper work on this. Of course, the consequences of its work will flow through to this and other relevant pieces of legislation in due course, but in the meanwhile the consumer is protected by the ABI codes, the fact that the FOS did not find any use of warranties in the strict sense in relevant consumer contracts, and the Unfair Terms in Consumer Contracts Regulations 1999. So the consumer is fully protected and it would be ill considered of this Committee to attempt to pre-empt very considered and detailed work that will cover consumer warranties in the near future.

Lord Lloyd of Berwick: I should like to express some concern about this amendment—I know I should have done it earlier. Could the noble Lord refer us to the passage in the evidence in which, as I understand it, Mr Hertzell was thought to have supported his argument in favour of the amendment. I have the evidence in front of me and Mr Hertzell said quite specifically that they were not abolishing warranties in consumer contracts but they were abolishing one particular type of warranty, when there is provision in the contract that makes a representation the basis of the contract. All other warranties are simply not touched. To introduce at this stage an amendment that says that warranties

can be simply disregarded would be very much going against the views of the Law Commission, as I understand them. It would at least be carrying those views much further than it has carried them itself.

Lord Davies of Stamford: I find myself much more confused than enlightened by the Minister's response to this amendment. The whole purpose of this Bill is to create a separate legal regime for consumer insurance products outside the ambit of the Marine Insurance Act 1906. So to say that the amendment would create problems, difficulties or ambiguities for that Act in relation to business insurance or would pre-empt or prejudge the Law Commission's decisions in relation to warranties generally does not seem to make any sense. This amendment makes it very clear indeed that warranties, if this amendment were enacted, would no longer be allowed, or exist, or arise, in matters of consumer insurance. It seems extremely valuable to make that absolutely clear. As the Minister acknowledged, the warranties have not been used in practice in consumer insurance for a long time—for 25 years, I think. We are not changing anything in practice; we are simply making the legal position absolutely clear without any effect on business insurance. Therefore, it cannot be said that we are pre-empting the work of the Law Commission in relation to business insurance contracts.

Lord Sassoon: Perhaps I can address that point. I shall try to be a bit clearer. This Bill addresses a very targeted, narrow but important issue and brings the law into line with best practice on the question of representations by consumers. It is not intended to do anything more than that.

Lord Davies of Stamford: Representations and warranties surely go together. They are often the subject of exactly the same clause in legal contracts. The distinction between the two is always an interesting issue, but they go together. If you produce a Bill affecting representations, that is the right place to make the position clear in relation to warranties.

Lord Sassoon: My Lords, it is the view of the Law Commission, of the industry, of consumer groups and particularly of the Government that it is appropriate to bring in this Bill to sort out the lack of clarity in the law on representations. We have dealt in Clause 6 with one key warranty matter which is clear. Other warranty matters go far wider than the Bill and it is appropriate for the Law Commission to run its course in looking at that. As I have explained, it will come forward with a consultation dealing with consumer warranties next year, but in the meanwhile, as I have attempted to explain, there is negligible, if any, risk of any consumer detriment as a result of leaving the Bill in its present form. Perhaps I should leave the noble Lord, Lord Eatwell, to answer the noble and learned

Lord's question before we get diverted into other parts of the jungle.

Lord Eatwell: I am grateful to all Members of the Committee who have spoken on this amendment. I think that we have managed to clarify issues. First, it is clear that the ABI bars the use of warranties in consumer insurance contracts. The Minister said that, so I accept his assertion. The second point is—and I think that this is a red herring—that the Law Commission is considering other aspects of warranties in consumer and business contracts.

I say in answer to the noble and learned Lord, Lord Lloyd, that I certainly did not want to misrepresent Mr Hertzell as in some way supporting the position that I was putting forward. I quoted his evidence because it was clear from it that warranties remained an aspect of consumer insurance, other than being introduced through this mechanism; that is, through representations associated with insurance contracts. That is why I drew up my amendment quite precisely. It states:

“No consumer warranties will be associated with a consumer insurance contract”.

It refers only to consumer insurance contracts; it does not go any wider than that. It does not trespass on any future review by the Law Commission; it does not attempt to pre-empt its position; it simply makes it absolutely clear that there will not be warranties associated with consumer insurance contracts. It is quite narrowly drawn in that respect.

Lord Lloyd of Berwick: Mr Hertzell made it quite clear that the Law Commission was not intending to abolish warranties; it was intending only to abolish a form of warranty created by words known as the basis of contract. He said:

“I am sorry if I gave you the impression that we were abolishing them. That is not quite right. What we are abolishing is the ability of the insurer to take down all the information you provide them with at renewal and convert that into a warranty, because a warranty has stricter outcomes”.

It was a particular type of warranty with which the Law Commission at this stage was concerned to abolish. It would be rather worrying if somehow we were abolishing something which the Law Commission has not even considered abolishing. The Committee should be very careful before it accepts the amendment.

Lord Eatwell: The drafting that I have put forward covers the points made by the noble and learned Lord, Lord Lloyd of Berwick. However, this is a matter which we can consider and to which we can return on Report. Simply appealing to Law Commission activities which have not been completed when perhaps they should have been with respect to the drafting of this Bill seems to be kicking something into the long grass which has not been adequately considered. I am not very happy with that, but the objective of this Committee is not

to make me happy but to make better law. On that basis, for the moment, I beg leave to withdraw the amendment.

Amendment 7 withdrawn.

Clause 6 agreed.

Clauses 7 to 11 agreed.

Clause 12: Short title, commencement, application and extent

Amendment 8

Moved by Lord Hodgson of Astley Abbotts

8: Clause 12, page 6, line 6, at end insert—

“() Such date shall not be less than twelve months after the implementation of the provisions of the Retail Distribution Review by the Financial Services Authority.”

Lord Hodgson of Astley Abbotts: My Lords, Clause 12 is concerned with the commencement provisions of the Bill. I want to raise some concerns about them. My amendment is designed to delay implementation until at least 12 months after the implementation of the provisions of the retail distribution review by the Financial Services Authority.

I referred in my opening remarks on Amendment 1 to my chairmanship of a network firm for independent financial advisers. This is an industry which has not always had the highest-possible reputation in the past, but it is now undergoing a revolution in the way that it has to carry out its work. Independent financial advisers will move from commissions to fees; they will be required to pass exams of a certain level; they will have to create a professional relationship with their clients. It is important that this should be carried through successfully because the need for the country to encourage savings is critical. The trigger for these changes is the retail distribution review, which is planned to come into force on 1 January 2013. The sub-trigger is the capital adequacy rules. We therefore have a new level of personal qualification, a new way of conducting business and a need for additional funding. This Bill will add a series of other, admittedly quite minor, straws for this particular camel's back.

My noble friend Lady Noakes raised this issue at Second Reading. My noble friend the Minister wrote back to her on 15 June:

“We cannot, of course, predict the timing of this Bill's progress through Parliament, but it will not come into forces until a date set by the Treasury. This must be at least one year after the Act is passed. It will be for the Treasury to determine the appropriate date for it to come into force”.

6 pm

The critical date is not the date on which the Bill is passed. The critical issue for big and small

firms—this applies to large firms as well—is the date on which RDR comes into force. All the aspects of RDR need to settle down before you bring in further provisions. I hope that the Minister will be able to accept this amendment and, before he pulls the trigger, will have a chance to talk to the British Bankers' Association, IEFA and the various other trade bodies that are concerned with it.

As I have mentioned before, I have taken a certain amount of incoming fire from various bodies during the course of preparation for this amendment. While I was preparing my remarks, my phone went and it was the British Bankers' Association. I thought, "My goodness, what are they going to savage me with now?", but I was delighted that they said, "We're very pleased to see your amendment down and we very much hope that the Minister will be able to accept it because it's important for us as the BBA to have appropriate time to make sure that the changes implied in this particular piece of legislation are factored into the changes that are considered and are going to take place as part of RDR".

With big and small firms facing this revolution in the way that the industry carries out savings and its dealings with customers, I hope that this does not overload the industry—particularly the smaller end of the industry, from my point of view, but clearly the BBA is anxious too. I hope that my noble friend can accept the amendment.

Lord Eatwell: My Lords, the noble Lord, Lord Hodgson, and I have worked closely together in the regulatory sphere in the past, but I am afraid that I must disagree with him on this amendment. As has been argued on many occasions, the reform of consumer insurance is long overdue. The Bill has strong support on all sides, and further delay would really not be appropriate for this legislation. Given the consultation process that the Law Commission has undertaken, I feel that institutions have had sufficient warning that this was on the way and should have had adequate time to prepare for the implications of the legislation.

Lord Sassoon: My Lords, the first thing to recognise is that there should not be a significant burden of implementation as a result of the Bill. Remember that we are trying to achieve codification of best practice precisely because, among other things, those involved do not need to change what they are doing. It is supposed to be in every substantive way what they are doing now. Nevertheless, we have allowed this minimum period of one year from enactment until the Bill comes into force, so those firms that have to make any changes or to review parts of their normal procedures have a significant amount of time.

The effect of the amendment would be to delay implementation until a year after the retail distribution review requirements come into force at the end of 2012, so there could be a significant delay. Some firms may prefer to implement the two requirements separately and others may want to do it as part of the same process.

With regard to the consultation position on this, the joint position statement to the Committee by various consumer groups stated that they would not wish to see the period for implementation extended, given that general insurance products typically renew annually, so even as it stands it will be at least two years after the Act comes into force before all such contracts are subject to the new law. In its written evidence to the Committee, the ABI has also stated that it has no concerns about the projected timeline for the adoption of the Bill.

What the British Bankers' Association is saying to my noble friend is somewhat at odds with what it is saying to us. We have consulted it on this and it did not raise any such issues, but of course we are always happy to listen to more representations at any stage.

I do not accept the need for this amendment. However, I undertake to my noble friend that, both now and in the period up to the Treasury considering the date of implementation for which an order would have to be made by statutory instrument, we will of course continue to take representations from all parts of the industry, and in the light of that we will set the implementation date, whether that be after a year or some time after that. However, the Bill should stay as drafted and not amended, and I ask my noble friend to withdraw his amendment.

Lord Hodgson of Astley Abbotts: I am grateful to my noble friend, particularly for the assurance that he gave about the consultation process continuing as we work towards implementation. Of course it is all very well telling the consumer that it will be two years but the producer, the deliverer, the salesman, the agent and so on will have to start with the new procedures from day one. The effect may be delayed for the consumer but that does not affect those who are providing the service. Nevertheless, I am grateful for his assurance that careful collaborative discussions will take place with the industry so that people are not unduly burdened as we go through this revolution in our savings industry. On those grounds, I beg leave to withdraw the amendment.

Amendment 8 withdrawn.

Clause 12 agreed.

Schedules 1 and 2 agreed.

Bill reported with amendments.

Committee adjourned at 6.06 pm.

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