IAFICO THE INTERNATIONAL ACADEMY OF FINANCIAL CONSUMERS

Vol. 8 No. 1 JUN. 2023

Special Issue on Consumer Protection in Insurance Markets

Contents

www.iafico.org

IRFC The International Review of Financial Consumers Vol. 8 No. 1 / JUN. 2023

IAFICO ISSN 2508-3155 (Print)
ISSN 2508-464X (Online)

IRFC

The International Review of Financial Consumers

Vol. 8 No. 1 Special Issue

JUN. 2023

The International Review of Financial Consumers Editorial Board

Vol. 8 No. 1 JUN. 2023

ISSN 2508-3155 eISSN 2508-464X

The International Review of Financial Consumers

Special Issue on Consumer Protection in Insurance Markets

CONTENTS Vol. 8, No. 1, 2023

The International Review of Financial Consumers, Volume.8 Issue.1(Special Issue, June, 2023), 1-15 pISSN 2508-3155 eISSN 2508-464X
https://doi.org/10.36544/irfc.2023.8-1.1

The International Review of Financial Consumers
www.eirfc.com

The Value of Understandable Consumer Insurance Contracts

Kyle Logue* · Daniel Schwarcz** · Brenda J. Cude†

A B S T R A C T

Insurance consumers, the intermediaries who serve them, and the regulators who protect them all would benefit from understandable consumer insurance contracts. This article outlines the benefits of understandable insurance contracts, identifies the regulatory tools that are or can be used to ensure such comprehensibility, and reviews the existing literature about how well consumers comprehend their insurance policies within the context of personal lines insurance in the U.S. The article concludes by proposing an empirical research strategy to study consumers' understanding of the terms of homeowners insurance policies and, even when they have not read their policies, their expectations about coverage.

Keywords: Insurance policy language, consumer understanding, personal lines insurance

Ⅰ. Introduction

An insurance contract may be the only thing that stands between an individual who suffers a large, unexpected loss and financial ruin. But even if the individual has an insurance policy in force, whether that policy actually covers the loss depends on its precise wording. This conclusion follows from the basic principles of contract and insurance law. Nearly universally across the globe, the plain language of the insurance policy generally determines whether there is coverage, at least assuming that those terms are not ambiguous in the context of a particular claim (American Law Institute, 2019).

The contractual character of insurance policies makes it vital that ordinary consumers be able to read and understand the language in those policies. Yet reading the policy makes little sense for most consumers given that insurers sell their policies on a take-it-or-leave-it basis and the terms of coverage are often—though not always—similar or identical across different insurers (Schwarcz, 2014).[1] In fact, insurance companies usually do not even give customers the insurance policy until the coverage is nearly finalized - when the transaction costs of backing out of the purchase are significant (Ayres & Schwartz, 2014). Moreover, many consumers likely assume that their insurance agent will inform them directly if their policy does not cover something "important."

Even so, comprehensible insurance policies provide at least three essential benefits to insurance consumers. First, such policy language enhances the capacity of the small subset of individuals who do read insurance policies to understand the terms of coverage (Schwarcz, 2007).

† Professor Emeritus, Department of Financial Planning, Housing and Consumer Economics, University of Georgia, bcude@uga.edu
* Douglas A. Kahn Collegiate Professor of Law, University of Michigan Law School, klogue@umich.edu
** Fredrikson & Byron Professor of Law, University of Minnesota Law School, schwarcz@uminn.edu

[1] In the United States, the homogeneity of property/casualty insurance policy terms is a byproduct of insurers' historical reliance, in part or in full, on policy forms that the Insurance Services Office (ISO) drafts and updates. The ISO is a commercial entity that provides a variety of services to the insurance industry, including policy language.

Second, understandable insurance policies allow for consumers to meaningfully assent to the policy terms even if they choose not to read that policy (Boardman, 2009). Third, insurance policy language that consumers can read and understand can promote fair and efficient claims payments when insureds suffer a loss (van Boom et al., 2016).

Thus, clear and comprehensible insurance policy language is an essential consumer protection goal in all personal lines insurance markets. Yet many informed observers have expressed skepticism about the success of legal and regulatory strategies intended to produce insurance policies that are comprehensible to ordinary consumers, or even reasonably well-trained insurance specialists (Boardman, 2006; French, 2017). However, remarkably little empirical research has examined whether strategies to produce comprehensible policy language have been effective. The limited empirical evidence that is available has mostly been conducted by industry or journalists and has focused predominantly on consumers' understanding of coverage in general, without any investigation of how this general understanding is impacted by the actual insurance policy that defines the scope of coverage (Metz, 2022; Nationwide, 2013).

This article thus aims to examine the value of comprehensible insurance policy language as a critical consumer protection goal. Section II more fully reviews the potential benefits of insurance policy language that consumers can understand. We introduce four categories of insurance consumers - coverage realists, coverage agnostics, coverage pessimists, and coverage optimists - and discuss the potential market problems associated with each category. Section III describes the various tools that law and regulation use to attempt to achieve comprehensible insurance policy language. Section IV reviews the limited empirical evidence regarding how well consumers understand the scope of their insurance coverage generally, and how well they can understand communications, including insurance policies, related to such coverage in particular. Section V describes a strategy to empirically test consumer understanding of insurance policy language and factors that influence that understanding, including whether consumers are coverage realists, agnostics, pessimists, or optimists. Section VI concludes. The focus throughout the article is personal lines homeowners' insurance policies in the U.S., though much of the discussion is applicable to other insurance policies as well as to countries across the globe.

Ⅱ. The Value of Comprehensible Insurance Policies

A. Promoting Consumer Understanding of Coverage

Insurance policies that consumers can comprehend tend to promote consumer understanding of coverage for several reasons. First, while most consumers do not read their insurance policies at the time of purchase (Ayers & Schwartz, 2014; Bakos et al., 2014; Ben-Shahar & Schneider, 2014; Hillman & Rachlinski, 2002), some do. Comprehensible language should improve the understanding of what is covered and what is not for those few individuals who do take the time to read their policies. It could also increase the number of consumers who would attempt to read their policies in the first place. Second, and arguably more important, considerably more consumers will read their policies, at least the key terms in their policies, if they suffer a loss and file a claim, especially one that their insurer denies. A consumer has an obvious interest in understanding the basis for an insurer's claim denial. What is more, state law typically requires insurers to give the policyholder the precise basis for any claim denial decision, including a reference to the specific language in the policy that forms the basis for that denial (Schwarcz, 2014). In such situations, the insured is more likely to know if they have a basis to contest a denied claim if the policy language on which the insurer relies is comprehensible than if it is opaque or confusing (Boardman, 2009; van Boom et al., 2016).

Third, even if most consumers do not read their policies, others do, including market intermediaries, consumer advocates, academics, sophisticated consumers, lawyers, judges, and regulators. The more comprehensible the language is to those individuals, the better able they will be to spotlight potentially unreasonable coverage restrictions and to explain the terms of coverage to others, including to unsophisticated consumers (Schwartz & Wilde, 1983).

When consumers do not understand the language in their insurance policy, their expectations about what the policy covers are likely to diverge from reality. This can lead to a myriad of potential distortions in insurance markets, ranging from insufficient protection against risk to excessively priced coverage to increased moral hazard.[2]

To better appreciate the potential for these distortions,

Table 1. Categories of consumer expectations about insurance coverage

Consumer Expectations of Coverage at Purchase	Coverage Realist	Coverage Agnostic	Coverage Pessimist	Coverage Optimist
Potential Market Problems Associated with Coverage Expectations	n.a.	n.a.	n.a.	Overpricing Risk
	n.a.	n.a.	Moral Hazard Risk	Moral Hazard Risk
	n.a.	Restrictive Policy Terms Risk	Restrictive Policy Terms Risk	Restrictive Policy Terms Risk
	n.a.	Inadequate Protection Risk	Inadequate Protection Risk	Inadequate Protection Risk

we organized consumer expectations about insurance policy coverage into four categories, each of which raises distinct consumer protection concerns (See Table 1). Ayres and Schwartz (2014) used the concepts of optimism and pessimism in a way that is similar to, but not precisely the same as, the way we use these terms in this article; otherwise, the categories are original to us. Although our approach neatly sorts consumers' expectations about their insurance coverage into four categories, it is also possible that consumers' beliefs vary across different settings, such as the type of coverage at issue.

First, consumers' coverage expectations might be roughly accurate. That is, insured consumers who have not read or understood their policies may have expectations that tend to coincide with the reality of what the policy language covers. We call such individuals "coverage realists." Second, insured consumers may have no expectations whatsoever regarding whether their insurance covers any particular loss (Thomas, 1998), a group we call "coverage agnostics." Third, insured consumers may be "coverage pessimists" in that they assume that their policy *will not* cover their losses, *even when the policy terms indicate coverage*. Finally, some insured consumers may assume that their insurance policy *will cover* losses that befall them, *even when the terms of the policy state otherwise*. We label these individuals "coverage optimists."

The last of these four categories - coverage optimists - presents the most significant potential problems for insurance markets. First there is the possibility of over-priced coverage. That is, a coverage optimist may be willing to pay premiums that reflect their mistaken expectation that the policy will cover a loss it will not. Ayres and Schwartz (2014) have suggested that consumer optimism can lead to overpriced insurance policies, especially in the absence of market competition. Although competition among insurers would help to offset this risk, this advantage is undermined by consumers who tend not to comparison shop once they initially select coverage, a specific manifestation of the well-known status quo bias (Samuelson & Zeckhauser, 1988). Insurers that can identify these policyholders using either conventional predictive models or more modern tools that rely on big data or artificial intelligence can exploit their coverage optimism by increasing their rates.

Second, and alternatively, if competition forces insurers to price their policies at roughly marginal cost, coverage optimists might actually *not* be paying for coverage that they *believe* they have. Then coverage optimism can cause consumers to believe (from their *ex-ante* perspective although not from the consumer's *ex post* perspective nor from the insurer's perspective) that insurance policies are underpriced as they think their policy covers more than it does. Underpriced coverage, in this narrow and specific sense, can be a cause for concern, because it can worsen a particular type of moral hazard (Baker, 1996).

Consider a homeowner who lives on a coastline and believes their homeowners policy covers certain catastrophic weather-related damage to their home when it does not. Some of these consumers may be more likely to build or purchase homes in this area than they would have been had they (i) not had insurance or (ii) been forced to purchase insurance that was priced to cover the risk. Thus, as in this example, coverage optimism can drive a wedge between the actual cost and perceived cost of insurance, thereby incentivizing socially wasteful construction in high-risk areas or similar forms of moral hazard (Ben-Shahar & Logue, 2016).

Yet a third potential problem with coverage optimism is that it can create perverse incentives for insurers to either limit the coverage they provide or fail to expand that coverage to reflect new risks. Even in relatively

[2] A moral hazard occurs when there is an incentive for someone to change their behavior depending on whether or not they are insured.

non-competitive insurance markets, insurers generally have good incentives to design policies to provide the types of coverage for which consumers would be willing to pay. By contrast, when consumers are coverage optimists, insurers are unlikely to suffer commensurate market penalties if they choose to hollow out their coverage or not to adapt that coverage to reflect new risks (Schwarcz, 2012). So long as consumers remain coverage optimists despite these changes (or failure to adapt), insurers can save money on claims payments without suffering decreased demand for their coverage. Even more perniciously, insurers in competitive markets composed of coverage optimistic consumers can be compelled by market forces to hollow out or fail to adapt coverage; failure to do so if their competitors are adopting this strategy can result in losing customers to those competitors who offer better prices.

The fourth, and perhaps most serious, concern with coverage optimism is that it can cause individuals to suffer life-changing financial disasters that they might have avoided either by changing their behavior (say, not building their homes so close to the coast) or by purchasing a separate insurance policy that in fact covered the loss. A coverage optimist who believes their existing insurance policy covers a particular catastrophic loss when in fact it does not has no incentive to shop for or pay the additional premium to purchase a separate policy that would in fact cover that loss (Schwarcz, 2014). Then, if a catastrophic loss happens, the individual could lose the entire value of the equity in their home, along with all of their personal possessions. In other words, coverage optimism can lead not only to a misallocation of resources (houses being built where they should not be) but also to substantial financial disasters.

At least some of the four potential costs of coverage optimism - (i) over-pricing, (ii) moral hazard, (iii) restrictive policy terms, and (iv) inadequate risk protection - can also exist when consumer understanding of insurance policy terms is inaccurate in other ways. For instance, coverage agnosticism can almost certainly cause the latter two consumer protection harms. When consumers simply do not have concrete expectations about the coverage they purchase, insurers will be able to profit in the short term by unreasonably restricting or failing to adapt their specific terms of coverage. Moreover, although coverage agnostic individuals have few specific expectations regarding their coverage, they might still be willing to pay for additional coverage were they to become aware of its costs and benefits (Thomas, 1998).

Like coverage agnosticism, coverage pessimism can also plausibly result in excessively restrictive policy terms and inadequate risk protection. When consumers believe that insurers will not pay for coverage that is explicitly provided for in their policies, they are unlikely to respond to market innovations, such as policies with expanded coverage. This, in turn, creates strong incentives for insurers to hollow out their coverage, which can then compel other insurers to follow suit. The prospect of inadequate risk protection for coverage pessimistic consumers is even more straightforward: if consumers do not expect insurers to pay for the coverage that their policies provide, then they will have little reason to pay for all of the coverage that they would want if they had more confidence in their insurers. Further, because coverage pessimism can persist at the claims stage, it can result in a consumer deciding not to file a claim when the loss in question would in fact be covered (Sommers, 2021). This possibility can exacerbate other insurance market problems. For example, if insurers come to expect that their insureds will not file claims for certain types of covered losses (owing to coverage pessimism), there is increased pressure for the coverage price to not fully reflect risk, causing potential moral hazard.

All of these insurance market problems, which can result when consumers do not understand the language in their insurance policies, can be ameliorated if even a small number of market intermediaries do understand that language (Schwartz & Wilde, 1983). For example, an insurance broker who understands a policy's coverage can educate their customers about that coverage. Likewise, they can steer consumers away from insurers who tend to write especially unclear or one-sided policies, which creates a disincentive for insurers to engage in that practice (Schwarcz, 2014). Also, a state insurance regulator who understands a given insurance policy's terms is in a better position to police the terms of that policy's coverage (Schwarcz, 2017).

B. Promoting Meaningful Assent

Although the vast majority of consumers may never read their insurance policies, courts nevertheless regularly enforce unambiguous insurance policy terms. This is be-

cause there is a meaningful sense in which consumers can be said to have assented to those terms (at least the not patently unreasonable or socially objectionable ones) notwithstanding having never read them, so long as they had an opportunity to read those terms. This idea, sometimes understood as the concept of "blanket assent," plays an important role in the modern justification for enforcing standard form contracts, including insurance contracts (Llewelyn, 1960; Rakoff, 1983). But the blanket assent principle is strongest when the terms of the contract are not only unambiguous but also comprehensible; otherwise, consumers never had a meaningful initial opportunity to read those terms in the first place, meaning that their decision not to do so was, in fact, not a choice at all (Radin, 2012).

C. Promoting Fair Claims Handling

Policyholders can be vulnerable to insurers' unfair claims-handling practices. By the time the loss has occurred, and the insurer is contractually obligated to pay the claim (assuming it is covered), the policyholder has no other option to cover the loss; once the loss happens, it is uninsurable (American Law Institute, 2019). If the insurer unreasonably delays or denies the claim, the policyholder faces a possible financial catastrophe. This possibility is reduced insofar as the policy terms on which the insurer bases its denial decision are clear and comprehensible (Boardman, 2009; Schwarcz, 2017).

As previously mentioned, even if consumers do not read their policies at the time of purchase, they are much more likely to do so when there is a large loss followed by a claim denial. This is especially true when state law requires the insurer to identify the policy language that formed the basis of the denial decision. The risk of an unreasonable claim denial or delay is reduced when the relevant policy language is clear and comprehensible because of the availability of extra-contractual damages when insurers violate their coverage obligations in bad faith (Schwarcz, 2017). Also, if an insurer were to deny a claim notwithstanding clear and comprehensible policy language requiring coverage, they would risk prompting regulatory scrutiny under the state's unfair claims handling practices laws (Schwarcz, 2017).

Ⅲ. Legal and Regulatory Strategies to Promote Consumer Understanding

Given the value of comprehensible insurance policies, it is no surprise that U.S. insurance law and regulation seek to promote this goal, as do laws and regulations in other countries (see, for example, van Boom et al. (2016) for a discussion of European Union rules instructing financial services providers to communicate in a "clear, fair and non-misleading way"). Although the specific approach varies across states, most jurisdictions embrace one or more of at least five distinct tools to promote transparent insurance policies in personal lines markets. Three of these - quantitative readability rules, qualitative readability standards, and mandated disclosures - are implemented via statute and/or regulation. The remaining two - *contra proferentem* and the reasonable expectations doctrine - are legal doctrines that courts implement.

A. Quantitative Readability Rules

Most states in the U.S. require that certain insurance policies meet minimum "readability" standards (Schwarcz, 2014). In the U.S, only Kansas, Mississippi, Utah, and Washington do not have such laws (Blasie, 2022). In many cases, state laws require that personal lines policies - such as homeowners and auto policies - meet specific quantitative thresholds based on readability formulas, such as the Flesch-Kincaid Grade Level formula or the Flesch Reading Ease Test (Blasie, 2022). These tests use objective features of documents, specifically word and sentence length, to estimate the difficulty individuals would have comprehending a written document (Cogan, 2010). The specific scores that insurance policies must meet under these laws vary by state, and sometimes even within states across different types of insurance policies (Blasie, 2022). Compliance with quantitative rules (vs. standards) is relatively easy to assess and enforcement can be achieved through straightforward strategies (Kaplow, 1992), such as insurers' affirmations to regulators of compliance with applicable requirements.

B. Qualitative Readability Rules

In addition to quantitative readability requirements, many states have laws requiring that personal lines insurance policies meet qualitative readability requirements. Often, these requirements are stated in law and regulation at an extremely high level of generality, requiring, for instance, that insurance policies be written in "plain language" or "plain English" (Blasie, 2022). Sometimes, these broad concepts are explained a bit more fully. A Minnesota law, for instance, requires insurance policies to "use policy and contract forms which are written in simple and commonly used language, which are logically and clearly arranged, which are printed in a legible format, and which are generally understandable" (Readability of Insurance Policies Act, 2022).

Because of the high level of generality of qualitative readability standards (vs. rules), the mechanisms by which they are enforced are crucial in determining their ultimate impact (Kaplow, 1992). In virtually every state, this enforcement occurs principally through the form filing process, under which insurers must file with state insurance departments copies of any new policies or endorsements they wish to offer in the marketplace.[3] In many cases, state regulators must approve these policy forms before they can be sold to consumers ("prior approval"), though a non-trivial number of states allow filed policies to be sold if they are not disapproved after a specified period of time ("file and use"). Some states allow insurers to use a policy form if it is filed within a specified period of time thereafter ("use and file") (Abraham & Schwarcz, 2022; Cope, 2022; Tucker, 2009). Some states explicitly authorize state regulators to disapprove a personal lines insurance policy if it is "misleading," "ambiguous," or "confusing" (Cope, 2022; Schwarcz, 2014). And, of course, state regulators generally have the power to disapprove of any form that does not comply with state laws, including laws that require those policies to be written in "plain language." According to state insurance regulators, these rules ensure "that [insurance consumers'] rights and responsibilities, and those of the insurance company, are clearly stated" (NAIC, 2010).

[3] States often have various exemptions from form filing requirements for large commercial risks. Also, in the majority of states, an Interstate Insurance Product Regulatory Commission (n.d.), not the state regulator, approves life, annuity, disability income, and long-term care insurance products.

C. Mandated Disclosures

Many states mandate via statute or regulation that insurers provide consumers with a variety of disclosures at some point during the insurance purchase and renewal process. These disclosures give consumers information about a range of insurer practices, including insurers' privacy policies (NAIC, 2017) and usage of specific rating and underwriting factors (see, e.g., Disclosure of Credit Reports, 2022; General Rules Governing Insurance, 2011; Private Passenger Automobile Liability Policy; Disclosure; Requirements, 2001). They also commonly alert consumers to the availability of state guarantee funds that protect against insurer insolvency (NAIC, 2018). In most cases, however, these mandated disclosures do not attempt to highlight or summarize particularly important insurance policy terms or conditions (Schwarcz, 2014). Instead, in personal lines auto and homeowners insurance, the policy itself, including the declarations page, is the only information that insurers are typically required to provide to consumers about the scope of their coverage. By contrast, ERISA - a federal law governing employee benefit plans, including plans that deliver insurance benefits - requires plans to provide consumers with a "summary plan description," which must "be written in a manner calculated to be understood by the average plan participant" and be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan" (Summary Plan Description, 1974).

To be sure, there are occasional exceptions to these generalizations, where states do indeed mandate disclosures pertaining to the scope of coverage in insurance policies not covered by ERISA or other federal laws. For instance, many states require property insurers to disclose exclusions for flood or earthquake (see California Earthquake Authority, 2018) (earthquake); Flood Insurance Notice, 2007) (mudslide or flood); Notice Regarding Earthquake Exclusion, 2012) (earthquake); Notice Regarding Flood Damage Coverage, 2013 (flood); Required Disclosures for Residential Homeowner Policies, 2013 (flood). The distinguishing features of these exclusions are that consumers can typically purchase supplemental coverage specific to the excluded perils through public insurance programs. A handful of states also require disclosure of other types of specific insurance policy terms in personal lines insurance policies, such as an auto insurance policy's

coverage of rental vehicles (Personal Automobile Insurance, Rental Vehicle Coverage, 2019). Finally, and most significantly, at least two states - Colorado and New Jersey - require insurers to provide a summary disclosure that offers a simple explanation of the policy's major coverages and exclusions as well as its terms governing cancellation and nonrenewal (Customer Information Brochure for Homeowners Insurance consumers, 2013; Summary Disclosure Forms Required, 2019).

Outside the U.S. the German implementation of the European Union Directive 2002/92/EC to Advise and Disclose requires insurance agents to give consumers "fact sheets" before they apply for coverage. The fact sheets describe the insurance product and its insured and excluded risks, as well as the amount and timing of premium payments and ways to cancel the contract. However, the disclosures appear to have had limited impact on consumer understanding, in part because the information in and the format of the fact sheets are not standardized. The information is often delivered electronically, and the consumer may never see it (Schwarzbach & Weston, 2016).

D. Contra Proferentem

In addition to regulatory and statutory strategies that promote consumer comprehension of insurance policies, several key judicial doctrines of insurance law also are intended in significant part to promote this goal. The most important such doctrine is *contra proferentem*, or the rule that ambiguities in insurance policies are interpreted against the insurer, which Abraham (1996) has been described as the central principle of insurance law. Insurance policy language is ambiguous under this doctrine when it is reasonably susceptible to two or more meanings in the context of a specific coverage dispute (American Law Institute, 2019). The central rationale for this interpretive principle is that it incentivizes insurers to draft unambiguous policy language to avoid unfavorable judicial rulings in coverage disputes (Boardman, 2013). This clarity of policy terms, it is often assumed, can help to promote policyholders' understanding regarding the scope of their coverage (Abraham & Schwarcz, 2022).

E. Reasonable Expectations Doctrine

Another familiar rule of insurance law that is intended in part to promote more comprehensible insurance policies is the reasonable expectations doctrine, which has been the subject of a large and often critical literature (Abraham, 1981). Although few states now endorse a strong version of the doctrine that would allow them to disregard the unambiguous meaning of policy language (American Law Institute, 2019), a non-trivial number of states continue to consider policyholders' reasonable expectations of coverage when interpreting policy language and assessing whether that language is ambiguous. In most cases, this merely amounts to interpreting policy language as an ordinary consumer unschooled in the details of insurance would understand it (*Burton v. Ky. Farm Bureau Mut. Ins. Co.*, 2010). In rare cases, courts go a bit further, insisting that the doctrine allows them to disregard policy language that is "overly technical or contains hidden pitfalls, cannot be understood without employing subtle or legalistic distinctions, is obscured by fine print, or requires strenuous study to comprehend" (*Zacarias v. Allstate Insurance Company*, 2021).

Like the ambiguity rule, a central rationale for the reasonable expectations doctrine is that it can promote comprehensible insurance policy language. It can accomplish this, the thinking goes, by discouraging language that is excessively complex or hyper-technical. Under the more common weaker version of the doctrine, courts would be more likely to deem such language ambiguous, and hence to construe it in favor of coverage. By contrast, under the stronger - though increasingly rare - version of the doctrine, consumers might even be entitled to the coverage they believe they bought, irrespective of whether they read or understand their policy (Schwarcz, 2007).

Ⅳ. Existing Evidence Regarding Consumers' Understanding of Their Insurance Coverage

Despite the regulatory and legal importance of consumer understanding of their insurance policies, there is remarkably limited empirical evidence on point. This evidence can be subdivided into two basic categories: (i)

Empirical academic studies related to consumer understanding of insurance coverage and (ii) Industry or regulatory assessments of consumers' understanding of insurance coverage.[4]

A. Empirical Academic Studies Related to Consumer Understanding of Insurance Coverage

Only a handful of academic studies have empirically assessed consumers' understanding of insurance coverage outside the health insurance setting (Kirsch, 2002). The most relevant of these is a study using data from an online survey to evaluate the impact of a Dutch insurance company's changes to the terms of an auto insurance policy. The changes were voluntarily undertaken to improve the policies' readability but not to alter the scope of coverage (van Boom et al., 2016). Participants in the study were first given a basic coverage scenario involving an auto accident. They were then asked to assess their coverage rights based on either the pre-revision or the post-revision policy. In a follow-up study, participants were also given a coverage denial letter.

The survey provided some evidence that the insurer's efforts to craft a more readable policy impacted consumers' capacity to understand their coverage and to pursue payments of contested claims. Survey participants who were provided with the revised and more readable version of the insurer's policy reported they found it easier to understand than did participants who received the original version of the policy. Perhaps more significantly, survey participants given the more readable policy expected a larger claim payment, on average, than did participants who received the less readable policy. Curiously, however, the study found mixed evidence regarding the relationship between policy readability and participants' willingness to contest coverage (as opposed to their expectations of coverage). On one hand, survey participants who saw a claim denial letter were more likely to seek information from their insurer, family, and friends, and to initiate legal proceedings or formal complaints to the extent that they expected a relatively large portion of their claim to be covered. On the other hand, however, the study found no direct relationship between the readability of the insurance policy that consumers saw and their willingness to challenge the insurers' claim denial (van Boom et al., 2016).

A second much earlier study did not directly examine consumer understanding of policy language but instead evaluated the effectiveness of disclosures. Formisano (1981) concluded that mandated life insurance disclosures cannot fully inform consumers about their coverage at the time of purchase. The study evaluated the NAIC's Model Solicitation Regulation, which required insurers to provide purchasers of life insurance with both a generic life insurance buyer's guide and a policy summary sheet describing key details about the specific policy being purchased. These details included the annual premium, death benefits, and cash value, among others. The study's author conducted interviews with almost 200 life insurance consumers several months after they had purchased coverage. The majority of those interviewed did not recall receiving a buyer's guide, and only about 30% reported that they looked at the buyer's guide during the sales process. A higher percentage - about two-thirds - recalled receiving a policy summary sheet. A significant number were not able to correctly identify basic features of their policies or to answer basic questions about life insurance more generally. Importantly, however, the study did not compare understanding among consumers who received disclosures against those who did not, meaning there are significant limitations in interpreting its results.

A third relevant study also did not directly examine consumer understanding of policy language. Solan et al. (2008) evaluated survey respondents' analysis of two hypothetical insurance loss scenarios, finding that respondents were equally likely to conclude that coverage would be provided in uncovered scenarios as in covered scenarios. The study design asked respondents to determine whether insurance would cover situations described in vignettes implicating a pollution exclusion in a liability insurance policy and an earth movement exclusion in a property insurance policy. In each case, respondents were split into an insurance version (where coverage would be available) and an exclusion version (where coverage would not be available). The study found no significant difference in how respondents assessed

[4] We used a variety of search tools and queries to identify studies relating to consumer understanding of insurance coverage. In particular, we searched for relevant results using Google, Google Scholar, Westlaw, and Lexis. We also reviewed all of the studies we were able to locate in this fashion to identify the sources they relied upon, as well as any newer studies that we were able to identify.

the likelihood of coverage in the insurance and exclusion versions for both the pollution and earth movement scenarios. Solan et al. also found that respondents significantly overestimated the extent to which their interpretations of the two scenarios would be shared by others. This result, moreover, applied not only to ordinary study participants but also to a group of state and federal judges who took a similar survey.

Importantly, the primary aim of the Solan et al. study was not to measure how well respondents understood policy language. Instead, the researchers sought to assess the extent to which respondents disagreed with one another and overestimated the extent to which their interpretations would be shared by others. As such, one of the two vignettes did not include any actual policy language, while the second included only a single relevant line of policy language. And in both cases, the vignettes provided subjects with simplified explanations of the applicable policy language. A recent study extended Solan et al.'s methodology and reported "considerable unexplained variation" in the respondents' interpretations of policy language (Waldon et al., 2023).

In contrast to the dearth of academic evidence regarding consumer understanding of property/casualty and life insurance products, a significant body of academic research evaluates consumers' understanding of health insurance products (see, for example, Kim et al., 2013 and Loewenstein et al., 2013) and concludes that consumers have a very poor understanding of their health insurance coverage. Much of this research, moreover, evaluates the effectiveness of efforts to improve understanding through mechanisms such as simplifying policy choices or disclosures (Consumers Union, 2012; Day & Nadash, 2012; Kingsdale, 2010). Unfortunately, the unique economic and regulatory features of U. S. health insurance markets make it hard to extrapolate from these studies to other insurance contexts. Health insurance products are more salient for most consumers than other insurance products, are used by consumers much more consistently than other types of insurance products, are governed by a different set of state and federal laws than other insurance products and are either principally sold in the U.S. through state-based insurance exchanges or provided as an employee benefit.

Several academic studies have evaluated the effectiveness of insurance-based disclosures regarding topics other than the scope of coverage provided by a non-health insurance policy. For instance, one study used focus groups to examine the effectiveness of several mandated insurance disclosures concerning policyholder privacy rights, rights to guarantee fund protection should a life insurer become insolvent, and the risks of replacing existing life insurance or annuity products with substitutes (Cude, 2006). Cude reported that most respondents had trouble understanding the disclosures and did not tend to read them at the time of purchase. Another study evaluated the effect of oral disclosures regarding insurance agents' commissions or the ratio of expected payout to premiums. deMeza et al. (2010) found that these disclosures had virtually no effect on subjects' purchasing decisions in a high-stakes experiment.

Additionally, some empirical research has examined the impact on insurance policies of legal strategies designed to promote insurance policy transparency. For instance, one recent study found that insurers crafted much of the language in modern homeowners insurance policies to clarify policy language that courts had found ambiguous (Schwarcz, 2020). The same study also found that this has, over time, resulted in significantly lengthier and more detailed policy language, a result that may have the perverse effect of impeding consumers' ability to understand the basic elements of coverage. Moreover, there are well-known examples where court determinations that policy language was ambiguous have not induced insurers to redraft policy language (Boardman, 2006; Boardman, 2013; French, 2017).

Outside of the insurance context, numerous studies have investigated how well consumers understand other types of financial contracts, such as mortgages and auto finance agreements. The literature on efforts to improve consumer understanding through disclosures, consumer education, and more readable contracts is also wide ranging (Adler, 2012; Garrison et al., 2012; Lacko & Pappalardo, 2010; McElvaney et al., 2018). Overall assessments of how well such policy interventions can work are, however, mixed. Some notable commentators have persuasively argued that most studies find limited evidence that mandated disclosures significantly improve consumer understanding (Ben-Sharar & Schneider, 2014). Others have reached similar conclusions regarding efforts to promote consumer financial literacy (Willis, 2008). By contrast, some commentators offer a more hopeful evaluation of the evidence, even while recognizing that mandated disclosure and consumer education often fail to achieve their goals. These commentators emphasize that certain types

of smart disclosure strategies that are empirically tested and developed are indeed effective in some settings, even if they rarely, if ever, can fully achieve regulatory goals (Bar-Gill, 2015; Bertrand & Morse, 2011).

B. Industry and Regulatory Studies Related to Consumer Understanding of Insurance Coverage

In addition to academics, other actors, such as insurers, popular media outlets, and state regulators, have conducted a number of studies about insurance policy language. For instance, a recent *Forbes* survey of 2,000 U.S. homeowners found that the majority have basic misconceptions regarding their coverage. In some cases, they were unaware that their insurance covered certain risks (Metz, 2022). More than two-thirds of respondents were unaware that their policy included liability insurance protection if their dog bit someone else or their child kicked a ball through a neighbor's window. In many other cases, though, consumers believed they were covered for risks that homeowners' policies typically exclude. For instance, 40% of respondents wrongly believed that a standard homeowners policy covers earthquake damage and 36% wrongly believed that it covers flood damage. Various similar surveys conducted by regulators and insurance companies have found that sizable percentages of consumers have erroneous general understandings of insurance, not realizing, for instance, that homeowners policies do not generally cover the risk of earthquake and flood (Boardman, 2009).

One industry survey suggests that this persistent consumer confusion about insurance coverage may be linked to the complexity and length of insurance policies. A 2013 survey commissioned by Nationwide Insurance found that about 40% of respondents reported having read their current insurance policy in its entirety in the year prior to the survey, and only about 20% reported that they completely understood the details in the insurance policy they purchased (Nationwide, 2013). Survey respondents were much more likely to describe their policies as "too long," "confusing," "complicated," or "overwhelming" than to describe them as "clear," "simple," or "easy to understand." However, the survey did not ask respondents to examine an insurance policy, either their own or a sample policy.

Ⅴ. Empirical Research to Assess Consumer Understanding of Insurance Coverage

Empirical tests of the research questions posed in the previous sections could take multiple forms. However, we propose a two-prong approach involving both quantitative and qualitative research using data from consumers who own homeowners insurance policies. The first quantitative stage of this inquiry could consist of a survey of a nationally representative sample. An initial set of survey questions could ask respondents about their homeowners insurance policy - how they bought their current policy (e.g., online, from an agent, from an insurance app, by phone, etc.), the type of homeowners insurance policy (as well as whether they have supplemental policies such as earthquake, flood, and umbrella liability coverage), the sources of information they relied upon when they bought their current policy, their experience with filing claims, and whether they have ever read their current policy and, if so, when and why, and if not, why not.

A survey could then explore how well respondents understand insurance policy language by asking two groups of respondents to assess whether a homeowner's policy would cover losses described in several different vignettes. One group of respondents could be asked to predict the likelihood of coverage in these vignettes without seeing any relevant insurance policy language, while the second set of respondents could be asked to answer the same questions with the aid of the applicable policy language. One key question that could be addressed using this approach would be the extent to which giving survey respondents relevant policy language improves the accuracy of their coverage assessments or their confidence in those assessments. More specific analysis could then be conducted regarding whether changes in respondents' coverage assessments resulting from access to policy language were correlated with their experiences with homeowners insurance; the sophistication of the policy language; whether the respondents are coverage realists, agnostics, pessimists, or optimists; and their demographic characteristics.

Another quantitative approach might assess the impact of disclosures on consumer understanding of their insurance policies. Sunstein (2010) described disclosures as "highlight(ing) the most relevant information in order

to increase the likelihood that people will see it, understand it, and act in accordance with what they have learned." Online experiments in which consumers are shown policy language with and without disclosures designed to call their attention to the most relevant information could be used to test the disclosures' effectiveness. The disclosures could be specific; for example, a disclosure could highlight an important exclusion in the policy and be linked to the relevant policy language. Or the disclosures could be summary disclosures, such as the ones required in Colorado and New Jersey (Customer Information Brochure for Homeowners Insurance Consumers, 2013; Summary Disclosure Forms Required, 2019). In either case, the disclosure would be tested with consumers before being used in the research to ensure that the format and content are designed to maximize consumer understanding.

A second, qualitative stage of the research could usefully supplement the quantitative data by generating more textured information about how consumers respond to and attempt to digest insurance policies. During this second stage, researchers could conduct cognitive interviews in which interviewees are asked to review a sample homeowners insurance policy and "think out loud" as they read and attempt to understand the policy. Initial interview questions could ask the interviewees to provide generalized reactions to the policy, and to note what portions of the policy seem particularly notable or important. Interviewees could then be asked to consider whether the policy would cover a series of specific losses, including some of the scenarios used in the survey research, and to explain their reasoning. For each coverage scenario, interviewees could first be asked to locate the relevant language within the policy. To the extent that interviewees have difficulties with this task, they could then be directed to the relevant language by the interviewer.

While the above proposals are focused on evaluating consumer understanding of insurance policy language in general, researchers could also attempt to assess the impact of different versions of policy language by integrating variations into either the qualitative or the quantitative stages of the study, or both. For example, respondents could be shown policy language that experts consider more or less readable, as in van Boom et al.'s (2016) study. It would be less important, in our view, to assess how variations across different regulatory settings or jurisdictions might impact consumers' understanding of policy language. Although regulatory rules and enforcement do indeed vary across states (as described above), there is limited evidence that these variations produce meaningful differences with respect to the comprehensibility of policy language. In fact, virtually all insurers adjust to state-specific regulatory requirements governing their policies not by altering the language in their base policy, but instead by adding state-specific endorsements to these policies. Consumers face significant challenges deciphering the impact of these amendatory endorsements because they typically amend various specific provisions within the base policy (Schwarcz, 2012).

Ⅵ. Conclusions

For individuals who suffer a sudden catastrophic loss, the most important contract in their lives may be an insurance policy. Because courts in the vast majority of cases enforce the language of policies as written, the precise meaning of policy terms can be critical. Focusing on the example of personal lines insurance in the U.S., this article explains why it is critical that the language in insurance policies be comprehensible (not only to consumers but, perhaps more important, to various intermediaries), identifies the regulatory tools that are or can be used to ensure such comprehensibility, reviews the existing literature about how well consumers comprehend their insurance policies, and proposes a new strategy to study consumers' understanding of the terms of homeowners insurance policies and, even when they have not read their policies, their expectations about coverage. In subsequent work, we will attempt to carry out this research strategy.

References

Abraham, K. S. (1981). Judge-made law and judge-made insurance: Honoring the reasonable expectations of the insured. *Virginia Law Review, 67*(6), 1151-1199.

Abraham, K. S. (1996). A theory of insurance policy interpretation. *Michigan Law Review, 95*(3), 531-569.

Abraham, K. S., & Schwarcz, D. (2022). The limits of

regulation by insurance. *Indiana Law Journal, 98*(1), Article 5. https://www.repository.law.indiana.edu//cgi/viewcontent.cgi?article=11481&context=ilj

Adler, M. (2012). The plain language movement. In P. M. Trersma & L. M. Solan (Eds.), *The Oxford handbook of language and law* (pp. 67-83). Oxford University Press.

American Law Institute. (2019). *Restatement of the law of liability insurance (RLLI)*. American Law Institute Publishers.

Ayres, I., & Schwartz, A. (2014). The no-reading problem in consumer contract law. *Stanford Law Review, 66*(3), 546-548.

Baker, T. (1996). On the genealogy of moral hazard. *Texas Law Review, 75*(2), 237-292.

Bakos, Y., Marotta-Wurgler, F., & Trossen, D. R. (2014). Does anyone read the fine print? Consumer attention to standard-form contracts. *Journal of Legal Studies, 43*(1), 1-35.

Bar-Gill, O. (2015). Defending (smart) disclosure: A comment on more than you wanted to know. *Jerusalem Review of Legal Studies, 11,* 75-82. http://doi.org/10.1093/jrls/jlu017

Ben-Shahar, O., & Logue, K. (2016). The perverse effects of subsidized weather insurance. *Stanford Law Review, 68*(3), 571-626.

Ben-Shahar, O., & Schneider, C. (2014). *More than you wanted to know: The failure of mandated disclosure*. Princeton Press.

Bertrand, M., & Morse, A. (2011). Information disclosure, cognitive biases, and payday borrowing. *The Journal of Finance, 66*(6), 1865-1893. https://www.jstor.org/stable/41305179

Blasie, M. A. (2022). The rise of plain language laws. *University of Miami Law Review, 76*(2), Article 4, 447-524.

Boardman, M. (2009). Insuring understanding: The tested language defense. *Iowa Law Review, 95*(4), 1075-1124.

Boardman, M. E. (2006). Contra proferentem: The allure of ambiguous boilerplate. *Michigan Law Review, 104*(5), 1105-1128.

Boardman, M. E. (2013). Penalty default rules in insurance laws. *Florida State University Law Review, 40*(2), 305-348.

Burton v. Ky. Farm Bureau Mut. Ins. Co., 326 S.W.3d 474, 476 (Ky. Ct. App. 2010).

California Earthquake Authority, Cal. Ins. Code § 10089.28 (2018). https://law.justia.com/codes/california/2018/code-ins/division-2/part-1/chapter-8.6/section-10089.28/

Cogan, J. R., Jr. (2010). Readability, contracts of recurring use, and the problem of ex post judicial governance of health insurance policies. *Roger Williams University Law Review, 15*(1), Article 4. https://docs.rwu.edu/cgi/viewcontent.cgi?article=1420&context=rwu_LR

Consumers Union. (2012). *What's behind the door? Consumers' difficulties in selecting health plans.* https://advocacy.consumerreports.org/research/whats-behind-the-door-consumer-difficulties-selecting-health-plans/

Cope, C. (2022). Regulation of policy forms. In J. E. Thomas (Ed.), *New Appleman on insurance law library edition*). Lexis-Nexis.

Cude, B. J. (2006). Insurance disclosures: An effective mechanism to increase consumers' insurance market power? *Journal of Insurance Regulation, 24*(2), 57-80. https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/3888

Customer Information Brochure for Homeowners Insurance Consumers, N.J.S.A. 17:36-5.36. (2013). https://law.justia.com/codes/new-jersey/2013/title-17/section-17-36-5.36

Day, R., & Nadash, P. (2012). New state insurance exchanges should follow the example of Massachusetts by simplifying choices among health plans. *Health Affairs, 31*(5), 982-989. http://doi.org/10.1377/hlthaff.2011.0691

de Meza, P. E., Irlenbusch, B., & Reymers, D. J. (2010). *Disclosure, trust and persuasion in insurance markets*. IZA Discussion Paper No. 4060. https://www.iza.org/publications/dp/5060/disclosure-trust-and-persuasion-in-insurance-markets

Disclosure of Credit Reports, Colo. Rev. Stat. Ann. § 10-4-616 (2022). https://casetext.com/statute/colorado-revised-statutes/title-10-insurance/property-and-casualty-insurance/article-4-property-and-casualty-insurance/part-6-automobile-insurance-policy-regulations/section-10-4-616-disclosure-of-credit-reports

Flood Insurance Notice, N.Y. INS. LAW § 3444 (2007). https://codes.findlaw.com/ny/insurance-law/isc-s

ect-3444.html

Formisano, R. A. (1981). The NAIC Model Life Insurance Solicitation Regulation: Measuring the impact in New Jersey. *Risk and Insurance, 48,* 59-79. http://www.bonknote.com/wp-content/uploads/1981-AP-Formisano-FTC-Life-Insurance-Disclosure-22p.pdf

French, C. C. (2017). Insurance policies: The grandparents of contractual black holes. *Duke Law Journal Online, 67.* https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1027&context=dlj_online

Garrison, L., Hastok, M., Hogarth, J. M., Kleimann, S., & Levy, A. S. (2012). Designing evidence-based disclosures: A case study of financial privacy notices. *Journal of Consumer Affairs, 46*(2), 204-234. https://doi.org/10.1111/j.1745-6606.2012.01226.x

General rules Governing Insurance, Cal. Ins. Code § 489 (2011). https://law.justia.com/codes/california/2011/ins/division-1/480-491/489/

Hillman, R. A., & Rachlinski, J. J. (2002). Standard-form contracting in the electronic age. *New York University Law Review, 77*(1), 429-495.

Interstate Insurance Product Regulatory Commission. (n.d.). *The Interstate Compact.* https://content.naic.org/sites/default/files/government-affairs-brief-about-insurance-compact.pdf

Kaplow, L. (1992). Rules versus standards: An economic analysis. *Duke Law Review, 42*(1), 557-629. https://scholarship.law.duke.edu/dlj/vol42/iss3/2/

Kim, J., Braun, B., & Williams, A. D. (2013). Understanding health insurance literacy: A literature review. *Family and Consumer Sciences Research Journal, 42*(1), 3-13. https://doi.org/10.1111/fcsr.12034

Kingsdale, J. (2010). Health insurance exchanges: Key link in a better-value chain. *New England Journal of Medicine, 362*(23), 2147-2150. http://doi.org/10.1056/NEJMp1004758

Kirsch, L. (2002). Do product disclosures inform and safeguard insurance policyholders? *Journal of Insurance Regulation, 20*(3), 271-295. https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/1959

Lacko, J., & Pappalardo, J. (2010). The promise of mandated consumer mortgage disclosures: Evidence from qualitative interviews and a controlled experiment with mortgage borrowers. *American Economic Review, 100*(21), 56-521. http://doi.org/10.1257/aer.100.2.516

Llewelyn, K. N. (1960). *The common law tradition - Deciding appeals.* Little Brown.

Loewenstein, G., Friedman, J. Y., McGill, G., Ahmad, S., Linck, S., Sinkula, S., Beshears, J. L., Choi, J. J., Kolstad, J., Laibson, D. I., Madrian, B., List, J. A., & Volpp, K. G. (2013). Consumers' misunderstanding of health insurance. *Journal of Health Economics, 32*(5), 850-862.

McElvaney, T. J., Lunn, P. D., & McGowan, F. P. (2018). Do consumers understand PCP car finance? An experimental investigation. *Journal of Consumer Policy, 41,* 229-255. http://doi.org/10.1016/j.jhealeco.2013.04.004

Metz, J. (2022, May 3). 72% of homeowners don't understand essential home insurance coverage. *Forbes.* https://www.forbes.com/advisor/homeowners-insurance/survey-homeowners-insurance-knowlege/National Association of Insurance Commissioners. (2010). A consumer's guide to home insurance

National Association of Insurance Commissioners. (2010). *A consumer's guide to home insurance.* https://content.naic.org/sites/default/files/publication-hoi-pp-consumer-homeowners.pdf

National Association of Insurance Commissioners. (2017). *Privacy of consumer financial and health information regulation.* https://content.naic.org/sites/default/files/model-law-672.pdf

National Association of Insurance Commissioners. (2018). *Life and health insurance guaranty association model act.* https://content.naic.org/sites/default/files/inline-files/MDL-520.pdf

Nationwide. (2013, September 26). *Consumers confused, overwhelmed by their insurance policies, according to survey.* https://www.benzinga.com/pressreleases/13/09/b3944738/consumers-confused-overwhelmed-by-their-insurance-policies-according-to

Notice Regarding Earthquake Exclusion, Va. Code Ann. § 38.2-2129 (2012). https://law.lis.virginia.gov/vacode/title38.2/chapter21/section38.2-2129/

Notice Regarding Flood Damage Coverage, N.J. ADMIN. CODE § 11:1-5.5 (2013). https://www.state.nj.us/dobi/division_consumers/insurance/floodreq.htm

Personal Automobile Insurance, Rental Vehicle Coverage, ME. REV. STAT. TIT. 24-A, § 2927 (2019). http://www.mainelegislature.org/legis/statutes/24-a/title24-Asec2927.html

Private Passenger Automobile Liability Policy; Disclosure; Requirements, Neb. Rev. Stat. Ann. § 44-7516.01 (2001). https://casetext.com/statute/revised-statutes-of-nebraska/chapter-44-insurance/article-75-property-and-casualty-insurance-rate-and-form-act/section-44-751601-private-passenger-automobile-liability-policy-disclosure-requirements

Radin, M. (2012). *Boilerplate: The fine print, vanishing rights, and the rule of law*. Princeton: Princeton University Press.

Rakoff, T. D. (1983). Contracts of adhesion: An essay in reconstruction. *Harvard Law Review, 96*(6), 1173-1284.

Readability of Insurance Policies Act, Minn. Stat. § 72C.02 (2022). https://www.revisor.mn.gov/statutes/cite/72C.02

Required Disclosures for Residential Homeowner Policies, 702 DEL. CODE REGS. § 5 (2013). https://regulations.delaware.gov/AdminCode/title18/700/702.shtml

Samuelson, W., & Zeckhauser, R. (1988). Status quo bias in decision making. *Journal of Risk and Uncertainty, 1*(1), 7-59. https://www.jstor.org/stable/41760530

Schwarcz, D. (2007). A products liability theory for the judicial regulation of insurance policies. *William & Mary Law Review, 48*(3), 1389-1463. https://scholarship.law.wm.edu/wmlr/vol48/iss4/5/

Schwarcz, D. (2012). Reevaluating standardized insurance policies. *University of Chicago Law Review, 78*(4), 1263-1348. https://chicagounbound.uchicago.edu/uclrev/vol78/iss4/3/

Schwarcz, D. (2014). Transparently opaque: Understanding the lack of transparency in insurance consumer protection. *UCLA Law Review, 61,* 394-462. https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1582&context=faculty_articles

Schwarcz, D. (2017). Coverage information in insurance law. *Minnesota Law Review, 101,* 1457-1527. https://www.minnesotalawreview.org/wp-content/uploads/2017/04/Schwarcz.pdf

Schwarcz, D. (2020). The role of courts in the evolution of standard form contracts: An insurance case study. *Brigham Young University Law Review, 46,* 471-572. https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3285&context=lawreview

Schwartz, A., & Wilde. L. (1983). Imperfect information in markets for contract terms: The examples of warranties and security interests. *Virginia Law Review, 69*(8), 1387-1485. http://doi.org/ 10.2307/1072774

Schwarzbach, C., & Weston, H. (2016). Limitations of German insurance disclosures to improve consumer understanding, with lessons for U.S. insurance practices. *Journal of Insurance Regulation, 35*(8), 1-28. https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/23497

Solan, L., Rosenblatt, T., & Osherson, D. (2008). False consensus bias in contract interpretation. *Columbia Law Review, 108*(5), 1268-1300. https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1275&context=faculty

Sommers, R. (2021). Contract schemas. *Annual Revenue of Law and Social Science, 17*, 293-308. http://doi.org/10.1146/annurev-lawsocsci-040721-103558

Summary Disclosure Forms Required, COLO. REV. STAT. § 10-4-111 (2019). https://codes.findlaw.com/co/title-10-insurance/co-rev-st-sect-10-4-111/

Summary Plan Description, ERISA § 1022(a), (1974). https://www.law.cornell.edu/uscode/text/29/1022

Sunstein, C. (2010). *Disclosure and simplification as regulatory tools. Memorandum for the heads of executive departments and agencies.* https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf

Thomas, J. E. (1998). An interdisciplinary critique of the reasonable expectations doctrine. *Connecticut Insurance Law Journal, 5*(1), 295-334. https://irlaw.umkc.edu/faculty_works/589

Tucker, R. L. (2009). Disappearing ink: The emerging duty to remove invalid policy provisions. *Akron Law Review, 42*(2), Article 6, 519-477. https://ideaexchange.uakron.edu/akronlawreview/vol42/iss2/6/

van Boom, W. H., Desmet, P., & van Dam, M. (2016). “If it’s easy to read, it’s easy to claim” - The effect of the readability of insurance contracts on consumer expectations and conflict behavior. *Journal of Consumer Policy, 39,* 187-197. http://doi.org/10.1007/s10603-016-9317-9

Waldon, B., Brodsky, M., Ma, M., & Degena, J. (2023). *Predicting consensus in legal document interpretation* (Stanford University Working Paper).

Willis, L. (2008). Against financial literacy education. *Iowa Law Review, 94*(1), 197-286. https://www.res

earchgate.net/publication/285717001_Against_Financial-Literacy_Education
Zacarias v. Allstate Insurance Company, 775 A.2d 1262 (NJ, 2021).

Received/ 2022. 10. 27
Revised/ 2023. 01. 27
Accepted/ 2023. 05. 23

The International Review of Financial Consumers, Volume.8 Issue.1(Special Issue, June, 2023), 17-31 pISSN 2508-3155 eISSN 2508-464X
https://doi.org/10.36544/irfc.2023.8-1.2

The International Review of Financial Consumers
www.eirfc.com

Consumer Grievance Redress in Indian Insurance Markets*

Vimal Balasubramaniam** · Aishwarya Gawali*** · Renuka Sane**** · Srishti Sharma*****

A B S T R A C T

We present results from a first-ever representative survey of five major Indian states to measure consumer grievances in Indian insurance markets. We document the lifecycle of the grievance redress process for life, health, vehicle and agricultural insurance products. Despite high resolution rates by insurance companies, consumers choose not to complain for an array of reasons. Insurance consumers prefer exiting insurance products rather than entering the redress process, suggestive of high transaction costs in redressing insurance grievances.

Keywords: consumer protection, grievance redress and insurance

Ⅰ. Introduction

Consumer protection has become an important pillar of the financial regulatory reform process (Tennyson, 2010). Due to market failures such as information asymmetry, market externalities and differences in bargaining power of consumers and Financial Service Providers (FSPs), there is an acute need for well-designed consumer protection systems (Financial Sector Legislative Reforms Commission, 2013). Information asymmetry in insurance markets stems from a variety of sources. Firstly, insurance contracts have complex contractual language and the nature of claim payments is contingent. Additionally, the service is provided in the future and consumers have a wide variety of products which have varying degrees of prices and product features. When tools for price comparison are not commonly available, consumers find it difficult to determine the price and quality of the insurance product. The consumer has to account for several factors when purchasing an insurance product which includes the price, coverage details, and what constitutes an insured event. While such information asymmetry is common in most markets, there is evidence to suggest that it plays out most visibly in insurance markets because of the cognitive limitations and psychological biases in consumers' risk decisions (Tennyson, 2010).

The consequences of not addressing market failure increase as the size of the market grows. In the wake of the Covid-19 pandemic, the health insurance market in particular received a shot in the arm with premiums growing at 16% year-on-year (LiveMint, 2020a). Similarly, for life insurance, insurance penetration rose from 2.82% in 2019 to 3.2% in 2020 which is close to the global average (The Economic Times, 2022a). However, this influx of policyholders is occurring in a country that lacks financial literacy as only 28% of the

* The authors would like to thank the Academy of Management Studies(AMS) for their support on sampling, data collection and field operations.
** Senior Lecturer, Queen Mary University of London and CEPR, London, England, vimsaa@gmail.com
*** Researcher, National Institute of Public Finance and Policy, New Delhi, India, aishwarya.gawali@gmail.com
**** Associate Professor, National Institute of Public Finance and Policy, New Delhi, India, renukas@gmail.com
***** Ph.D. Candidate, Boston University, Boston, MA, USA, stsharma@bu.edu

population is financially literate. As a result, consumers are unable to make decisions, and there is an undue reliance on insurance agents and advisors (Ankitha & Basri, 2019). This has led to rampant mis-selling of poorly designed products which has led to the loss of billions of dollars over the years (Halan, Sane, & Thomas, 2014). In addition to problems with consumer literacy and awareness, the market is growing in a regulatorily weak and fragmented space where consumers are required to approach different agencies depending on the nature of the problem (Task Force on Financial Redress Agency, 2016).

In order to systematically monitor the status of consumer protection in the country, the following sources of information are important: data on industry trends, regulator information, and consumer complaints. While an examination of the Grievance Redressal Mechanism (GRM) processes of *firms* in the industry suggests that there is long way to go in terms better GRM practices studying other jurisdictions reveals that there is much scope for improvement in the *design* of GRMs (Balasubramaniam, Sane, Sarah, & Suresh, 2021). The examination of regulator information on grievance redress, together with complaints data from other sources, suggests that there is a under-reporting of grievances (Balasubramaniam, Sane, & Sharma, 2022) (Balasubramaniam, Sane, Biswas, & Sarah, 2020). It is therefore a systematic enquiry into consumer complaining behaviour that requires much deeper analysis and study. Previous work in this area was for limited geographical regions. This study expands that scope by studying five major states of India and attempts to provide a comprehensive picture of consumer complaining behaviour.

The paper proceeds as follows. Section II presents an overview of the insurance industry in India and the current Grievance Redress Mechanisms. It presents regulator level information on the number of complaints received and resolved. Section III presents information on the sampling and study design. Section IV provides summary statistics of our survey. Section V presents our estimates of the incidence of grievances. Section VI examines the consumer's journey through the grievance redress process. Section VII reports the reasons why consumers don't complain after facing an issue, Section VIII shows the impact of a grievance on the process of usage, and Section IX concludes.

Ⅱ. Insurance Markets in India

A. Insurance Landscape in India

Before 1956, India had a primarily private insurance market and little government intervention. In 1956 and 1972, life insurance and general insurance respectively, were nationalized. As part of the liberalization reforms of 1991, the Committee on Reforms of the Insurance Sector (Malhotra Committee) recommended that the insurance markets be opened up to private participation which was eventually implemented in 2000. At this stage, foreign ownership was restricted to 26% but in 2021, the Finance Ministry notified that 74% foreign investment would be allowed in insurance sector firms (Sinha, 2005) (Hindu Business Line, 2021).

When it comes to regulation, the main regulator is the Insurance Regulatory and Development Authority of India (IRDAI) and it performs the duties of *regulating, promoting and ensuring the orderly growth of the insurance and reinsurance business* which includes a broad spectrum of activities apart from just regulation and supervision. It has been tasked with the growth role because the Act that constituted this body envisioned it to be a catalyst in the development of the insurance industry in a time when there was very low penetration of insurance (Working Group on Insurance, Pensions and Small Savings, 2013). To this end, the IRDAI has announced its vision for Insurance For All by 2047 (Insurance Regulatory and Development Authority of India, 2022b).

However, the primary roles of the regulator include prudential and consumer protection related regulation. While there is much written about the rigidity on the solvency and capital requirement aspects of prudential regulation, there is not enough literature from the consumer's perspective on the consumer protection front. Studying this becomes especially important, as insights from such studies can help identify shortfalls in regulation and eventually fill these gaps.

Examining the insurance industry from the consumer lens has already helped identify one of the most serious problems in the industry, which is mis-selling. The case of mis-selling of bundled products such as Unit Linked Insurance Plans (ULIPs) has cost investors billions of rupees (Halan et al., 2014). This was a result of high front loaded commissions, high costs and poor disclosures

(The Leap Blog, 2016). To address this issue, a government-appointed committee recommended that bundled products should not have any front loaded commissions. Additionally it also suggested practicing regulatory arbitrage such that for bundled products, the insurance component is regulated by the insurance regulator and the investment component by the investment regulator (Bose Committee Report, 2015). On the bundled products front, Asset Management Companies (AMCs) have been barred from selling ULIPs and insurance companies have been asked to offer a standard, non-investment linked term insurance plan which is a move in favour of simplifying consumer choices by providing them with a plan that has straightforward disclosure terms and singularity of purpose (LiveMint, 2020b).

In addition to this regulatory approach to consumer protection, another consumer driven solution is to improve financial education in the system. There is evidence to suggest that interventions in improving financial education lead to better insurance purchasing decisions and the absence of such interventions leads to poorer choices. An informed base of consumers, combined with a regulatory environment that puts consumers first has the potential to minimize the extent of issues such as mis-selling (Balakina, Balasubramaniam, Dimri, & Sane, 2021).

Another consumer centric perspective to the insurance industry comes from examining the quality of insurance products from consumer complaints. Measuring product quality by studying the extent of consumer complaints goes beyond the standard metrics of financial inclusion and incorporates the actual usage experience of the consumer. A study of the health insurance industry in India showed that when measured using consumer complaint metrics, the quality of products is substantially inferior to other jurisdictions with similar legal systems. With an understanding of the insurance space in India we now focus to understanding the current consumer protection framework (Malhotra, Patnaik, Roy, & Shah, 2018).

B. Current Grievance Redressal System

In India, the grievance redress system works broadly at two levels. At the first level, when a consumer faces a grievance, they are expected to lodge a complaint with the FSP. In the event that this complaint is not resolved within 15 days or the consumer is unhappy with the resolution, they can escalate the complaint to the regulator IRDAI. This is the second level of the GRM process. This escalation can be done through four channels: (1) Call toll free Number; (2) Send an e-mail to dedicated email address; (3) Use IRDAI's online portal Integrated Grievance Management System (IGMS); (4) Send a letter to IRDAI with the complaint with due documents. Additionally, all these channels have been rationalised under the Bima Bharosa platform which a gateway for registering and tracking grievances online. The new portal is an industrywide grievance repository for the IRDAI to monitor disposal of grievances by insurance companies (IRDAI, 2022a).

The above table indicates that a large chunk of the

Table 1. Reported Statistics of Incidence of Grievances

	Reported during the year	Attended during the year	Pending at the end of the year
Life Insurer			
LIC	109,631	112,454	29
Private	41,415	41,286	153
Life Insurer Total	151,046	153,740	182
General Insurer			
Public Sector	21,192	21,456	378
Private Sector	26,825	26,421	433
General Insurer Total	48,017	47,877	811
Grand Total	199,063	201,617	993

This table documents the number of grievances received by the Insurance Regulatory and Development Authority(IRDAI) at the all-India level. This data is from the IGMS and also includes those complaints received by the Insurance Ombudsman. Source: Annual Reports of the IRDAI, 2021.

escalated complaints are resolved when it comes to life insurance. For general insurance, a significantly larger chunk of complaints remains unresolved. Within general insurance, private sector companies have more unresolved complaints than the public sector. These numbers however, do not paint a true picture of the extent of grievances as they do not capture grievances that didn't turn into complaints. Consumers may not complain to the FSP in the first place, or get dissuaded by their experience at the FSP to not escalate further (Balasubramaniam et al., 2022).

Ⅲ. Study Design

A. Sampling Design

The survey was conducted in 5 major states of India, namely Andhra Pradesh, Bihar, Haryana, Madhya Pradesh and Maharashtra. We covered a total of 21,355 respondents across 27 districts in 5 states. A multi-stage stratified sampling strategy was employed. Census 2011 served as the sampling frame (Office of the Registrar General And Census Commissioner, 2011). All the districts in a state were divided into terciles on the basis of distribution of households availing banking services curated from the RBI data1 across four quarters of 2020-21 (Reserve Bank of India, 2021). Ensuring proportionate distribution in each tercile, two district were picked from each tercile using systematic random sampling.

In the states of Maharashtra, Bihar & Haryana, one district accounted for a substantial proportion of deposits. In this case, one district was sampled from the tercile and then split into two clusters. Thus in Maharashtra, Bihar & Haryana we sampled 5 districts and in Andhra Pradesh and Madhya Pradesh we sampled 6.

The village was the Primary Sampling Unit (PSU) for rural areas and the Census Enumeration Blocks (CEBs) were the PSU for the urban areas. The number of PSUs to be selected from each district was decided on the basis of number of districts sampled from the state. If 6 districts were sampled, 10 PSUs were selected per district and if 5 districts were sampled 20 PSUs were selected. PSUs were allocated between rural and urban areas proportionately with respect to population.

For selecting PSUs in rural areas, the villages were stratified into 3 groups, based on distance to District Headquarters/Urban Centres. After this, the population proportion of each stratum as a percentage of the district's rural population was calculated and the number of villages to be selected from each stratum was decided based on this proportion. Thus, the villages were selected from each stratum using circular systematic random sampling approach.

For selecting PSUs in urban areas, first, the ULBs were stratified using select variables. A complete list of ULBs with critical details for each district was drawn from Census 2011. The ULBs were stratified into 3 groups, based on population proportion of ULB as a percent of the district's urban population. This proportion was calculated for individual ULBs, and then they were allocated to a stratum ensuring that all three strata have roughly equal population (33%). In cases where a single ULB accounted for a very high population proportion, the division was either non-proportionate or the ULBs were divided into only two strata. The required CEB information was obtained from the Office of the Registrar General and Census Commissioner, New Delhi. Each CEB comprised of about 150-200 households.

After this, population proportion of each stratum as a percentage of the district's urban population was calculated. The number of ULBs to be selected from each stratum was decided based on this proportion using circular systematic random sampling approach. Once the ULBs were sampled, the decided number of CEBs were randomly selected. We selected 70 households from every PSU by circular systematic random sampling approach. First, the field team selected a unit r (random start) at random from all the N units of the population, then every kth unit was selected in a circular manner, using a right-hand-start method, until the desired sample size n was obtained. Here k was taken as an integer nearest to N/n.

B. Survey Instrument

The survey instrument consisted of seven modules. The modules focused on capturing information about demographics, participation in financial markets, asset and liability profile of household. The core module focused on the respondent's usage of financial products, their experience with grievances, actions taken, reasons for

taking or not taking actions and experience of resolution. Additionally, we capture information on the respondent's risk and time preferences and cognitive abilities.

The interview begins with capturing a detailed profile of the respondent's household where we collect information on the basic demographic profile of the household, ownership of physical and financial assets, and their liability portfolio. In the module on the grievance redress, we begin by asking whether respondent has used a financial product. If they have used it, we go on to ask if they have faced any issue or grievance with respect to the product. We then ask them about when they faced the issue, the nature of the issue, whether they registered a complaint, the status of any such complaint and the impact of the grievance on their usage of the product. The next modules focus on understanding respondents' preferences with respect to risk taking and patience. We also capture certain personality related traits along with the dynamics of financial decision making in the household. A detailed description of the questionnaire is given in Table A2 of the Appendix.

Pilots were conducted in each state and the instrument was revised while incorporating the experience of the pilots. The survey was conducted using Computer Assisted Personal Interviews (CAPI) and this was available in the regional languages in which the survey was conducted. These were Hindi, Marathi and Telugu. Surveyors were trained extensively, with multiple rounds of training and mock interview sessions being conducted separately in each state. The surveyors were made familiar with the research agenda, the details of the instrument and any other nuances required to administer the questionnaire. On an average, an interview took between 30 and 40 minutes.

Ⅳ. Data

Table 2 describes the data from our survey. When we look at the age of the sample, we see that respondents are largely within the age of 31-50 years. The large majority of households have 3-5 members and report having an annual household income of between INR 1 and 3 lakhs. Almost 40% of the respondents have finished education up to 10th standard. Respondents' occupation is heteroge-

Table 2. Descriptive Statistics

Variable	Observations	Percent
Age		
18-30	5,386	25.22
31-40	6,972	32.65
41-50	5,067	23.73
51-65	3,350	15.69
65+	580	2.72
No of family members		
1-2	4,058	19.00
3-5	13,698	64.14
6 or more	3,599	16.85
Education level		
Illiterate	5,539	25.94
Less than 5th grade	1,446	6.77
Up to 10th grade	8,210	38.45
12th grade pass	2,964	13.88
College or more	3,196	14.97
Annual family income		
Less than Rs.1 lakh	9,514	44.55
Rs.1 lakh - Rs. 3 lakh	8,574	40.15
Rs.3 lakh - Rs.6 lakh	2,411	11.29
Rs.6 lakh - Rs.10 lakh	285	1.33
Above Rs.10 lakh	35	0.16
Did not answer	536	2.51
Occupation		
Cultivation/Agriculture	2,962	13.87
Own business	3,732	17.48
Salaried employee	4,184	19.59
Wage Labour	5,431	25.43
Not working	5,046	23.63
Financial products		
Banking	17,521	82.05
Payments	8,951	41.92
Securities	620	2.90
Pensions	622	2.91
Insurance products		
Any insurance product	4,596	23.21
Life	3,154	14.76
Health	1,510	7.07
Crop	617	2.88
Vehicle	1,894	8.86

This table provides a summary of the sample. It provides the distribution of age, household size, education level, occupation and family income. It also presents participation rates of different financial markets.

neous where 17% of respondents have their own business, 25% are engaged in wage labour and about 20% are salaried employee.

In terms of participation in financial markets, 82% reported having used banking products. Banking products constitute banking deposits and bank credit. 41% of the sample has used a payment system. This means that the respondent has used either an ATM/Debit card, Immediate Mobile Payment Service (IMPS), National Electronic Funds Transfer (NEFT), Real-Time Gross Settlement (RTGS) system or any Unified Payment Interface (UPI) wallets, or all of the above. 23% of the sample reports having some kind of insurance, about 3% has pension and securities products. Within the insurance category, 14.76% people have life insurance, 7% have health insurance, 2.8% has crop insurance and 8.86% has vehicle insurance. The details of the state-wise distribution of the sample are available in the Appendix.

In addition to overall sample characteristics, we also show the usage of the four insurance products in our sample, by age, gender, income, education, occupation and location. Table 3 provides an overview of the same.

Table 3. Usage Patterns of Insurance Products

Variable	Life Insurance	Health Insurance	Crop Insurance	Vehicle Insurance
Gender				
Male	1732 (54.9%)	804 (53.2%)	384 (62.2%)	1181 (62.4%)
Female	1423 (45.1%)	706 (46.8%)	233 (37.8%)	713 (37.6%)
Age				
21-30	696 (22.1%)	338 (22.4%)	115 (18.8%)	507 (26.8%)
31-40	1263 (40.0%)	608 (40.3%)	191 (31.0%)	670 (35.4%)
41-50	786 (24.9%)	355 (23.5%)	168 (27.2%)	436 (23.0%)
51-65	369 (11.7%)	174 (11.5%)	125 (20.3%)	247 (13.0%)
65+	40 (1.3%)	35 (2.3%)	17 (2.8%)	34 (1.8%)
Education				
Illiterate	379 (11.7%)	121 (8.0%)	87 (14.1%)	161 (8.5%)
Less than 5th grade	119 (3.8%)	42 (2.8%)	40 (6.5%)	83 (4.4%)
Up to 10th grade	1028 (32.6%)	409 (27.1%)	270 (43.8%)	627 (33.1%)
12th grade pass	589 (18.7%)	291 (19.3%)	115 (18.6%)	391 (20.6%)
College or more	1048 (33.2%)	647 (42.8%)	105 (17.0%)	632 (33.4%)
Occupation				
Cultivation/Agriculture	306 (9.7%)	171 (11.3%)	279 (45.2%)	285 (15.0%)
Not working	618 (19.6%)	295 (19.5%)	118 (19.1%)	370 (19.5%)
Own business	802 (25.4%)	363 (24.0%)	88 (14.3%)	505 (26.7%)
Salaried employee	1123 (35.6%)	599 (39.7%)	96 (15.6%)	576 (30.4%)
Wage Labour	305 (9.7%)	82 (5.4%)	36 (5.8%)	158 (8.3%)
Family income				
Less than Rs.1 lakh	625 (19.8%)	258 (17.1%)	236 (38.2%)	385 (20.3%)
Rs.1 lakh - Rs. 3 lakh	1365 (43.3%)	617 (40.9%)	237 (38.4%)	924 (48.8%)
Rs.3 lakh - Rs.6 lakh	990 (31.4%)	511 (33.8%)	113 (18.3%)	478 (25.2%)
Rs.6 lakh - Rs.10 lakh	137 (4.3%)	67 (4.4%)	15 (2.4%)	66 (3.5%)
Above Rs.10 lakh	9 (0.3%)	12 (0.8%)	2 (0.3%)	11 (0.6%)
Did not answer	28 (0.9%)	45 (3.0%)	14 (2.3%)	30 (1.6%)
Location				
Rural	895 (28.4%)	368 (24.4%)	465 (75.4%)	693 (36.6%)
Urban	2259 (71.6%)	1142 (75.6%)	152 (24.6%)	1201 (63.4%)

We find that men use all the four products more than women. Respondents in the age group of 31-40 years form the biggest share of users for all four products. When we look at the educational background of the users, we see that for life, health and vehicle insurance most users are undergraduates. Crop insurance users, however only educated up to 10th standard (matriculation). Over 50% of life, vehicle and health insurance users are salaried or have their own business. In the case of crop insurance, it follows that close to half the users are engaged in cultivation and allied agriculture activities. Users are concentrated in the INR 1 lakh to 3 lakh category for all the products.

Ⅴ. Incidence of Grievances

Table 4 shows the incidence of grievance in our sample. We find that life insurance has the highest *number* of grievances and crop insurance has the highest *%* of grievances as a proportion of total users. Specifically, 26% of crop insurance users faced a grievance followed by 10% of life and health insurance users.

Table 5 shows the incidence of grievances by state and insurance product. The (N) column represents the number of grievances for a given product in a state. The (%) column shows the proportion of users in that state who reported having a grievance. When we look at how these are spread across the states, we find that Maharashtra accounts for about 41% of all life insurance grievances. This is followed closely by Andhra Pradesh which accounts for 30%.

Additionally, the table shows us that about 23.86% of life insurance users in Andhra Pradesh have faced a grievance and 11.31% of users in Maharashtra reported that they faced an issue regarding life insurance. For health insurance, the maximum number of grievances is reported in Maharashtra, but the largest proportion of grievances is in Andhra Pradesh. For crop insurance as well, Maharashtra and Andhra Pradesh report high number and proportion of grievances. In the case of vehicle insurance, Andhra Pradesh accounts for a very large proportion of the grievances as 20% of vehicle insurance users in the state have experienced a grievance.

Table 4. Incidence of Grievances

	Life Insurance	Health Insurance	Crop Insurance	Vehicle Insurance
Usage				
N	3154	1510	617	1894
%	14	7	2	8
Grievances				
N	345	164	162	161
%	10	10	26	8

This table presents the incidence rates of grievances i.e. total grievances as a percentage of the total users of the product. N represents number of users of the product. % represents total grievances divided by number of users of the product.

Table 5. Incidence of Grievances by State

State	Life Insurance		Health Insurance		Crop Insurance		Vehicle Insurance	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Andhra Pradesh	105	23.86	88	29.53	66	33.00	86	20.14
Bihar	44	8.07	1	1.82	10	18.18	0	0.00
Haryana	6	2.13	2	1.21	5	10.20	3	1.20
Madhya Pradesh	47	7.54	10	3.55	21	14.00	33	5.06
Maharashtra	143	11.31	63	8.87	60	36.81	39	9.58

This table presents the state wise incidence rates of grievances i.e. total grievances in the state as a percentage of the total users of the product. N represents number of users of the product. % represents total grievances divided by number of users of the product.

Table 6. The Nature of Grievances

Type of Insurance	Claim related	Fraud by agent	Misselling	Process related	Did not answer	Total
Life	65 (19%)	63 (18%)	47 (14%)	134 (39%)	36 (10%)	345
Health	72 (44%)	15 (9%)	25 (15%)	21 (13%)	31 (19%)	164
Crop	67 (41%)	9 (5%)	16 (10%)	41 (25%)	29 (18%)	162
Vehicle	67 (42%)	5 (3%)	45 (28%)	29 (18%)	15 (9%)	161

While the above table gives us an idea of the extent of grievances, Table 6 allows us to understand what kind of grievance it is. We categorize the nature of grievances four segments. They are as follows:

1. Mis-selling: Mis-selling in the insurance industry is a well-documented phenomenon and primarily stems from the conflict of interest that exists in distribution of retail financial products (Halan et al., 2014). Mis-selling can be of various kinds sometimes customers don't understand the policy well and the agent is unable to explain the nuances, given the overly complicated structure of insurance-cum-savings plans and sometimes the agents deliberately mislead the customers into buying the wrong plan (LiveMint, 2019).
2. Fraud by agent: Agents may issue fraudulent policies or commit any deceiving action deliberately with the intention of making financial gains for themselves.
3. Process related: This category includes issues such as not getting refunds and dues on time after policy closure, installment related issues, processing delays and not receiving appropriate documents.
4. Claim related: This category includes any difficulty or delays in getting claims, rejection of claims or incomplete disbursement of claims.

We find that process related issues are the most common for life insurance users. This is followed by claim related issues and fraud. The prominence of process related issues goes to show that there are gaps in the systems that FSPs use which leads to consumers facing procedural delays and lack of transparency. A change in the internal working processes of FSPs will help ameliorate this issue. Mis-selling and fraud are more serious issues as they exhibit glaring issues with the behaviour of the staff at FSPs. These require changes at the regulatory level. For all other insurance products, claim related issues seem to be most common followed by mis-selling.

It is important to remember that grievances reflect the consumer's perception of the situation. The asymmetry of information in the market for insurance products makes it harder to identify what kind of information exchange has happened between the FSP and consumer and the extent of transparency in any given transaction. For example, the consumer may think that high charges were deducted, and report a transaction related issue. However, it might be that in reality the FSP may have misled the consumer to believing that no charges would be deducted (Balasubramaniam et al., 2022).

Ⅵ. From Grievance to Complaints

What matters most in case of grievance redress is the conversion of a grievance into a complaint, and then the resolution of the same. In the following section we study the pattern of users who faced grievances to see how many complained and how many obtained resolution. We also examine at what stage they got the resolution (if any). Before we present these results, it is important to note the definition of complaint, resolution and escalation rates. Complaint rate signifies the proportion of respondents with a grievance who complain to the FSP. Resolution rate (at FSP stage) signifies the proportion of respondents whose complaints were resolved by the FSP. At the escalated stage, it signifies the proportion of people who reported that their complaint was resolved by a higher authority. Escalation rate is the proportion of people who escalated their complaint to a higher authority after it remained unresolved after the first complaint.

Table 7 shows the experiences consumers of insurance had with the grievance redress process. It presents the statistics of the life-cycle of a grievance : from owning the product to initiation of grievance till the resolution by the higher authority.

In the case of life insurance, we see that 42% of those

Table 7. The Process of Grievance Redress

Products	Own the product	Had a grievance	Complained to FSP	Resolved by FSP	Escalated to higher authority	Resolved by higher authority
Life	3154	345	145	103	11	6
Health	1510	164	90	68	4	3
Crop	617	162	51	28	6	4
Vehicle	1894	161	82	45	9	5

This table presents the statistics of the life-cycle of a grievance : from owning the product to initiation of grievance till the resolution by the higher authority

who faced a grievance complained to the FSP. Of these, 71% received resolution at the FSP level and 28% did not. Of those who did not receive resolution, 26% users escalated the complaint to a higher authority and 71% did not. Of those who escalated, 54% got a resolution from the higher authority. Complaint rates (to FSPs) range between 31% (crop insurance) and 54% (health insurance) and FSP resolution rates range between 54% (vehicle and crop insurance) and 75% (health insurance). The escalation rates vary between 18% (health insurance) and 26% (life and health insurance). Resolution rate at the stage when complaint reaches a higher authority lies between 54% (life insurance) and 75% (health insurance).

We see there is some variation in the complaint rates of the selected insurance products. One of the reasons for this variation could be because of the differences in the characteristics of the users who use these products. Table 4 suggests that users of crop insurance users are poor, less educated and older. There is evidence to suggest that people who are young, have a high level of education, belong to an upper socioeconomic group, have a high income, and are more socially involved, are more likely to complain, as they tend to be more capable of doing so, have greater self-assurance, and have a stronger motivation to complain when they are not satisfied (Suomi & Järvinen, 2005). These characteristics may play a role in the complaint rates observed for crop insurance.

Ⅶ. Understanding Complaining Behaviour

After having looked at complaints and resolution, we now examine complaining behaviour. Figure 1 presents the main reasons why people do not complain when faced

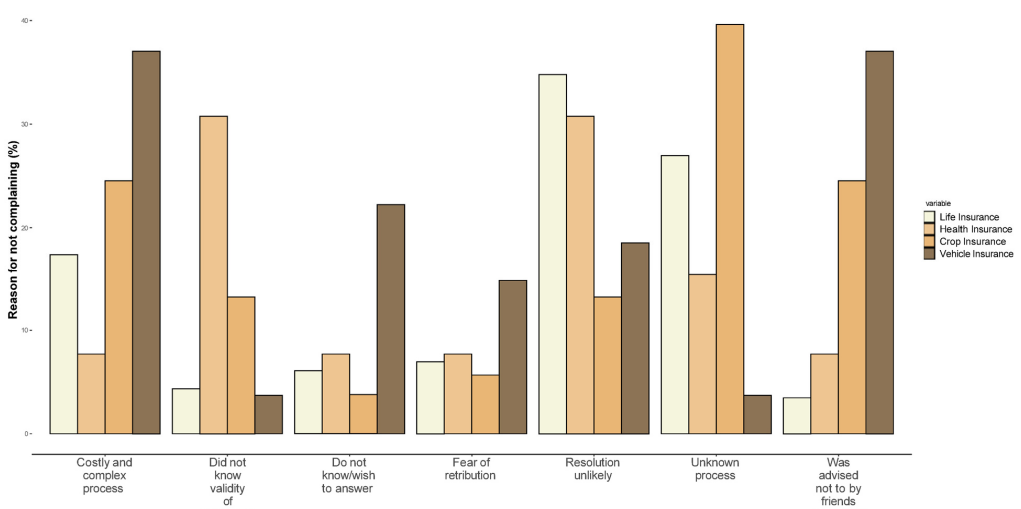


Figure 1. Reasons for not complaining

This figure presents the main reasons why people do not complain when faced with a grievance.

with a grievance. When we look at life insurance, we see that consumers do not complain because they do not believe they will receive any resolution. The other reason seems to be that consumers don't know the GRM procedure. From some qualitative responses, we observe that respondents don't complain because they think the grievance redress process requires money and they cannot afford it. This ties in to both the earlier reasons if consumers knew that the grievance redress process is free, they may have complained and been more hopeful about the possibility of resolution.

In case of health insurance too, not knowing whether their complaint was valid and not knowing the process were the two main reasons why consumers did not complain upon facing a grievance. In case of crop insurance, unlikely resolution, advice from friends and family to not complain and the costly and complex nature of the processes came in the way of people complaining. For vehicle insurance, the main causes were the high cost and complexity of the process and advice from friends and family to not complain. This goes to show that the perception of FSPs and their GRM systems is poor and there is an urgent need to build trust. The lack of trust in the ability of the system to resolve the consumer's issues is the driving force that stops people from complaining.

From these results, it is evident that there is a lack of advertisement about available redress mechanisms which compounds the trust issue as it is possible that FSP have good GRM processes but have simply not engaged in disseminating this information to the public (Balasubramaniam et al., 2021). The characteristics of the users may also explain why certain reasons dominate others in our results. For example, almost 44% of crop insurance users are only educated up to 10th standard (less than high school), which may play a role in why most crop insurance users who do not complain, do so because they are not aware of the process.

For insurance products, as established before, information is an extremely significant parameter in decision making. When scant information is available while purchasing, and little to no information is available in the process of grievance redress, the problem of information asymmetry is exacerbated.

Ⅷ. Impact of Grievance on Usage

Regardless of whether consumer received resolution for their grievance, there is bound to be an impact on the usage of the product. In this section, we examine what the nature of this impact is.

Table 8 presents the impact of facing a grievance on the usage of the product. In the case of life insurance, a significant number of those who faced a grievance reported that they either reduced usage or stopped using the product entirely as a result of the grievance. This is another clear indication that GRM processes need to be improved to avoid any such efflux of consumers. A small proportion also changed their service provider. In case of health insurance, there is an equal proportion of people who reduced or stopped using the product and those who changed the service provider. For crop insurance and vehicle insurance, most people who faced a grievance changed their provider.

Another important addition to this analysis is to see whether impact on usage varies according to complaining and resolution patterns. In Table 9, we present impact of grievance basis whether the respondent complained, whether this complaint was resolved along with impact in case the respondent did not complain at all. In the scenario where the user did not complain, we see that for life, health and vehicle insurance, cumulatively most people who did not complain either reduced or stopped

Table 8. Impact of Grievance on Product Usage

Type of Insurance	Changed provider	Increased use	Kept using but warned others	No change in use	Reduced or stopped use	Did not answer
Life Insurance	50(16%)	8(2%)	37(12%)	93(31%)	99(33%)	10(3%)
Health Insurance	41(32%)	2(1%)	11(8%)	24(19%)	42(33%)	6(4%)
Crop Insurance	41(31%)	-	3(2%)	49(37%)	28(21%)	8(6%)
Vehicle Insurance	55(40%)	3(2%)	12(8%)	27(19%)	36(26%)	3(2%)

Table 9. Variation in Impact of Grievance by Complaint Status

	Changed provider	Do not know/ wish to answer	Increased use	Kept using, but warned friends and family	No change in use	Reduced or stopped using	Total
Did not complain							
Life Insurance	17	7	5	9	63	51	152
Health Insurance	10	3	1		6	16	36
Crop Insurance	13	2		2	44	17	78
Vehicle Insurance	14	2	3	5	19	11	54
Complained and resolved							
Life Insurance	25	1	3	26	26	28	109
Health Insurance	22	1	1	11	18	18	71
Crop Insurance	22	3	0	0	0	7	32
Vehicle Insurance	15	0	0	2	1	6	24
Complained and not resolved							
Life Insurance	6	1	0	2	4	18	31
Health Insurance	0	1	0	0	0	1	2
Crop Insurance	4	1	0	1	5	4	15
Vehicle Insurance	12	1	0	1	3	11	28

using the product or exhibited switching behaviour. It was only in the case of crop insurance where most people made no change. In the scenario where the user complained and the complaint was resolved, we see that across products users exhibit switching or reducing/exiting behaviour. Interestingly, for life and health insurance we see some respondents warning those in their social network about their experiences. In the case where the user complained, but this complaint was not resolved, we see that most people across products exhibit switching and exiting behaviour.

We see that the impact is largely negative, irrespective of the complaint status. What is interesting is that a significant number of people whose complaints are resolved also reduced/stopped using the product. While we already know that the overall impact is negative, this table suggests that the grievance redress system may have something to do with why the impact is negative. Additionally, some differences in products, such as low switching behaviour for non-complaining crop insurance users may be down to "consumer sophistication" which includes characteristics such as a consumer's knowledge of the alternatives in the marketplace, their awareness of consumer-protection rights, concern for quality and satisfaction and awareness of complaint mechanisms (Tronvoll, 2007). We know from the information in Figure 1 that crop insurance users are not aware of complaint mechanisms. We know they are not highly educated and thus may not be aware of their rights or about any alternate products available in market. In this circumstance, it is likely that the switching costs are too high for them. However, for all the other products and all other complaining statuses, we see that reducing/exiting or switching is the dominant response.

Ⅸ. Conclusion

India is witnessing a massive influx of insurance buyers. The quantum of this influx is significant as life insurance premiums are expected to cross the $100 billion mark by 2022 (The Economic Times, 2022b). There is a need for change to serve this large mass of consumers, both in terms of improving firms' own grievance redress processes and pushing regulatory reform to create more awareness about the GRM process.

We find that while FSPs have fairly high resolution rates, there are information constraints and trust deficits that are causing people to not complain when faced with a grievance. The adverse impact of these is visible as large sections of those who faced grievances reduced

or stopped using the product as a result of the grievance.

Results from our survey also suggest that there is significantly higher incidence of grievance than what the official numbers reflect and that the nature of these grievances is serious. Therefore, in order to promote meaningful financial participation, a robust GRM system is of the utmost importance.

References

Ankitha, S., & Basri, S. (2019). The effect of relational selling on life insurance decision making in India. *International Journal of Bank Marketing*.

Balakina, O., Balasubramaniam, V., Dimri, A., & Sane, R. (2021). Unshrouding product specific attributes through financial education. *Available at SSRN 3519845*.

Balasubramaniam, V., Sane, R., Biswas, K., & Sarah, M. A. (2020). Estimating customer complaints using twitter feeds. Retrieved from https://blog.theleapjournal.org/2020/ 05/estimating-customer-complaints-using.html

Balasubramaniam, V., Sane, R., Sarah, M. A., & Suresh, K. (2021). Do Indian financial firms have a robust grievance redress framework in place?

Balasubramaniam, V., Sane, R., & Sharma, S. (2022). Consumer grievance redress in Indian financial markets. *Available at SSRN 4104911*.

Bose Committee Report. (2015). Report of the committee to recommend measures for curbing mis-selling and rationalising distribution incentives in financial products. *Ministry of Finance, Government of India*.

Financial Sector Legislative Reforms Commission. (2013). Report of financial sector legislative reforms commission: Vol. i and ii. *Department of Economic Affairs, Ministry of Finance*.

Halan, M., Sane, R., & Thomas, S. (2014). The case of the missing billions: Estimating losses to customers due to mis-sold life insurance policies. *Journal of Economic Policy Reform*, *17* (4), 285-302. doi:10.1080/17487870.2014.971797. eprint: https://doi.org/10.1080/17487870.2014.971797

Hindu Business Line. (2021). Government notifies final rules for 74% foreign investment in insurance sector. Retrieved May 20, 2020, from https://www.thehindubusinessline.com/money-and-banking/government-notifies-final-rules-for-74-foreign-investment-in-insurance-sector/article34604690.ece

Insurance Regulatory and Development Authority of India. (2021). Annual report 2020-21. Retrieved from https://www.irdai.gov.in/admincms/cms/uploadedfiles/annual%5C%20reports/Annual%5C%20Report%5C%202020-21.pdf

Insurance Regulatory and Development Authority of India. (2022a). Bima bharosa grievance management system. *Insurance Regulatory and Development Authority of India*. Retrieved from https://policyholder.gov.in/integrated-grievance-management-system

Insurance Regulatory and Development Authority of India. (2022b). India@100-insurance for all. *Insurance Regulatory and Development Authority of India*. Retrieved from https://www.irdai.gov.in/ADMINCMS/cms/whatsNewLayout.aspx?page=PageNo4695&flag=1

LiveMint. (2019). The menace of mis-selling in insurance and how to curb it. Retrieved October 13, 2019, from https://www.livemint.com/insurance/news/the-menace-of-mis-selling-in-insurance-and-how-to-curb-it-11570966082505.html

LiveMint. (2020a). The covid-19 boost to health insurance, in four charts. Retrieved November 18, 2020, from https://www.livemint.com/insurance/news/the-covid-19-boost-to-health-insurance-in-four-charts-11605597369780.html

LiveMint. (2020b). The insurance regulator's 70s mindset is not serving the purpose in 2020. Retrieved October 27, 2020, from https://www.livemint.com/money/personal-finance/the-insurance-regulator-s-70-s-mindset-is-not-serving-the-purpose-in-2020-11603816829386.html

Malhotra, S., Patnaik, I., Roy, S., & Shah, A. (2018). Fair play in Indian health insurance. *Available at SSRN 3179354*.

Office of the Registrar General And Census Commissioner. (2011). Census 2011. *Ministry of Home Affairs, Government of India*.

Reserve Bank of India. (2021). Quarterly statistics on deposits and credit of scheduled commercial banks.

Sinha, T. (2005). The Indian insurance industry: Challenges and prospects. *Available at SSRN 792166*.

Suomi, K., & Järvinen, R. (2005). European consumer complaint behaviour in the financial sector. *Available at SSRN 792166*.

Task Force on Financial Redress Agency. (2016). Report of the task force on financial redress agency. *Department of Economic Affairs, Ministry of Finance*.

Tennyson, S. L. (2010). Rethinking consumer protection regulation in insurance markets. *Networks Financial Institute*.

The Economic Times. (2022a). Covid brings life insurance penetration in India to global levels. Retrieved January 31, 2022, from https://economictimes.indiatimes.com/wealth/personal-finance-news/covid-brings-life-insurance-penetration-in-india-to-global-levels/articleshow/89243583.cms

The Economic Times. (2022b). Life insurance premium in India set to cross $100 billion mark this year: Swiss re. Retrieved September 1, 2022, from https://economictimes.indiatimes.com/wealth/personal-finance-news/covid-brings-life-insurance-penetrationin-india-to-global-levels/articleshow/89243583.cms

The Leap Blog. (2016). Regulatory mistakes on the treatment of investment products sold by insurance companies. Retrieved April 24, 2016, from https://blog.theleapjournal.org/2016/04/regulatory-mistakes-on-treatment-of.html

Tronvoll, B. (2007). Complainer characteristics when exit is closed. *International journal of service industry management*, *18* (1), 25-51.

Working Group on Insurance, Pensions and Small Savings. (2013). Report of the working group on insurance, pensions and small savings. *Department of Economic Affairs, Ministry of Finance*.

Received/ 2022. 10. 31
Revised/ 2022. 12. 28
Accepted/ 2023. 04. 08

Appendix

Table A1. Descriptive statistics-by state

Variable	Andhra Pradesh (N=4316)	Bihar (N=4222)	Haryana (N=4241)	Madhya Pradesh (N=4246)	Maharashtra (N=4330)
Age					
21-30	773 (17.9%)	1048 (24.8%)	1141 (26.9%)	1203 (28.3%)	1221 (28.2%)
31-40	1342 (31.1%)	1294 (30.6%)	1251 (29.5%)	1359 (32.0%)	1726 (39.9%)
41-50	1267 (29.4%)	929 (22.0%)	918 (21.6%)	1045 (24.6%)	908 (21.0%)
51-65	771 (17.9%)	805 (19.1%)	760 (17.9%)	573 (13.5%)	441 (10.2%)
65+	163 (3.8%)	146 (3.5%)	171 (4.0%)	66 (1.6%)	34 (0.8%)
No of family members					
1-2	1860 (43.1%)	320 (7.6%)	413 (9.7%)	510 (12.0%)	955 (22.1%)
3-5	2399 (55.6%)	2180 (51.6%)	2696 (63.6%)	3367 (79.3%)	3056 (70.6%)
6 or more	57 (1.3%)	1722 (40.8%)	1132 (26.7%)	369 (8.7%)	319 (7.4%)
Education level					
Illiterate	611 (14.2%)	294 (7.0%)	568 (13.4%)	525 (12.4%)	966 (22.3%)
Less than 5th grade	1252 (29.0%)	2016 (47.7%)	1137 (26.8%)	953 (22.4%)	181 (4.2%)
Up to 10th grade	407 (9.4%)	322 (7.6%)	195 (4.6%)	289 (6.8%)	233 (5.4%)
12th grade pass	480 (11.1%)	262 (6.2%)	484 (11.4%)	557 (13.1%)	1413 (32.6%)
College or more	1566 (36.3%)	1328 (31.5%)	1857 (43.8%)	1922 (45.3%)	1537 (35.5%)
Annual family income					
Less than Rs.1 lakh	1876 (43.5%)	2575 (61.0%)	1722 (40.6%)	2305 (54.3%)	1036 (23.9%)
Rs.1 lakh - Rs.3 lakh	1629 (37.7%)	1492 (35.3%)	2097 (49.4%)	1600 (37.7%)	1756 (40.6%)
Rs.3 lakh - Rs.6 lakh	383 (8.9%)	125 (3.0%)	330 (7.8%)	302 (7.1%)	1271 (29.4%)
Rs.6 lakh - Rs.10 lakh	40 (0.9%)	11 (0.3%)	35 (0.8%)	35 (0.8%)	164 (3.8%)
Above Rs.10 lakh	12 (0.3%)	6 (0.1%)	5 (0.1%)	2 (0.0%)	10 (0.2%)
Did not answer	376 (8.7%)	13 (0.3%)	52 (1.2%)	2 (0.0%)	93 (2.1%)
Occupation					
Cultivation/Agricultur	798 (18.5%)	1052 (24.9%)	272 (6.4%)	534 (12.6%)	306 (7.1%)
Not working	367 (8.5%)	938 (22.2%)	1731 (40.8%)	1085 (25.6%)	925 (21.4%)
Own business	710 (16.5%)	593 (14.0%)	667 (15.7%)	778 (18.3%)	984 (22.7%)
Salaried employee	1093 (25.3%)	262 (6.2%)	760 (17.9%)	458 (10.8%)	1611 (37.2%)
Wage Labour	1348 (31.2%)	1377 (32.6%)	811 (19.1%)	1391 (32.8%)	504 (11.6%)
Financial products					
Banking	2900 (67.2%)	3875 (91.8%)	3409 (80.4%)	3794 (89.4%)	3543 (1.8%)
Payments	2070 (48.0%)	776 (18.4%)	1539 (36.3%)	1768 (41.6%)	2798 (64.6%)
Insurance	871 (20.2%)	695 (16.5%)	547 (12.9%)	1127 (26.5%)	1716 (39.6%)
Securities	184 (4.3%)	13 (0.3%)	8 (0.2%)	52 (1.2%)	363 (8.4%)
Pensions	305 (7.1%)	72 (1.7%)	71 (1.7%)	77 (1.8%)	97 (2.2%)

This table presents the summary statistics of our survey by state.

Table A2. Description of Survey Instrument

No.	Module	Description
1	Profile of Respondent	Identification details of the respondent
2	Demographics	Household roster, family income, religion, caste, household debt, investments
3	Grievance Redress with Financial Products	
3.1	Access to financial products	Usage of five financial products: banking, insurance, securities, pensions, and payments
3.2	Incidence of grievances	Extent and nature of grievances, first response to grievances
3.3	Experience with GRM	Resolution of complaints, impact of using GRM
4	Risk and Time Preferences	General & domain specific risk measurement, general self assessment, patience elicitation
5	Individual Characteristics and Perceptions	Cognitive ability, personality traits etc
6	Decision Making	Profile of household financial decision making
7	Women's Ownership and Usage of Financial Products	Understanding women's participation in the asset ownership and usage

The International Review of Financial Consumers, Volume.8 Issue.1(Special Issue, June, 2023), 33-45 pISSN 2508-3155 eISSN 2508-464X
https://doi.org/10.36544/irfc.2023.8-1.3

The International Review of Financial Consumers

www.eirfc.com

Consumer Protection Mechanisms in the Polish Market of Unit-linked Insurance Products

Iwona Dorota Czechowska* · Joanna Stępińska**

A B S T R A C T

The insurance market in Poland is developing dynamically. Insurance companies offer customers various products, including a unit-linked insurance plan/product (ULIP), which combines protection and investment functions. Customers' insurance premiums are invested in these funds, and their assets are divided into units. There are risks for consumers in the ULIP market: a need for financial literacy (regarding products and choosing the right product for the financial situation and knowledge of the risk) and market imperfections (product design, sales practices, investment practices). Given the above rationales for tighter regulation, the regulations for these products have been amended with the objective of increasing consumer protection. The paper presents a descriptive analysis of the market and a comprehensive discussion of the regulatory changes in consumer protection for unit-linked insurance products in Poland in 2014-2021. The study consists of two parts. The first part presents the characteristics of unit-linked insurance products and their popularity in the European and Polish markets. The second part describes regulatory changes in the Polish market regarding protecting consumers purchasing ULIP products. The last part of the article concludes the conducted study.

Keywords: consumer protection, unit-linked life insurance products, insurance in Poland

Ⅰ. Introduction

The insurance market in Poland is developing rapidly. Insurance companies offer various products to customers, including unit-linked insurance plan/product (ULIP), which combines a protection function with an investment function. The hallmark of a unit-linked life insurance product is, on the one hand, to reduce the insurance component and, on the other hand, to give the investment component greater importance. The basis of the design of this type of product is insurance capital funds. Customers' funds paid for insurance premiums are invested in these funds, and their assets are divided into units. The fund's investment activities are carried out at risk and for the policyholder's account. In practice, consumers buy these products at their own risk without knowing the final investment effect, bearing the risk of losing part or even all of the funds paid. The accumulated are invested in various financial instruments. The functioning of ULIP products is accompanied by problems relating to consumers. The following could be noted:

- The problem of passing the business risk to consumers. It refers to the regulations related to the liquidation fees.
- The problem of lack of knowledge for the products. It refers to the regulations/recommendations for insurers to publish more information.
- The problem of lack of knowledge for their (consumers')

* Prof. UL, Institute of Finance, Faculty of Economics and Sociology, University of Lodz, Lodz, Poland, dorota.czechowska@uni.lodz.pl
** Research Assistant, Institute of Finance, Faculty of Economics and Sociology, University of Lodz, Lodz, Poland, joanna.stepinska@uni.lodz.pl

financial situation. It refers to the recommendations for selling products adequate to the needs of consumers.
- The problem of market misconduct. It refers to the regulations for prudent product design and selling practices and to the court judgements.

Thus, there are risks for consumers in the ULIP market both: in the form of a lack of financial literacy (regarding products and choosing the right product for the financial situation and knowledge of the risk) and in the form of market imperfections (product design, sales practices, investment practices). Considering the reasons mentioned above for stronger regulations (the complicated construction of the ULIP for consumers, the lack of financial knowledge and potential market failures), the regulations concerning these products have been modified. By changing the regulations, the caretaker of financial markets in Poland pursued the goal of increasing consumer protection.

The article provides a descriptive analysis of the market and an extensive review of the consumer protection regulatory changes related to unit-linked insurance products in Poland in 2014-2021. The paper informs about the regulatory changes in Poland's ULIP consumer protection mechanisms. The study consists of two parts. The first part presents the characteristics of unit-linked insurance products and their popularity in the European and Polish markets. The second part describes changes in regulations in the Polish market to protect consumers purchasing ULIP products. In the article's final part, conclusions from the study are formulated.

Ⅱ. The Relevance and Importance of Unit-linked Insurance Products

ULIPs are insurance products with a complex construction and operating mechanism. They provide the consumer with a required protection. The peculiarity of insurance products, their intangible form or complex structure makes it difficult for customers to understand the offer (Pisarewicz et al., 2020). Help may be needed to assess the risk associated with purchasing such a product[1]. Such an assessment of the ULIP product is highlighted by Lakhani (2021), recognising that after many years of ULIPs on the market, customers may need to be made aware of the intricacies of their operating mechanisms. Many authors have studied unit-linked insurance products. They have analysed their popularity, the motives influencing customers' choices, the level and specificity of regulation, and the practice of misselling occurring in sales. The issue of misselling in the Indonesian market, for example, was described by Yusuf and Wahyuningati (2022). Ostrowska-Dankiewicz (2017), on the other hand, focused on describing the problems occurring with unit-linked products, pointing out not only misselling but also low fund efficiency. The subject of the study by Wankhede et al. (2021) was factors influencing retail investors' decisions to buy unit-linked insurance products. Shanmuganathan et al. (2020) analysed ULIP as an investment solution and studied the level of investor satisfaction with this insurance product and the services offered by insurance companies. The issue of customer rights and the benefits of acquiring ULIP products was dealt with by Dimitrov (2022). Homa (2017) analysed the benefits of purchasing this type of product. The attention of Ciumas et al. (2016) was devoted to a study of guarantee issues in unit-linked products, while the study of unit-linked life insurance products, as a new type of life insurance products, especially in developing countries, was dealt with by Dacev (2017).

It is worth mentioning that ULIPs are products often chosen by customers. They are an alternative to other savings methods, such as bank deposits. In the case of ULIPs, however, the level of return on investment needs to be defined in advance. Therefore, they can provide higher returns than a bank deposit, but at the same time, there is a higher exposure to the investment risk. Remembering that these are long-term products is also essential, which means freezing the funds for a more extended period. ULIPs combine features of investment and insurance products, so they have a broader scope, which may be attractive to customers. A SWOT analysis of ULIP products is presented in Figure 1.

In order to show the importance of unit-linked insurance

[1] The Position of the Office of the Polish Financial Supervision Authority on the presentation of fees in life insurance contracts with insurance capital fund from January 2022 https://www.knf.gov.pl/knf/pl/komponenty/img/Stanowisko_76997._prezentowanie_oplat_w_umowach_ubezpieczenia_na_zycie_z_UFK_76997.pdf (30.09.2022).

Strengths	Weaknesses
- An alternative way of saving money. - A product combining an investment and insurance component. - Possibility to define individual parameters of the contract (amount of premium, selection and change of funds in which money is invested).	- The unpredictable result of the investment and so the is the possibility of losing the invested funds. - Funds are not covered by a system of guarantees. - The need to allocate funds for an extended period of time. - The cost of withdrawal before the end of the contract. - Complicated product construction and insufficient product knowledge among customers.
Opportunities	**Threats**
- Continuous and regular monitoring of the contract terms and conditions by the supervisory authorities and institutions supporting consumers protecting of their rights. - Implementation of legal changes to eliminate practices that abuse consumers' rights.	- Identification of an unacceptable condition of agreements after a certain period time. - Regulatory changes should be implemented more quickly. - The risk of misselling. - Unexpected circumstances that may have an impact on investment results.

Source: author's analysis

Figure 1. SWOT analysis of unit-linked products

products in the insurance market, let us analyse the information on the level of premiums paid by insurance companies to purchase such products. On the other hand, the areas of risk for consumers concerning these products, where intervention in the field of consumer protection was required, were indicated in regulations. In more than a dozen regulations/recommendations in the 2014-2021 period, the market for unit-linked insurance products was adjusted in such a way as to increase the safety of their purchasers through regulatory adjustments and recommendations, as well as decisions by those involved in the insurance field and the supervisors responsible for its operation. The scale of consumer problems in relation to the purchase of unit-linked insurance products is illustrated by the information published by the Financial Ombudsman.

It is worth taking a closer look at these products because their share of the life insurance market is substantial. In order to identify the importance of ULIP products, annual premium revenue (using gross premiums written) in unit-linked contracts and in the total life insurance market was studied. Information was analysed for 18 EU countries for which values of premiums written for the two categories, as mentioned above, were available[2]. The study of the size of this market covered a five-year period from 2016 to 2020. The results are presented in Table 1. In 2020, the value of premiums written in unit-linked contracts (taken together) was €149,670 million. However, the ratio of premiums written by unit-linked contracts to premiums written in the total life insurance market was 23% in 2016 and grew in subsequent years, reaching 32% in 2020. Meanwhile, in Poland, the share of premiums collected from this product declined from 43% in 2016 to 28% in 2021, connected to their poor rating and lack of confidence among customers.

Figure 2 shows the gross premiums written for ULIP products and life insurance in general in Poland. From 2012-2017, the premiums written for ULIP products ranged from PLN 10.3 billion to PLN 13.1 billion. The most significant sales of this type of insurance occurred in 2013. In 2018-2021, there was a noticeable decline in spending on ULIPs, with premiums written for ULIP products decreasing from PLN 7.9 billion in 2018 to PLN 5.7 billion in 2021[3]. The years in which the highest share of gross premiums written for ULIP products concerning premiums for life insurance was generally noted were from 2013 to 2017, amounting to more than 40% during this period and peaking in 2015 at 47%. In the

[2] https://www.insuranceeurope.eu/ (05.10.2022).

[3] Unit-linked insurance is a long-term product, often paid as a regular premium. The conclusion of a contract thus causes an obligation to pay premiums not only in the year the contract is taken out but also in future years. Therefore, the sum of premiums customers pay in a particular year also includes premiums paid under contracts signed in previous years.

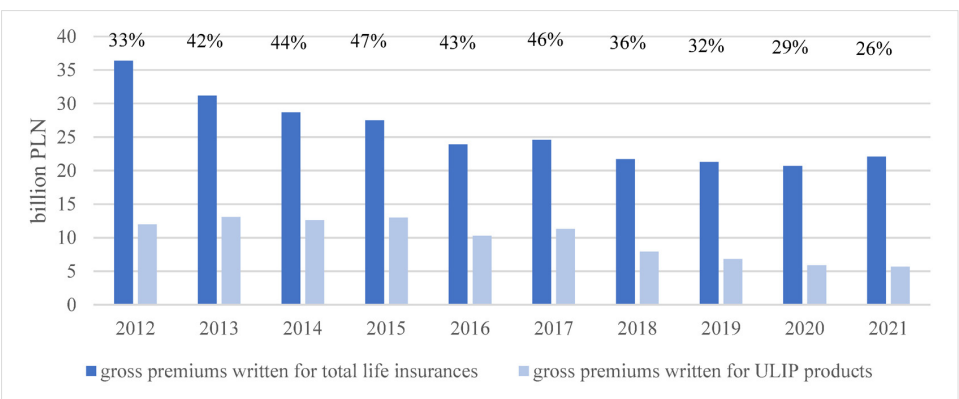
Table 1. Share of Premiums written in unit-linked contracts in EU countries, 2016-2020

Country	Premiums written	2016	2017	2018	2019	2020
BE	ULIP	2 209	3 169	3 517	3 325	3 439
	Total	14 852	14 572	15 551	16 137	15 058
	Share	15%	22%	23%	21%	23%
BG	ULIP	30	36	40	47	55
	Total	185	180	174	179	173
	Share	16%	20%	23%	26%	32%
CH	ULIP	1 619	1 593	1 730	1 764	1 834
	Total	28 557	25 287	26 108	26 917	23 003
	Share	6%	6%	7%	7%	8%
CZ	ULIP	969	1 012	980	752	695
	Total	2 083	2 117	2 037	1 857	1 773
	Share	47%	48%	48%	40%	39%
DE	ULIP	15 033	15 469	29 423	34 860	36 547
	Total	90 774	90 643	92 607	103 210	103 232
	Share	17%	17%	32%	34%	35%
ES	ULIP	2 261	3 364	3 462	4 105	4 158
	Total	31 608	29 730	29 020	27 398	21 773
	Share	7%	11%	12%	15%	19%
FI	ULIP	3 813	3 813	3 660	5 225	3 354
	Total	18 667	19 158	19 463	21 954	18 155
	Share	20%	20%	19%	24%	18%
FR	ULIP	30 551	42 926	42 136	39 981	40 240
	Total	145 403	152 238	152 323	138 895	111 099
	Share	21%	28%	28%	29%	36%
GR	ULIP	273	299	322	371	576
	Total	1 911	1 877	1 875	2 199	2 085
	Share	14%	16%	17%	17%	28%
HR	ULIP	64	74	61	57	40
	Total	389	401	430	420	357
	Share	16%	18%	14%	14%	11%
HU	ULIP	29	26	23	21	22
	Total	1 411	1 477	1 477	1 556	1 498
	Share	2%	2%	2%	1%	1%
IT	ULIP	43 458	51 501	47 432	44 679	44 250
	Total	125 022	120 955	123 113	126 737	119 050
	Share	35%	43%	39%	35%	37%
MT	ULIP	37	38	43	45	46
	Total	357	394	415	378	361
	Share	10%	10%	10%	12%	13%
NO	ULIP	3 603	3 740	3 777	4 488	4 372
	Total	10 161	9 458	10 087	11 096	9 704
	Share	35%	40%	37%	40%	45%

Table 1. Continued

Country	Premiums written	2016	2017	2018	2019	2020
PL	**ULIP**	**2 341**	**2 701**	**1 843**	**1 593**	**1 325**
	Total	**5 402**	**5 875**	**5 045**	**4 950**	**4 669**
	Share	**43%**	**46%**	**36%**	**32%**	**29%**
PT	ULIP	1 686	2 187	1 767	1 704	1 909
	Total	6 676	7 090	8 123	6 993	4 559
	Share	25%	31%	22%	24%	42%
RO	ULIP	104	119	109	142	123
	Total	447	517	535	573	569
	Share	23%	23%	20%	25%	22%
SE	ULIP	6 296	6 556	6 454	6 384	6 684
	Total	21 320	22 959	24 103	24 674	28 671
	Share	30%	29%	27%	26%	23%
ALL	**ULIP**	**114 376**	**138 623**	**146 779**	**149 542**	**149 670**
	Total	**505 224**	**504 928**	**512 485**	**516 126**	**465 789**
	Share	**23%**	**27%**	**29%**	**29%**	**32%**

Source: based on data from https://www.insuranceeurope.eu/ (05.10.2022). (current exchange rates, in million euro

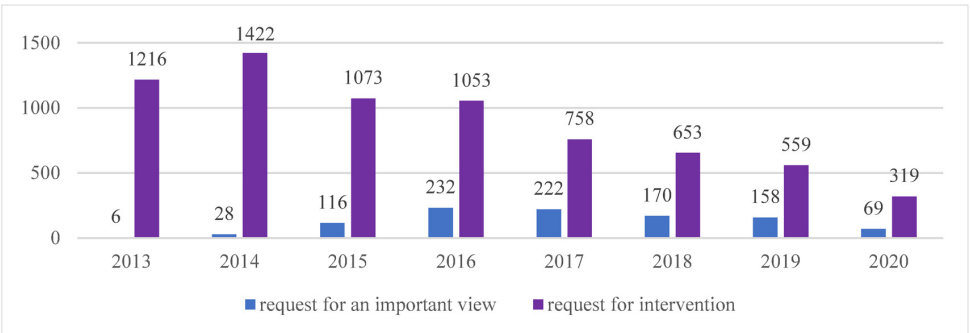


Source: based on the Polish Chamber of Insurance (PCI) reports - Insurance in Numbers. The insurance market in Poland for the following analysed years.

Figure 2. Premiums written for ULIP products and total life insurance products in Poland, 2012-2021

following years, the share began to decline and decreased from 36% in 2018 to 26% in 2021. However, this type of product still accounts for a substantial share of the total life insurance group.

Based on the Financial Ombudsman Reports, it was determined that in 2013-2016 consumers submitted more than a thousand requests per year for intervention. The most significant number of applications (1,422) was filed in 2014. After 2016, the number of requests for intervention began to decrease significantly (although a decline was already evident from 2015), and in 2020 there were only 319. See Figure 3. As for requests for an important opinion in a unit-linked case, during the period analysed from 2013-2020, the number gradually increased from six in 2013 to 232 in 2016. Then, as in the case of requests for intervention by the Financial Ombudsman, the number began to decrease. In 2020, there were 69 requests submitted by consumers to the Financial Ombudsman for a critical opinion. There has been a reduction in applications for an important view and intervention over the



Source: Financial Ombudsman Position dated 16.07.2021 https://rf.gov.pl/2021/07/16/rzecznik-finansowy-pozytywnie-o-interwencji-produktowej-knf/ (05.10.2022)

Figure 3. Number of requests from consumers to the Financial Ombudsman for important opinions and interventions, 2013-2020

period under review. However, the decrease in demand for ULIP over this same period must also be taken into account.

Ⅲ. Review of Implemented Regulations Designed to Protect the Consumer in the Polish Market

The conclusion of insurance contracts, including ULIP, is regulated by law. The high popularity of this type of product and the continuous development of the offer generates the need for constant control and updating regulations to protect customers who decide to purchase ULIP. Consumers are protected on many levels through participation in the unit-linked market supervisory process carried out by a number of entities. On the EU-wide scale, the European Insurance and Occupational Pensions Authority (EIOPA) is the European supervisory authority. A key objective of EIOPA's operation is to ensure consumer safety, and one of its main tasks is to create rules for the supervision of the insurance market[4]. In the Polish market, the tasks of the primary supervisor in this field belong to the Polish Financial Supervision Authority (PFSA). Other entities also participate in the process: the Office of Competition and Consumer Protection (OCCP) and the Financial Ombudsman (FO offices responsible for protecting customers of, among others, insurance market entities. Also of significant importance for the functioning of the insurance market is the Polish Chamber of Insurance (PCI), whose tasks, as a statutory organization of industry self-government, include[5]: supporting the legislator in forming of insurance law, cooperation with the above-mentioned supervisory authorities and consumer protection, cooperation with foreign institutions for the benefit of Community law and raising insurance awareness among the society.

This section of the article presents chronologically (2014-2022) the main changes that have occurred in the ULIP product market in the context of consumer protection, thanks to the entities mentioned above. The changes were carried out by the Polish Chamber of Insurance (PCI), Financial Ombudsman (FO), Office of Competition and Consumer Protection (OCCP), The Polish Financial Supervision Authority (PFSA), EIOPA, as well as the Minister of Finance (MF).

A. Recommendation of Informational Good Practices for Life Insurances related to Insurance Capital Funds (2014)[6]

On April 14, 2014, the Polish Chamber of Insurance

[4] https://www.eiopa.europa.eu/browse/consumer-protection_en (03.10.2022).

[5] https://piu.org.pl/organizacja/ (03.10.2022).

[6] Recommendation of good information practices for life insurance related to insurance equity funds dated 14.04.2014. Microsoft Word - REKOMENDACJA_UFK_nowelizacja - 14 kwietnia 2014 (piu.org.pl) (28.09.2022).

(PCI) issued the Recommendation of Informational Good Practices for Life Insurance Related to Insurance Capital Funds. The document does not have the character of a mandatory law. It is a list of recommendations for insurance companies to disseminate good practices for transparently informing consumers about the terms of unit-linked contracts. The recommendation indicates the information that an adequately constructed Product Card should contain, including information on all fees associated with the service. In addition, the recommendation mandated identical naming of fees for each insurer. What is essential, the PCI recognized that each Product Card should contain information about the risks associated with the investment. It was recommended that the customer be provided with simulations of the value of the insurance, made available in three variants: base, reduced return, and increased return.

B. The Act on Insurance and Reinsurance Activity (2015)[7]

The draft of the Act noted that unit-linked insurance products are highly complicated and contain elements of an investment nature. The purpose of the amendments was to address the disproportion in customer protection in the capital and insurance markets by introducing additional obligations on insurance companies, resulting in better consumer protection as a consequence. The Law introduced an obligation for insurance companies to analyse customer needs. Consumers were allowed an opportunity to withdraw from the contract before its end, i.e. within 60 days of receiving the annual information for the first time[8]. In addition, the Law introduced significant regulations regarding the early liquidation fee. It was specified that the insurance company should pay the consumer a benefit in the number of the value of the premiums paid, reduced by no more than 4%. In addition, an obligation was imposed on insurance companies to post general insurance terms and conditions on their websites.

C. Report of the Financial Ombudsman (FO) Life Insurance with Insurance Capital Fund (2016)[9]

The FO Report from March 2016 on unit-linked products highlighted the inadequacy of preventive measures by supervisory institutions to ensure consumer protection in the Ombudsman's view. The issue of the liquidation fee, which violates the interests of consumers, was highlighted. Reference was made to the long-term nature of such contracts, the possibility of termination of contracts by customers, as well as the issue of misselling. Numerous court proceedings pending in cases of unit-linked contracts were pointed out. A large number of applications received by the FO in unit-linked insurance cases was identified, indicating the importance of this problem. For example, in 2015, 172 requests from consumers were submitted to the Financial Ombudsman to provide a statement containing a substantial view of the case, 116 concerned unit-linked products[10].

D. Regulations of OCCP on Liquidation Fee (2016)[11]

One of the biggest problems reported by consumers to various institutions regarding unit-linked products was liquidation fees. Contracts contained provisions for very high fees in case of resignation before the indicated term. The consumer could lose as much as 80%-100% of the amount paid in, especially during the first term of the contract. As the contract term continued, the share tended to drop, but early resignation was usually connected with incurring costs. In the situation of unit-linked agreements signed for an extended period (10-15 years), the consumer was often left in a difficult situation, e.g. when they needed money for private purposes and wanted to withdraw from the product. Then, by paying a hefty liquidation fee, they made a loss. The OCCP took steps to regulate liquidation fees, accusing insurance companies of trans-

[7] Act of 11.09.2015 - The Act on Insurance and Reinsurance Activity (Journal of Laws of 2015, item 1844).

[8] The information concerns the amount of benefits due under the concluded insurance contract, if the amount of benefits changes during the term of the insurance contract, as well as information on the insurance surrender value if there is an insurance withdrawal under the concluded insurance contract.

[9] Life insurance with insurance capital fund. Financial Ombudsman Report Part II, March 2016. https://rf.gov.pl/wp-content/uploads/2020/05/UFK_raport_2016.pdf (03.10.2022).

[10] https://rf.gov.pl/wp-content/uploads/2020/05/UFK_raport_2016.pdf (03.10.222).

[11] https://uokik.gov.pl/aktualnosci.php?news_id=12288 (03.10.2022). https://uokik.gov.pl/html/finanse/ufk/kalendarium/ubezpieczyciele-obnizaja-oplaty-likwidacyjne.html (03.10.2022).

ferring costs to customers that should be considered a business risk. In March 2016, OCCP reported[12] the finalisation of proceedings in this matter, processed in the case of 17 insurance companies that committed themselves voluntarily to reduce the number of liquidation fees in already signed contracts and eliminate liquidation fees from new agreement templates. In the case of contracts, the first year of its term, for which the fee was the highest and amounted to about 80%-100% of the premiums paid, there was a decrease in the fee to a level of about 15%-25%. The OCCP reported on agreements in effect since January 1, 2017, under which 16 insurers were supposed to reduce liquidation fees for specific insurance products with an investment element[13].

E. PFSA Reminds Insurance Companies to Publish General Insurance Terms, Conditions, and other Contract Templates on Websites (2017)[14]

PFSA has undertaken numerous activities to ensure excellent consumer protection in the unit-linked service market. As part of these activities, in April 2017, PFSA sent a letter to all insurance companies, reminding them of the obligation, i.e. the Insurance and Reinsurance Activity of 2015, to post general terms and conditions of insurance and other contract templates on the websites of insurance companies as of 01.01.2016. Such a solution was intended to provide consumers with access to information about the concluded contracts and to unify how they are presented by increasing the transparency of offers and the possibility of comparing them.

F. Regulation of the Minister of Finance on the Maximum Amount of Fixed Remuneration of a Company for Managing an Open-ended Investment Fund or a Specialized Open-ended Investment Fund (2018)[15]

The Finance Minister's Regulation of 2018 implemented, starting in 2022, a limitation of the maximum amount of a fund company's fixed remuneration for fund management to 2% of the average value of the fund's net assets per year. The project's justification indicates that the recommended solutions to the TFI remuneration rules, also affecting unit distributors, will increase the protection of investors' interests, enabling investment in units to be made on fair and attractive terms. The draft also notes that remuneration for fund management, including remuneration for distributors, affects the rate of return on unit-linked product investments.

G. PFSA's Position on Product Customization and Consumer Knowledge of Risk (2018)[16]

In a position issued in 2018, PFSA noted that the product offered to the consumer should match the consumer's needs and knowledge of the risks involved in purchasing a unit-linked product through an appropriate procedure[17], carried out before concluding an insurance contract. The procedure includes an analysis of the consumer's financial situation and life insurance knowledge and experience by conducting a so-called needs survey. Subsequently, the provider of the unit-linked product should assess whether the insurance contract suits the customer's needs. If not, the consumer should be informed. The Regulation, as mentioned above, is complemented by the Regulation of the Minister of Finance guidelines of February 2, 2016, on the minimum scope of data to be included in a questionnaire on the policyholder's needs. This Regulation implies that the product offeror should obtain information from the customer regarding the level of investment risk that he or she can accept when deciding to enter into an insurance contract.

12 https://uokik.gov.pl/aktualnosci.php?news_id=12288 (03.10.222).

13 https://uokik.gov.pl/html/finanse/ufk/kalendarium/ubezpieczyciele-obnizaja-oplaty-likwidacyjne.html (03.10.2022).

14 Letter from the KNF, 04.04.2017. stanowisko_UKNF_publikacja_OWU_przez_ZU_4_04_2017_50687.pdf (03.10.2022).

15 Regulation of the Minister of Finance of December 13, 2018, on the maximum amount of fixed remuneration of a company for managing an open-ended investment fund or a specialized open-ended investment fund.

16 KNF's Position on the Application of Article 21 of the Act on Insurance and Reinsurance Activity https://www.knf.gov.pl/knf/pl/komponenty/img/Stanowisko_w_sprawie_stosowania_art_21_ustawy_o_dzialalnosci_ubezpieczeniowej_i_reasekuracyjnej_63502.pdf (03.10.2022).

17 It was introduced in Article 21 of the Act on Insurance and Reinsurance Activities, dated September 11, 2015.

H. Position of PFSA on Analysing the Needs of Customers and Offering Products Adequate to the Needs, as well as Selecting Assets and Following the Prudent Investor Principle (2019)[18],[19]

In 2019 PFSA again highlighted the need for consumer protection in the context of analysing customers' needs and offering products adequate to meet their needs, as well as asset selection and adherence to the prudent investor principle. The supervisory authority stressed the importance of assessing the client's investment profile and identifying the client's acceptable level of risk. PFSA pointed out that it is necessary to ensure effective internal control mechanisms for the distribution of the products described, to activate monitoring tools, and to ensure that information is presented to consumers in a reliable manner. In addition, it stressed the obligation of product distributors to take measures to eliminate improper practices and provide reliable and understandable information, especially regarding the purpose of the contract, its duration and the risks associated with the purchased product.

I. EIOPA's Supervisory Statement on Assessment of Value for Money of Unit-linked Insurance Products under Product Oversight and Governance (2021)[20]

EIOPA, in the period 13.04.2021-16.07.2021, conducted a public consultation on unit-linked products. EIOPA stressed that these are the dominant insurance-based investment products on a European scale. As stated on the website - according to EIOPA's estimate, unit-linked products account for a significant portion - over EUR 2.8 trillion of the total asset under management in Europe[21]. EIOPA assumes that consumers should be assured that the investment insurance products offered to them have a favourable ratio of costs and fees in relation to benefits. The EIOPA report[22] pointed out that meeting the requirement - value for money should manifest itself in offering consumers products tailored to their needs, goals and characteristics of the target market and should not adversely affect customers' interests. It was noted that it is crucial for relevant authorities to monitor the market for unit-linked products and "*ensure that customers receive fair value unit-linked product*"[23].

J. Product Intervention - PFSA Decision (2021)[24]

In the middle of 2021, a crucial decision of the PFSA arrived, representing a product intervention in the market for insurance investment products - life insurance contracts linked to an insurance capital fund. This is one of the most critical changes in the system of offering unit-linked products recorded during the period under review. The decision took effect in 2022. The PFSA made the following changes[25]:

- prohibiting the marketing, distribution and sale of insurance investment products and life insurance contracts linked to an insurance capital fund, for which the average return is less than 50% of the interest rate for period N according to the relevant risk-free rate term structure.
- prohibiting the marketing, distribution and sale of insurance investment products and life insurance con-

---

18 Position of the Office of the Financial Supervision Authority on insurance from group 3 of division I of the Appendix to the Law of September 11, 2015, on insurance and reinsurance activity https://www.knf.gov.pl/knf/pl/komponenty/img/Stanowisko_UKNF_dot_UFK_66545.pdf (03.10.2022).

19 KNF's Decision No. DNM-DNMZWP.6065.79.2021, dated 15.07.2021. - product intervention https://dziennikurzedowy.knf.gov.pl/DU_KNF/2021/16/akt.pdf (03.10.2022).

20 EIOPA's Supervisory Statement on assessment of value for money of unit-linked insurance products under product oversight and governance, 30.11.2021 (03.10.222). https://www.eiopa.europa.eu/content/eiopa-sets-out-framework-delivering-better-value-money-consumer-centric-way_en (03.10.222).

21 https://www.eiopa.europa.eu/content/eiopa-sets-out-framework-delivering-better-value-money-consumer-centric-way_en (03.10.2022).

22 Supervisory statement on assessment of value for money of unit-linked insurance products under product oversight and governance, 30.11.2021. https://www.eiopa.europa.eu/document-library/supervisory-statement/supervisory-statement-assessment-of-value-money-of-unit_en (03.10.2022).

23 Supervisory statement on assessment of value for money of unit-linked insurance products under product oversight and governance, 30.11.2021. https://www.eiopa.europa.eu/document-library/supervisory-statement/supervisory-statement-assessment-of-value-money-of-unit_en (03.10.2022).

24 KNF's Position on the implementation of the obligations referred to in Article 8(1), (3) and (4) and Article 2(3)(2) of the Act on Insurance Distribution by insurance distributors https://www.knf.gov.pl/knf/pl/komponenty/img/Stanowisko_praktyki_%20dystrybucja_1-10-2021.pdf (03.10.222).

25 Based on the announcement of the KNF to issue a decision on prohibitions on the marketing, distribution and sale of insurance investment products - life insurance agreements if they are linked to an insurance capital fund (product intervention). https://www.knf.gov.pl/komunikacja/komunikaty?articleId=74171&p_id=18 (03.10.2022).

tracts, if they are associated with an insurance capital fund, where the rules and investment restrictions set out in the fund rules do not include the prohibition of investment of funds in contingent convertibles[26], involving high risk.

K. Position of the PFSA on the Implementation of the Duties of the Act on Insurance Distribution by Insurance Distributors (2022)[27]

In this position, PFSA referred to the issue of the distribution of insurance products. Attention was paid to analysing the customer's requirements and needs for insurance coverage from the perspective of matching a product to the customer's needs and knowledge of the product. The supervisor's goal was to eliminate inappropriate sales practices and control entities' responsibility in distributing insurance products.

L. PFSA's Position on how to Present Fees in Life Insurance Agreements with Insurance Capital Fund (2022)

In this position, PFSA referred to how fees are presented in life insurance contracts with insurance capital funds and identified deficiencies in how fees are described, resulting in violations of the interests of policyholders and the insured. PFSA noted the occurrence of cases in which the unit-linked insurance contract does not contain information (or the information needs to be completed) that fees are charged separately by the insurance company and by the investment fund company in connection with the conclusion of the contract. The contractual provisions need to contain precise information about which entity, and to what extent, charges fees from the premiums consumers pay. This limits ULIP purchasers' knowledge regarding the fees charged from the funds they have paid. Among the failings of ULIP service providers, the lack of information about fees for these products on their websites was also pointed out. It was stressed that in the contractual provisions relating to fees, there are terms that need to be clarified or defined in a way that does not make it clear what activities and on what date are covered by charging fees. The assessment noted that the contracts should have described the issue of fee indexation more clearly. In addition, the fee tables only sometimes included all fees detailed in the body of the insurance terms and conditions, and there was an imprecise description of the elements that affect the final value of fees.

M. Announcement of the PFSA on the Draft Act on Investment Activities with the Funds of Insurance Capital Funds (2022)[28]

The Polish Financial Supervision Authority describes further changes to the unit-linked insurance market in Poland. In a draft of amendments to the Act on Insurance and Reinsurance Activity, an explanatory memorandum and a draft regulation concerning the conclusion by insurance companies of agreements involving derivatives when investing funds of an insurance capital fund. The purpose of these regulations is to "*permanently increase the level of protection of customers of insurance companies - natural persons, concluding insurance contracts with insurance capital fund, to the level already occurring in the open-ended investment fund market*"[29]. The changes

---

[26] Contingent convertibles are capital bonds, subordinated loans or other instruments and contracts for which, upon the occurrence of an initiating event specified in terms of issue or contract, the issuer or obligor redeems them, either in the form of a permanent write-down or a temporary write-down reducing the par value of the instrument or obligation in whole or in part, or converts them into shares, or it shall write off the interest in whole or in part for a given interest period or withhold it for an indefinite period, if these capital bonds, subordinated loans, instruments or contracts are issued or entered into by the debtor in order to qualify them or have already qualified for the regulatory capital of banks and brokerage houses or the own funds of insurance and reinsurance companies.
Based on the announcement of the KNF to issue a decision on prohibitions on the marketing, distribution and sale of insurance investment products - life insurance agreements if they are linked to an insurance capital fund (product intervention). https://www.knf.gov.pl/komunikacja/komunikaty?articleId=74171&p_id=18 (03.10.2022).

[27] Position of the Office of the Financial Supervision Authority on the presenting of fees in life insurance contracts with insurance capital funds, January 2022. https://www.knf.gov.pl/knf/pl/komponenty/img/Stanowisko_76997._prezentowanie_oplat_w_umowach_ubezpieczenia_na_zycie_z_UFK_76997.pdf (28.09.2022).

[28] Announcement of KNF dated 01.02.2022 on the draft of a comprehensive legal regulation on the rules for insurance companies to invest funds of the insurance capital fund https://www.knf.gov.pl/komunikacja/komunikaty?articleId=77012&p_id=18 (03.10.222).

[29] Announcement of KNF dated 01.02.2022 on the draft of a complex legal regulation on the rules of investment of financial assets of the insurance capital fund by insurance companies https://www.knf.gov.

are intended to reduce the level of investment risk for ULIP purchasers, through restrictions on investment activities with the funds of insurance capital funds, to the same extent as in the open-ended mutual fund market. The planned regulations are intended to prevent the practice of regulatory arbitrage as well as the offering to individuals of "*complicated and risky capital market products and instruments that are unavailable to non-professional customers*"[30].

N. Court Judgments

In addition to more than a dozen regulatory actions on contracts for unit-linked insurance products as mentioned above, the courts have issued numerous decisions indicating that there were violations of consumer rights in the contracts concluded. Such decisions include, for example, the judgment of the Supreme Court on 28.09. 2018, ref. I CSK 179/18[31], declaring as an unlawful practice the failure to clearly and unambiguously indicate in the insurance contract the method of determining liquidation fees "*charged upon cancellation of the continuation of the agreement, as well as the impact of such fees on the effectiveness of the investment*"[32]. In another case, the Supreme Court, in a decision dated May 21, 2020, ref. I CSK 772/19[33], maintained the decision[34] expressed in the Judgment of the Court of Appeals, favourable to consumers, in which the "*Overstatement of the liquidation fee and its incompatibility with the interest of the consumer*"[35] was indicated.

O. Discussion

To sum up, the aim of the indicated regulations and recommendations was to permanently increase the level of protection of customers from insurance companies. This allows to reduce the investment risk by eliminating misselling problems which occur when a person's concludes insurance contracts with ULIPs. In addition, the aim was to prevent regulatory arbitrage of offering complex and risky capital market products and instruments not available to non-professional clients. This was achieved by influencing the practices related to the information provided. As a result of the analysis of the ULIP market, inappropriate sales practices by insurance companies were noticed regarding the quality of the information provided to customers, which needed to be completed, clear, and transparent. The insurance market supervisors and monitors ordered the introduction of good practices in this regard, consisting of posting on insurers' websites offering ULIP a designated range of data that is also standardised in terms of presentation. As highlighted in these regulations, information on fees, especially liquidation fees for early termination, played a unique role. Insurance companies were obliged to: provide information (based on a uniform nomenclature) on all fees, their scope, timing, a detailed description of the elements influencing their final value, and an unambiguous way of determining the liquidation fees charged when cancelling the continuation of the contract, to stop overstating the liquidation fee contrary to the consumer's interest, to inform about the separate collection of fees by insurance companies and investment funds. It obliges insurance companies to provide information on the risks associated with the investment and to identify the impact of the fees on the effectiveness of the investment, maintaining a proper cost-benefit ratio. The above information is to be fair, understandable, and unambiguous.

Another tool for increasing consumer protection is the obligation to analyse consumers' needs, requirements, and knowledge about risk. Based on the information from the survey, ULIP products are tailored to the consumers' investment profile and risk acceptance. Insurance companies present consumers with simulations of the product's value in three variants (base, reduced yield, and enhanced yield). Consumers were also given the right to withdraw from/terminate the contract before the end of the contract, i.e. within 60 days of receiving annual information on

pl/komunikacja/komunikaty?articleId=77012&p_id=18 (28.09.2022).

30 Announcement of KNF dated 01.02.2022 on the draft of a complex legal regulation on the rules of investment of financial assets of the insurance capital fund by insurance companies https://www.knf.gov.pl/komunikacja/komunikaty?articleId=77012&p_id=18 (28.09.2022).

31 http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/I%20CSK%20179-18-1.pdf (03.10.2022).

32 The judgment of the Supreme Court on 28.09.2018, ref. I CSK 179/18.

33 http://www.sn.pl/sites/orzecznictwo/orzeczenia3/i%20csk%20772-19.pdf (03.10.2022).

34 The court refused to accept the cassation complaint of the defendant (insurance company) for processing.

35 Judgment of the Court of Appeals in Warsaw dated 24.05.2019, ref. No. V ACa 451/18.

the investment results. In addition, it was prohibited to market the distribution and sale of insurance investment products linked to an insurance equity fund, for which the average return is less than 50% of the interest rate for period N according to the relevant risk-free rate term structure. A further prohibition concerned the marketing of investment products in contingent convertibles involving high risk. The regulations emphasise that for a well-functioning, consumer-safe ULIP market, the role of internal control mechanisms and market monitoring by supervisory authorities is also essential.

Ⅳ. Conclusion

Unit-linked insurance products are offered worldwide and have a substantial share in the life insurance market in Poland and other European Union countries. Unit-linked insurance products are complex and risk-linked instruments. Consumers' awareness and knowledge of the design and factors affecting the investment outcome and the risk level associated with purchasing unit-linked insurance are often limited. In this situation, given the complexity of these products, the level of complexity of the design of the contracts and profit calculation rules, and their level of popularity, financial supervisors needed to introduce regulations modifying their functioning. These regulations aimed to increase consumer safety by, among other things, simplifying the design of ULIP products, introducing clear rules for assessing investment risk, setting liquidation fees, and making available on insurers' websites the information needed by consumers to make rational decisions on the use of products appropriate to their needs. The overview of changes presented abbreviated due to the limited framework of the study, concerned many regulations in the market for ULIP-insured products. A large number of these changes were introduced in response to the identified problems specific to these products, namely the asymmetry of information and the lack of clarity of the information provided causing misunderstanding. The problems were affecting the safety and economic interest of the consumer. For the safety of the consumer and for the protection of his economic rights, a number of changes have been made to the mechanisms of the ULIP instruments. The analysis of the changes in the legislation shows that internal control and monitoring of this market is advisable, which may result in further modifications, increasing the level of consumer protection and levelling out the asymmetry occurring there.

Based on the analysis of the numerical information on ULIP irregularities reported by consumers to the Financial Ombudsman, it can be noted that in the period studied (2014-2020), since 2016, there has been a noticeable reduction in the number of requests stating problems in connection with the conclusion of a unit-linked contract. The number of requests for intervention decreased from 2020 to 2016 (when the peak level of applications was recorded) by more than 3.5 times. Similar results can be observed for the number of applications to the Financial Ombudsman for a significant view on ULIP. The downward trends of the insurance markets in the last decade can explain this situation. The design of innovative products (with an investment component) such as ULIP should revive the demand for life insurance products. However, the problems associated with these products may affect confidence in insurance and dissimulate the desire for insurance. Better filling the regulatory gap of this market in terms of consumer protection mechanisms for ULIPs can play a crucial role in ensuring consumer confidence in insurance and increasing demand for such products.

References

Ciumas, C., Chis, D.-M., Corovei, E.-A. (2016). *The Development of Alternative Strategies for the Issuers of Unit-Linked Life Insurance Contracts with Investment Guarantees*. Studia Prawno-Ekonomiczne, (XCIX), 187-205.

Dacev N. (2017). *The necessity of legal arrangement of unit-linked life insurance products*, UTMS Journal of Economics, ISSN 1857-6982, University of Tourism and Management, Skopje, Vol. 8, Iss. 3, pp. 259-269.

Dimitrov S. (2022). Limitations of the framework to address value for money risk in the European unit-linked market. *VUZF Review, 7*(1), 32-42.

Homa M. (2017). *Unit-Linked Life Insurances as a Form of Protection for the Future*, Economic and Environmental Studies, Vol. 17, No. 1 (41/2017),

35-46, March 2017 p 35-46.

Lakhani D.Y., Bhardwaj P., Deshmukh V. (2021). *Study of investors awareness and attitude towards unit linked insurance plans*, Vidyabharati International Interdisciplinary Research Journal 12(2), p. 126-134.

Ostrowska-Dankiewicz A. (2017). *The Polish life insurance market in view of consumer protection issues*, Journal of Insurance, Financial Markets and Consumer Protection No. 25 (3/2017): 87-99.

Pisarewicz P., Gierusz A., Kowalczyk-Rólczyńska P., Pobłocka A., (2020). *Produkty Ubezpieczeniowe*, Gdańsk, Wydawnictwo Uniwersytetu Gdańskiego.

Shanmuganathan J., Senthil Kumar J.P., SathishKumar A.S. (2020). *Investors satisfaction level on unit linked insurance plan products of selected private life insurance companies in Tamil Nadu*, International Journal of Advanced Research in Engineering and Technology, Volume 11, Issue 7, July 2020, pp. 658-668, DOI: 10.34218/IJARET.11.7.2020.066.

Wankhede, Portia; Mude, Girish, (2021). *Retail Investor Behavior Towards Life Insurance, Mutual Fund and Unit-Linked Insurance Plans (ULIPs): A Thematic Literature Review*, IUP Journal of Financial Risk Management. Mar 2021, Vol. 18 Issue 1, p 29-42. 14p.

Yusuf, C. F. P., Wahyuningati, E. (2022). *Legal Protection of Mis-Selling Cases Victims on Unit Linked Insurance Products*, The Basis of Law No. 40/2014 Regarding Insurance Policy. Srawung Journal of Social Sciences and Humanities, 91-103.

Received/ 2022. 10. 28
Revised/ 2023. 02. 24
Accepted/ 2023. 03. 19

The International Review of Financial Consumers, Volume.8 Issue.1(Special Issue, June, 2023), 47-67 pISSN 2508-3155 eISSN 2508-464X
https://doi.org/10.36544/irfc.2023.8-1.4

The International Review of Financial Consumers
www.eirfc.com

Consumer Protection in Insurance Contracts: The Need for a 'Treating Customers Fairly' Regime*

Andrew Schmulow† · Baladev Dayaram** · Sian Mullen***

A B S T R A C T

In light of the findings of the 2019 Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, consumer protection has been highlighted as an area of particular concern, especially with respect to insurance. This article begins by exploring the current regulatory architecture for insurance consumer protection, including the recent amendments to the *Insurance Contracts Act 1984* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). Analysis of these changes indicates that there are insufficient protections for consumers, because of a lack of appropriate redress, a lack of corporate cultural change within insurance providers, and weak regulatory enforcement. An examination of the United Kingdom's 'treating customers fairly' regime provides a potential solution to these problems; and which could be relatively easily applied within the Australian context. The authors conclude that the UK TCF regime would adequately address deficiencies in consumer protection in the Australian insurance market and provide better consumer outcomes in the future.

Keywords: Financial consumer protection, insurance contracts, financial system regulation, Treating Customers Fairly, TCF, consumer financial well-being, Banking Royal Commission, Hayne Royal Commission

Ⅰ. Introduction

The provision of financial services to retail consumers[1] by financial service providers ('FSPs') has been a consistent area of concern for decades. This was demonstrated in the Financial System Inquiries in 1997[2] and 2014,[3] and most recently, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in 2019 ('FSRC').[4] The FSRC highlighted the

* The generous advice and assistance of John Tesarsch, of Dever's List at the Victorian Bar, is gratefully acknowledged.
† BA Honours LLB (*Witwatersrand*) GDLP (*cum laude*) (*ANU*) PhD (*Melbourne*). Admitted by the Supreme Court of Victoria as an Australian Legal Practitioner. Advocate of the High Court of South Africa. Visiting Associate Professor, Oliver Schreiner School of Law, University of the Witwatersrand, Johannesburg. Visiting Researcher, Centre for International Trade, Sungkyunkwan University, Seoul. Senior Lecturer, School of Law, University of Wollongong, andys@uow.edu.au
** LLB (*Hons I*), BEcon&Fin (Finance) (*Distinction*) (*Wollongong*).
*** Penultimate year Bachelor of Laws (LLB), Bachelor of Politics, Philosophy and Economics (BPPE) (Philosophy and Politics) student (*Wollongong*).

[1] Retail consumer is defined in s 761G and 761GA of the *Corporations Act 2001* (Cth) and in part 7.1 Division 2 of the corporations regulations and is used in accordance with these sections. See also *Corporations Act 2001* (Cth) s 761G(5)(b)(vii) and *Corporations Regulations 2001* (Cth) Reg 7.1.17, which outlines parameters concluding that a general insurance product will be provided to a retail client if it is a product listed. Further, the words 'consumer' and 'retail consumer' will be used interchangeably throughout.

[2] Commonwealth of Australia, "Financial System Inquiry." (March 1997) ('Wallis inquiry').

[3] Commonwealth of Australia, "Financial System Inquiry." (November 2014), p. 199 ('Murray inquiry').

[4] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1

complex and piecemeal approach to consumer protection -- scattered across multiple Acts, regulations, legislative instruments, and regulatory guides[5] -- facilitating regulatory arbitrage, creative compliance,[6] and ultimately rendering consumer protection in the financial services industry illusory. This culminated in Recommendation 7.4 of the FSRC Final Report, which recommended a comprehensive overhaul of consumer protection provisions in the *Corporations Act 2001* (Cth) and, where possible, to identify 'what fundamental norms of behaviour are being pursued'[7] in the legislation.[8]

An area where there is particular concern for the plight of consumers is in the insurance industry; specifically, general and life insurance. Both general and life insurance play a significant role for individual Australians, the economy and financial stability.[9] For retail consumers, such contracts provide peace of mind (rather than conferring a commercial advantage[10]) - it is a contract of faith. With respect to life insurance, most Australians have cover either directly or indirectly, through their superannuation (retirement) fund. Further, if the labyrinth of legislation, regulations, industry codes and regulatory guides were functional and fit-for-purpose, then it could be expected that most insurers would 'comply with most of their substantive obligations most of the time and that the community [could have] confidence that the insurance products [they] [acquired would] mostly be provided with fairness, honesty and professionalism'.[11] However, non-compliance and unscrupulous conduct appear to remain an endemic issue across the insurance industry.[12]

We are of the view that the adoption of a principles-based regulatory ('PBR') regime for the insurance industry would be optimal.[13] A principles-based regime would express the fundamental obligations and norms of behaviour that all providers could be expected to observe.[14] A correctly distilled principle[15] 'seeks to provide an overarching framework that guides and assists regulated entities to develop an appreciation of the core goals of the regulatory scheme,'[16] and allows regulators to police compliance with the spirit of the law, as distinct from legalistic compliance. Simultaneously, there should be an emphasis on *outcomes sought* rather than on *processes used* when determining compliance with any principle.[17] Thus, the adoption of a 'Treating Customers Fairly' ('TCF') regime for Australia's insurance industry, like that adopted in the United Kingdom, proves compelling. The adoption of such a framework would describe, in a succinct manner, the constellation of outcomes that the regulatory framework is intended to achieve and, simultaneously, informs both insurers and insureds of their rights and obligations.

This paper examines the benefits of the proposed introduction of fundamental norms of conduct to enhance consumer protection, along with a consolidated handbook, like that of the TCF regime in the UK, for the insurance industry. The paper focuses on general and life insurance.

('*FSRC*').

5 *FSRC*, ibid., p. 42.

6 Julia Black. "Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis." *The Modern Law Review* 75, no. 6 (2012), p. 1040; Andrew Godwin, Vivienne Brand, and Rosemary Teele Langford. "Legislative Design - Clarifying the Legislative Porridge." *Company and Security Law Journal* 38 (2021), p. 286 ('*Legislative Design - Clarifying the Legislative Porridge*').

7 *FSRC*, op cit., p. 42.

8 *FSRC*, op cit., p. 496.

9 Consumer Action Law Centre. Submission: *Extending Unfair Contract Terms Protections to Insurance Contracts*. (Treasury: 2018), accessed 2 August 2022 <https://treasury.gov.au/sites/default/files/2019-03/Consumer-Action-Law-Centre_0.pdf >.

10 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd; Mortenson v Laing* at 313. *Australian Competition and Consumer Commission v Medibank Private Ltd [2017] FCA 1006.*

11 Pamela Hanrahan. "Fairness and Financial Services: Revisiting the Enforcement Framework." *Company and Securities Law Journal* 35 (2017), p. 420.

12 See, e.g., Michael Roddan, 'Senior companies reporter', *Australian Financial Review* (Sydney, 30 July 2021); Evgenia Bourova, Ian Ramsay, and Paul Ali. "A 'Damaging Loophole' 'Long Overdue' for Closing Extending Consumer Protections against Unfair Contract Terms to Insurance." *Competition and Consumer Law Journal* 27 (2020), p. 291 ('*Damaging Loophole*'); Zofia Bednarz and Kayleen Manwaring. "Keeping the (Good) Faith: Implications of Emerging Technologies for Consumer Insurance Contracts." *Sydney Law Review* 43, no. 4 (2021) p. 485 ('*Keeping the (good) faith*').

13 *Legislative Design - Clarifying the Legislative Porridge,* op cit, p. 295; Australian Government Treasury, *Submission to the Financial Services Royal Commission Interim Report*, 6 (*Treasury Interim Report Submission*) ('*Treasury Interim Report Submission*'); Julia Black, "Principles Based Regulation: Risks, Challenges and Opportunities." In: Principles Based Legislation, 28 March 2007, p. 11 (available at <http://eprints.lse.ac.uk/62814/>.

14 Julia Black, "Principles Based Regulation: Risks, Challenges and Opportunities." *Law and Financial Markets Review* (2007), p. 3.

15 *Treasury Interim Report Submission*, op cit., p. 7.

16 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), § [4.7], citing Surendra Arjoon, "Striking a Balance between Rules and Principles-Based Approaches for Effective Governance: A Risks-Based Approach." *Journal of Business Ethics* 68 (2006), 58.

17 Julia Black, "Principles Based Regulation: Risks, Challenges and Opportunities." In: Principles Based Legislation, 28 March 2007, p. 8 (available at <http://eprints.lse.ac.uk/62814/>.

The impetus for this assessment stems from observed instances of consumer abuse,[18] and the inability of the current consumer protection regime to adequately protect and inform retail consumers of their rights and obligations. The paper proceeds as follows. First, Part II briefly outlines the current regulatory architecture governing general and life insurance products, highlighting the relevant consumer protection provisions. Part III builds on the previous section and discusses the practical implications for retail consumers provided by the existing legal framework, including illustrating its pervading flaws. Part IV reviews and examines the relevant legal framework for regulating insurance, with respect to retail consumers, in the United Kingdom under their TCF regime. It notes potential benefits for Australia. Part V proposes a new approach to consumer protection in Australia. It outlines how this could be achieved by reducing complexity, increasing coherence, and ultimately enhancing compliance and consumer outcomes. Part VI concludes.

Ⅱ. Australian Consumer Protection Regulatory Architecture

Australia's financial system (specifically banking) has been described as the central artery in the body of the economy.[19] In order to successfully fulfil this role, the financial system must be regulated to ensure that retail consumers are treated fairly. They must be provided with products that are fit-for-purpose, given service that is provided with care and skill, and sold financial products which perform in the way in which consumers are led to believe they will.[20] The current regulatory structure for consumer protection in Australia is piecemeal and, ultimately, lends itself to creative compliance[21] and legalistic interpretations by firms. This leads to a disjuncture between the underlying intention of the law, and the practical application thereof. This paper pays specific attention to the regulation of general insurance products and life insurance products. Consequently, there are six Acts, two industry codes of practice and a set of regulations that govern many of the consumer protections afforded to retail consumers. These include the:

- *Australian Prudential Regulatory Authority Act 1998* (Cth);
- *Life Insurance Act 1995* (Cth);
- *Life Insurance Code of Practice*;
- *Corporations Act 2001* (Cth);
- *Australian Securities and Investments Commission Act 2001* (Cth);
- *Insurance Act 1973* (Cth);
- *Insurance Contracts Act 1984* (Cth);
- *Insurance Contracts Regulations 2017*; and
- *General Insurance Code of Practice*.

Each of the relevant consumer protection provisions will be outlined in turn.

A. APRA

In accordance with Australia's Twin Peaks model of financial regulation, the Australian Prudential Regulation Authority ('APRA') is responsible for, among other things, the general administration of the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth), and prudential regulation of insurance providers. Pursuant to s 12 of the *Insurance Act 1973* (Cth),[22] a body corporate requires authorisation from APRA to carry on an insurance business in Australia, and s 15 outlines the circumstances in which APRA may revoke such authorisations. As the prudential regulator, APRA pays specific attention to matters regarding:

a) the conduct of any part of the affairs of, or the structuring or organising of, a general insurer, an authorised [non-operating holding company], a rele-

18 '…financial services entities paid almost $250 million in remediation to almost 540,000 consumers as a result of three particular forms of conduct in connection with home loans. The three forms of conduct were: … reliance on fraudulent documentation; processing or administration errors; and… breaches of responsible lending obligations.' *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, p. 35-6 ('*FSRC Interim Report*').

19 *FSRC*, op cit., p. 6.

20 See generally *FSRC,* op cit.

21 See for example: Andromachi Georgosouli, "The FSA's 'Treating Customers Fairly' (TCF) Initiative: What is So Good About It and Why It May Not Work", *Journal of Law and Society*, Vol. 38, no. 3 (2011), p. 417.

22 Note, s 12A is the relevant corresponding section for the *Life Insurance Act 1995* (Cth).

vant group of bodies corporate, or a particular member or members of such a group, in such a way as:

i. to keep the general insurer, [non-operating holding company], group or member or members of the group in a sound financial position; or
ii. to facilitate resolution of the general insurer, [non-operating holding company], group or member or members of the group; or
iii. to protect the interests of policyholders of any general insurer; or
iv. not to cause or promote instability in the Australian financial system; or

b) the conduct of any part of the affairs of a general insurer, an authorised NOHC,[23] a relevant group of bodies corporate, or a particular member or members of such a group, with integrity, prudence, and professional skill.[24]

Of critical importance are the circumstances in which an insurer is placed under judicial management due to a finding of an unsatisfactory financial position, as demonstrated with the demise of HIH Insurance Limited, in 2001. In some situations, APRA can be substituted as the creditor for the persons that are entitled to certain claims under outstanding policies. Here, APRA will make payment before they would otherwise receive such payment, because of the winding up proceedings.[25]

B. Corporations Act

Generally, contracts of insurance are considered to be, for the purposes of the *Corporations Act 2001* (Cth) ('Corporations Act'), 'financial products'.[26] Before moving further, it is pertinent to note that coming to such conclusions requires legal training that most retail consumers will not have. 'Financial product' is defined in s 763A of the *Corporations Act* as 'a facility through which, or through the acquisition of which a person makes a financial investment; manages a financial risk or makes a non-cash payment'. Section 763C goes on to include entering into an insurance contract as management of a financial risk.[27] This is a fundamental definition as regards consumer protections, yet it is overladen with specific inclusions[28] and exclusions,[29] cross references, and unnecessary complexity that ultimately detracts from its coherence and utility.[30] Nonetheless, dealing in such products requires an insurance business to hold an Australia financial services licence ('AFSL'), which in turn, enlivens the obligations under s 912A to, amongst other things, 'do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly'.[31] It is the Australian Securities and Investment Commission's ('ASIC') responsibility for administering and enforcing those provisions. Critically, not all obligations imposed by chapter 7 of the *Corporations Act* on an AFSL holder apply to its dealings with retail clients. This disjuncture adds a further layer of complexity in deciphering precisely what consumer protections apply, to whom, and under what circumstances.

Moreover, chapter 7 of the *Corporations Act* outlines a broad range of pre-contractual disclosure obligations applicable to general insurers, for example, product disclosure statements. However, the flaws in a purely disclosure-focussed regime became increasingly apparent amidst the Global Financial Crisis ('GFC'), and through firm failures, such as Storm Financial and Opes Prime, where consumers were left with unexpected losses totalling more than $5 billion.[32] In part, this was due to a lack of consumer understanding about products, notwithstanding extensive disclosure documents (which were provided according to the legislative requirements).[33] However, contemporary research into behavioural finance has uncovered inherent consumer biases, the effect of which undermine the idea that individuals are 'rational' and, consequently, this limits the efficacy of disclosure as a means of ameliorating harm.[34] Chapter 7, part 7.8, division 7 of the *Corporations Act*, amongst other things, prohibits

23 Non-operating holding company.
24 *Insurance Act 1973* (Cth) s 3(1).
25 *Insurance Act 1973* (Cth) s 62ZW.
26 *Corporations Act 2001* (Cth) s 763A, 763C.
27 *Corporations Act 2001* (Cth) s 763A, 763C.
28 *Corporations Act 2001* (Cth) s 764A.
29 *Corporations Act 2001* (Cth) s 765A.
30 Australian Law Reform Commission, Financial Services Legislation: *Interim Report A* (ALRC Report 137). (2021) ('*ALRC Report 137*').
31 *Corporations Act 2001* (Cth) s 912A(1)(a).
32 Marina Nehme. "Product Intervention Power: An Extra Layer of Protection to Consumers." *Journal of Banking and Finance Law and Practice* 31 (2020), p. 89.
33 Ibid 90.
34 Daniel Kahneman, *Thinking Fast and Slow.* Penguin Books 2011), p. 224.

a financial services licensee from 'engag[ing] in conduct that is, in all the circumstances, unconscionable'.[35] Additionally, part 7.10, division 2 prohibits a person, in the course of carrying on a financial services business, from making false or misleading statements,[36] or engaging in dishonest conduct,[37] or misleading or deceptive conduct.[38] All of these provisions are vital for consumer protection, however there is, evidently, considerable difficulty that a retail consumer will encounter when trying to decipher and understand precisely what their rights and obligations are. This difficulty applies to both finding the relevant provisions and interpreting the legislation. Consequently, this is difficult to reconcile with the fundamental principles of the rule of law, that is, 'the law should be knowable and accessible; that it should be certain; and that it should be general in its application'.[39]

C. ASIC Act

In addition to the provisions outlined above, the *Australian Securities and Investment Commission Act 2001* (Cth) ('ASIC Act') contains various consumer protection provisions in part 2, division 2, subdivisions C-E and G. Most notable is subdivision BA which, as a direct result of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('FSRC'), now applies to insurance contracts.[40] The FSRC found that '[t]he considerations that render a[n] [Unfair Contract Terms] regime appropriate for other contracts for financial products and services apply equally to insurance contracts'.[41] These considerations include the asymmetrical relationship between large and powerful insurers, and retail consumers, opacity of pricing, competition in the insurance industry, and the high incidence of potentially unfair terms. As an example of a consistent issue regarding insurance contracts, we note, the example of *complete replacement cover home insurance* policies. They contain terms with language similar to the following:

> If we decide to pay you what it would cost us to rebuild or repair … we will pay you … the amount that we determine to be the reasonable cost of repairing or rebuilding. The amount that we determine to be the reasonable cost will be the lesser amount of any quotes obtained by us and/or by you for the rebuild or repair. Discounts may be available to us if we were to rebuild or repair.[42]

This clause allowed insurers to cash-settle claims for an amount that would be available to the insurer for the completion of a scope of work, but which were unobtainable by the insured.[43] Often this was the result of the insurer having access to discounts, and the wholesale costs of labour and materials. The effect of which was that consumers were left with payouts wholly inadequate to the task of rebuilding their homes.

In general, unfair contract terms ('UCT') provisions seek to assist in balancing the asymmetric power difference between retail consumers and insurers. The regime allows for a term, in a consumer or small business contract, to be rendered void if it is found to be 'unfair'. Pursuant to s 12BG of the *ASIC Act*, a term is deemed to be 'unfair' if:

a. it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
b. it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
c. it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[44]

Additionally, several terms operating in conjunction with each other, which taken together create unfairness,

---

35 *Corporations Act 2001* (Cth) s 991A(1).

36 *Corporations Act 2001* (Cth) s 1041E.

37 *Corporations Act 2001* (Cth) s 1041G.

38 *Corporations Act 2001* (Cth) s 1041H.

39 Tess Van Geelen. "Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law." *Company and Securities Law Journal* 38 (2021), p. 296.

40 *Financial Sector Reform (Hayne Royal Commission Response - Protecting Consumers (2019 Measures)) Act 2020* (Cth).

41 Referring specifically to those under the *Insurance Contracts Act. FSRC*, op cit., p. 304.

42 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 3 p. 84; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 2 p. 437 ('FSRC vol 2').

43 *FSRC vol 2,* op cit., p. 435.

44 *Australian Securities and Investment Commission Act 2001* (Cth) s 12BG(1).

should be assessed with close attention to the statutory provisions, and should require a lower moral standard than unconscionability.[45] It is prudent to note that the UCT regime does not apply to terms that define the main subject matter of the contract,[46] or terms that set the upfront price payable under the contract.[47]

D. Insurance Contracts Act

Whilst much of the law relating to insurance contracts has its genesis in common law, the *Insurance Contracts Act 1984* (Cth) ('*ICA*') is not to be regarded as a total codification of the common law principles. The ICA has been referred to as remedial legislation and, as such, the courts have favoured the approach of construing the legislation 'in a manner that gives effect to the remedy and secures the result which it is the purpose of the legislation to achieve'.[48] Additionally, if circumstances give rise to an ambiguous interpretation of the legislation - literal, narrow, broad or otherwise - the approach taken by the court should be the reading that best protects the insured.[49] That said, many insurers continue to develop the wording of their policies with a particular regard to profit and competition.[50] Of particular importance here are the restrictions on relief, imposed by s 15 of the ICA on consumers, heavily limiting their avenues for relief to, mainly the ICA.

1. Section 12

Pressure, as a result of the systemic issues highlighted in the FSRC, led to the implementation of the *Financial Sector Reform (Hayne Royal Commission Response) Act* 2020 (Cth). Amongst other things, the amending legislation clarified the duty of an insured, under s 12, to ensure that it is interpreted as a 'duty to take **reasonable** care not to make a misrepresentation' (emphasis added) which, consequently, restricts s 13 with respect to the pre-contractual duty of disclosure. The language used in the previous version of s 12 had allowed insurers to deny legitimate claims where an insured had unintentionally left tangentially related illnesses undisclosed - illnesses suffered many years previously.[51] Additionally, ss 21 and 21B (now modified and repealed respectively) placed a different onus on the insured, which prevented insurers from asking general catch-all questions of the insured (for example in home and contents insurance). The effect of which was not to ask questions like "are you aware of any other circumstances that would affect the risk". These questions could be asked in commercial transactions but not when transacting with retail consumers - the effect of which would be to render the questions null. Commissioner Hayne noted that this was an unwieldy regime. Consequently, a new provision - s 20B - which applies to consumer contracts, requires the insured to take reasonable care not to make misrepresentations. An insured retail consumer cannot be expected to know what factors are relevant to the insurer. This provides for a more consumer friendly regime. Sections 28 and 29 provide outcomes for breaches. This substantially amended the common law position when enacted in 1986. In the case of fraud and misrepresentations, the insurer can void the contract. If the breach is innocent, the insurer can only reduce the level of cover.

2. Section 13

This section states:

1. A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.
2. A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this Act.

2A. An insurer under a contract of insurance contravenes this subsection if the insurer fails to comply with the provision implied in the contract by sub-

[45] *Australian Securities and Investments Commission v Bendigo and Adelaide Bank Limited* [2020] FCA 716.

[46] *Australian Securities and Investment Commission Act 2001* (Cth) s 12BI(1).

[47] *Australian Securities and Investment Commission Act 2001* (Cth) s 12BI(2).

[48] *Minister for Immigration and Border Protection v Kumar* [2017] HCA 11 at [72].

[49] *FAI General Insurance Company Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38; (2001) 204 CLR 641 at [50].

[50] *FSRC* vol 2, op cit., p. 437.

[51] Ibid., p. 332.

section (1).

Civil penalty: 5,000 penalty units.

3. A reference in this section to a party to a contract of insurance includes a reference to a third-party beneficiary under the contract.
4. This section applies in relation to a third-party beneficiary under a contract of insurance only after the contract is entered into.

Whilst the duty eludes a precise definition, it has been noted to import and connote notions of reasonableness, fairness, and decency, but critically, to extend wider than that, and requires each party to pay due regard to the interests of the other.[52] The leading authority on s 13 is *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1. Gleeson CJ and Crennan J stated:

> We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.[53]

At its core, this duty is symmetrical in nature, however it fails to recognise the practical difference and power imbalance between an individual consumer and a large insurance company. This imbalance has historically allowed the consumer protection aspect of this provision to be usurped by insurers and used as a tool to deny what would otherwise be legitimate claims by insureds. This disparity has been highlighted by the Consumer Action Law Centre, which reviewed 147 Financial Ombudsman Service (FOS) determinations in which a breach of the above duty was argued by either or both parties. The data revealed that in 83 per cent of cases, an insurer sought to avoid the contract by means of fraud, misleading or untruthful conduct or statements, non-disclosure or non-cooperation.[54] Whilst the section is mainly used by insurers, insureds could use this section where an insurer had failed to: make prompt admission of liability, to make payments or communicate acceptance or rejection of a claim within a reasonable time frame, and/or where there is an unjustified suspicion as to the legitimacy of the claim. Additionally, sub-section 13(2) makes a breach of the duty of utmost good faith a breach of the Act and, consequently, allows ASIC to enforce breaches of the duty.

3. Section 15

The position in Australia, arguably, appropriately reflects the fundamental nature of an insurance contract, being one of a 'transfer of risk', reflected in s 15 of the ICA. The underpinning rationale for this section stems from the unique nature of an insurance contract as a means of transferring risk between two or more parties and, as such, relief should predominantly be provided for only in the ICA.[55] However, to balance this restrictive provision, more is needed to entrench consumer protections in the ICA.

Section 15 provides:

Certain other laws not to apply

(1) A contract of insurance is not capable of being made the subject of relief under:
  (a) any other Act; or
  (b) a State Act; or
  (c) an Act or Ordinance of a Territory.

(2) Relief to which subsection (1) applies means relief

---

52 Ian Enright and Robert Merkin Sutton. *Sutton on Insurance Law*. 4th ed. vol 1. Thomson Reuters, 201, pp. 472-476; *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 [15].

53 CGU Insurance Ltd v AMP Financial Planning Pty Ltd (2007) 235 CLR 1 [15].

54 *Insurance Contracts Act 1984* (Cth) s 13; Consumer Action Law Centre. Submission: *Extending Unfair Contract Terms Protections to Insurance Contracts*. (Treasury: 2018), accessed 2 August 2022 <https://treasury.gov.au/sites/default/files/2019-03/Consumer-Action-Law-Centre_0.pdf>.

55 Enright, Ian, Peter Mann, Rob Merkin QC, and Greg Pynt. *General Insurance: Background Paper 14.* Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. (2018).

in the form of:

(a) the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable;

This section provides that statutory relief cannot be sought under any other Australian legislation, excluding compensatory damages and, only recently, s 12BF (unfair terms of consumer contracts) of the *ASIC Act*, as alluded to above. This section only applies to legislation, and hence may not include common law principals. The consensus was that s 13 provided consumers with *more than adequate protection*, but that consumers are generally unwilling to take action on the basis of an unknown provision - s 13 - where there is a possibility of losing, and then incurring the respondent's costs.[56] This begs the question as to whether the current legislative provisions are adequate to protect consumers, especially given the complexity and high stakes of failure, associated with insurance contracts.

Furthermore, the FSRC aptly described the importance of including the claims-handling aspect of insurance under the definition of 'financial service'. Commissioner Hayne noted:

> There can be no basis in principle or in practice to say that obliging an insurer to handle claims efficiently, honestly, and fairly is to impose on the individual insurer, or the industry more generally, a burden it should not bear. If it were to be said that it would place an extra burden of cost on one or more insurers or on the industry generally, the argument would itself be the most powerful demonstration of the need to impose the obligation.[57]

This is also brought to the fore due to the nature of insurance contracts as credence goods. Broadly, there are three categories of products, that is, *search goods*, *experience goods* and *credence goods*. *Search goods* describe a kind of product whose characteristics can be ascertained prior to purchase. For example, fruit and vegetables can be inspected and then purchased at a grocery store.[58] *Experience goods* relate to products, the quality of which can only be determined after having consumed the goods.[59] *Credence goods* refers to products 'whose characteristics cannot be fully known at the time of purchase and whose attributes are linked to the market, time, and contingent events',[60] making it more difficult to appropriately balance the responsibility of risk. For retail consumers, almost the entire value of the product lies in the ability to make a successful claim after a specified event occurs, which may be months, years, or decades in the future.[61] In addition, given the multitude of Acts, regulations, and codes of practice that govern consumer protection provisions in insurance contracts, it is difficult to understand how any non-lawyer or general retail consumer could effectively navigate and/or understand their rights and obligations. Ultimately, this presents a danger of making retail consumer protection in this space illusory.

E. Design Distribution Obligations

General insurance and life insurance products are financial products which attract the obligations set out in ss 994A-994Q of the *Corporations Act*.[62] These sections set out the product design and distribution obligations ('DDO') that financial product issuers and distributers must abide by when designing and distributing applicable financial products.

The DDOs are designed to force issuers and distributors to take a consumer-centric approach to the designing, marketing, and distribution of their financial products, to retail consumers. The key obligation for issuers is the requirement to create a 'Target Market Determination' ('TMD') for each product covered by the regime. The TMD must identify and describe the class of retail consumers that comprise the target market for the particular product

56 Australian Competition and Consumer Commission. *Consumer Credit Insurance Review* (ACCC Publication, 1998).

57 FSRC, op cit., p. 309.

58 John Armour, Jeffrey N. Gordon, Jennifer Payne, Daniel Awrey, Luca Enriques, Paul L. Davies, and Colin Mayer. *Principles of Financial Regulation*. 1st ed. ed.: Oxford University Press, 2016, p. 122.

59 *Principles of Financial Regulation*, op cit., p. 122.

60 Gail Pearson, "Suitability." *Company and Securities Law Journal 35* (2017), p. 469; *Principles of Financial Regulation*, op cit., p.122.

61 *FSRC*, op cit., p. 309; *Treasury Interim Report Submission.*

62 *Corporations Act 2001* (Cth) s 763A, 763C, 994A(1); *Corporations Regulations 2001* (Cth) regs 7.8A.02(4)-(5); *Corporations Act 2001* (Cth) s 910A as modified by ASIC, *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument* (2015/682, 28 July 2015).

and, in doing so, product issuers must consider the likely objectives, financial situation, and needs of the consumers in that class.[63] Furthermore, the TMD is not intended to be a consumer-facing disclosure document.[64] The requirement that the TMD be in writing, and publicly available, is purely to assist evidentiary requirements in substantiating claims of non-compliance with the DDO provisions, in the event that a dispute arises.[65] This also allows consumers to read the TMD for a product if they wish to. Critically however, it does not impose an obligation on consumers to have read or understood the TMD, since it is not a disclosure document.

First, an 'issuer', for the purposes of the DDO provisions, is any person that must prepare disclosure documents under the *Corporations Act*,[66] or anyone that sells financial products under a regulated sale, within the meaning of Div. 2 of Pt. 2 of the *ASIC Act*. Issuers also include any persons required by the *Corporations Regulations 2001* (Cth) ('*Corporations Regulations*') to create a target market determination ('TMD').[67]

The obligations for issuers can be summarised as follows: issuers are required (emphasis added):

- to make, in writing and publicly available, a TMD;[68]
- the TMD is to specify the target market for the product having considered the **likely objectives, financial situation** and **needs of the client**;[69]
- to review the TMD as and when required to **ensure it remains appropriate**;[70]
- to **keep records** of the decisions made in relation to the TMD and the new regime broadly;[71] and
- to notify ASIC of any '**significant dealings**'[72] in a financial product that are inconsistent with the financial product's TMD.[73]

A 'distributor' is, not surprisingly, a person who distributes a financial product. This includes Australian financial service (AFS) licensees and any of their authorised representatives, in addition to persons that may be exempt from holding an AFS license. The obligations placed on distributors of financial products can be summarised as follows: distributors must:

- not engage in 'retail product distribution conduct'[74] in relation to a product unless a TMD has been made;[75]
- not engage in retail product distribution conduct where a TMD may no longer be appropriate;[76]
- take reasonable steps to ensure that retail product distribution is consistent with the TMD;[77]
- keep records about any complaints made in relation to a financial product;[78] and
- notify the issuer of a product of any 'significant dealings' that are not consistent with the TMD.[79]

Once the issuer has determined the class of retail consumers for whom the financial product is suitable, the issuer and distributors must take reasonable steps to ensure that distribution of the product will be consistent with the TMD, and should not sell or provide the product to persons outside of the target market.[80] It is pertinent to note that a breach of this obligation will not necessarily

63 *Corporations Act 2001* (Cth) s 994B(8).

64 ASIC, *Product Design and Distribution Obligations* (Regulatory Guide No 274, December 2020) 46 [274.138].

65 Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 17 [1.49].

66 *Corporations Act 2001* (Cth) sub-ss 994B(1)(a)- 994B(1)(b).

67 *Corporations Act 2001* (Cth) sub-s 994B(1)(c); *Corporations Regulations 2001* (Cth) regs 7.8A.05, 7.8A.07; ASIC, *Product Design and Distribution Obligations* (ASIC Regulatory Guide No 274, December 2020) 14.

68 *Corporations Act 2001* (Cth) ss 994B(1)-994B(2), 994B(5).

69 *Corporations Act 2001* (Cth) s 994B(8).

70 *Corporations Act 2001* (Cth) s 994C.

71 *Corporations Act 2001* (Cth) s 994F.

72 Note, 'significant dealing' is not defined in the *Corporations Act* however the Revised Explanatory Memorandum indicates that it should take its ordinary meaning. This is expected to mean that an issuer must notify ASIC of dealings that 'would be worthy of its attention having regard to the object of the new regime and ASIC's role as its regulator': Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 23.

73 *Corporations Act 2001* (Cth) ss 994B-994C; Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 14 [1.42].

74 'Retail product distribution conduct' is dealing in a financial product in relation to a retail client: Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 14 [1.42].

75 *Corporations Act 2001* (Cth) s 994D.

76 *Corporations Act 2001* (Cth) sub-s 994C(3).

77 *Corporations Act 2001* (Cth) s 994E.

78 *Corporations Act 2001* (Cth) sub-ss 994F(2)-994F(2)(6).

79 *Corporations Act 2001* (Cth) ss 994F-994G; Revised Explanatory Memorandum, Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Cth) 15 [1.43].

80 *Corporations Act 2001* (Cth) s 994E.

arise, solely, by virtue of a retail client outside the target market, obtaining the product. However, it is expected that such circumstances would be considered when determining whether 'reasonable steps' were taken. Furthermore, 'retail product distribution conduct' is defined as dealing in, providing a disclosure document under Pt. 6D.2, or providing a Product Disclosure Statement ('PDS') under Pt. 7.9, for a product in relation to a retail client.[81] The term 'dealing' takes its ordinary meaning from s 766C of the *Corporations Act* (subject to some exclusions),[82] and includes 'applying for or acquiring a financial product', 'issuing a financial product', 'varying a financial product', 'disposing of a financial product', and arranging for a person to engage in such conduct.[83] It is clear that a wide variety of conduct is prohibited unless a TMD has been created for the product and, of critical importance, distributors must take reasonable steps to ensure distribution is consistent with the TMD.

Overall, and in combination, these obligations provide a step away from disclosure as the sole means of ameliorating retail consumer detriment. This is a direct result of placing responsibility on issuers and distributors to opine on an appropriate TMD for the product, ensure they give reasons for coming to that conclusion, and take reasonable steps to ensure that retail product distribution is consistent with the TMD. Additionally, non-compliance may be met with both civil and criminal penalties.[84]

F. General and Life Insurance Codes of Practice

Self-regulation via industry codes has some inherent and significant limitations. Treasury's submission to the FSRC aptly outlines a few, including:

- the standards set may not be adequate;
- not all industry participants may subscribe to, and be bound by, the code;
- monitoring and enforcement of compliance with the code may be inadequate; and
- consequences for breach of the code may not be enough to make industry participants correct and prevent systemic failures in its application.[85]

Commissioner Hayne further remarked that the range and diversity of code obligations, and some developments at common law,[86] may have contributed to there being some uncertainty about which provisions of industry codes may be relied upon, and enforced by, individuals. Uncertainty of this kind is highly undesirable. Participants in the financial services industry must know what rules govern their dealings.[87]

In addition, Recommendation 4.9 of the FSRC stated that, by 30 June 2021, the Insurance Council of Australia and ASIC should take all necessary steps to ensure that the provisions in the Codes of Practice that pertain to, and govern the terms of, the contract made between the insurer and the insured be designated as 'enforceable code provisions'.[88] This would allow breaches of the code to be enforced, and provide additional consumer protections. However, as at the time of writing, this has not occurred. With respect to the General Insurance Code of Practice, it is prudent to note that the Independent Review Office may be able to enforce the code, where there is a code compliance committee.

Whilst there is, arguably, merit to self-regulation in some industries, it appears that this structure has been ineffective to safeguard retail consumers and does not adequately assist them in understanding their rights and responsibilities. As regards insurers, complying with obligations that do not have legal force or significant sanctions[89] is likely to be viewed as nothing other than a cost of doing business.[90]

---

81 *Corporations Act 2001* (Cth) s 994A.

82 *Corporations Act 2001* (Cth) sub-s 994A(1); *Corporations Act 2001* (Cth) s 766C. Note, exclusions apply to: sub-ss 766C(1)(d)-(e), sub-s 766C(4)(c) if the dealing is an offer of securities that needs disclosure to investors under Part 6D.2, and sub-s 766(3) if the dealing is a regulated sale of the product on the person's own behalf.

83 *Corporations Act 2001* (Cth) sub-ss 766C(1)- 766C(2).

84 *Corporations Act 2001* (Cth) ss 994B-994H, 994J, 994M, 1317.

85 *Treasury Interim Report Submission*, pp. 9-10.

86 *Brighton v Australia and New Zealand Banking Group Ltd* [2011] NSWCA 152; *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302.

87 *FSRC*, op cit., p. 311.

88 *FSRC*, op cit., p. 315.

89 Insurance Council of Australia, *General Insurance Code of* Practice (Insurance Council of Australia, 2021), p. 44.

90 Insurance Council of Australia, *General Insurance Code of* Practice (Insurance Council of Australia, 2021), p. 44; *FSRC vol 2,* op cit., p. 328.

Ⅲ. Practical Implication for Consumers

The UCT regime changes are the most recent addition to the patchwork-style of consumer protection in the insurance market. These amendments appear significant, but arguably fail to address the root-causes of the problems, and thus only minimally improve consumer protection in the insurance market. There are several issues that continue to bedevil retail consumers, including: a lack of appropriate forms of redress, a lack of internal cultural change of insurance providers, and a general unwillingness to prosecute by ASIC.[91] Insurance providers are too focused on short-term financial gains, at times a product of a culture of greed, to fully appreciate the long-term detriment to consumer outcomes, profitability, and by extension, economic outcomes. While UCT measures have been described as promoting a proactive approach to insurance consumer protection, the extent of this may prove unconvincing.[92] UCT measures are inherently limited in their utility because of a largely reactive approach to consumer protection. That is, the offending must occur before the remedy can take place. It cannot be understated: the importance of a trustworthy insurance market, given insurers' involvement in what can be some of the most traumatising times in most consumers' lives.

A. Forms of Redress

The sole form of redress for UCTs is to void the unfair term to the extent that the contract can operate without it.[93] Voiding may not be the most appropriate form of redress for the consumer and, as Treasury noted in 2018, this 'may remove the basis for the claim entirely'.[94] Treasury recommended additional judicial powers, like injunctions, compensation, redress for non-party consumers, refusing to enforce the contract, refunds, and any other orders they deem appropriate.[95] Moreover, ASIC and ACCC have argued for a civil penalty regime for UCT as they provide a strong deterrent effect.[96]

In saying that, only having a pecuniary penalty may mean the insurer absorbs this as a 'cost of doing business'. That is, without additional powers to punish insurers, it may not prove effective. What insurers have evidently failed to appreciate is the role they play in the insureds' lives. As aforementioned, this cannot be made light of. This is evident by their failure to facilitate positive consumer outcomes that continue to drive down consumer and industry confidence. It does not appear convincing that insurance companies will be deterred in using UCTs when voiding is the only punishment, as this lacks an incentive to change.[97]

B. The Duty of Utmost Good Faith

The duty of utmost good faith still applies to insurance contracts and acts independently of UCT measures.[98] It prescribes an ethical standard for parties to act fairly and reasonably through every step of the contracting process.[99] This duty is not a recent development. It has played a role in insurance contracts since the case of *Carter v Boehm*,[100] and formed part of Australian common law until its introduction, when the ICA developed this common law position.[101]

This duty is regarded by some as having failed to protect consumers;[102] the FSRC noting a flagrant disregard for this duty.[103] Several groups note that this duty has

---

91 Though it is worth noting that courts have still found a breach of the duty of utmost good faith by insurers. See, e.g., *ASIC v TAL* [2021] FCA 193; *ASIC v YOUI* [2020] FCA 1701; *Alliance v Delorvue* [2021] FCA FC 121; and *Advance v Darshn* [2022] FCA FC 48.

92 Consumer Action Law Centre, *Denied: Levelling the Playing Field to Make Insurance Fair,* Report, p. 7.

93 *ASIC Act* ss12BF(1) and (2).

94 *Damaging Loophole,* op cit., p. 281; Treasury, 'Enhancements to Unfair Contract Term Protections, Regulation Impact Statement for Decision' ('*Regulation Impact Statement*') p. 23.

95 Treasury, *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021: Unfair Contract Terms Reforms* (2021) ('*Exposure Draft*').

96 *Damaging Loophole,* op cit., p. 282; *Exposure Draft,* op cit., p. 7.

97 *Regulation Impact Statement*, op cit., p. 24.

98 *FSRC,* op cit., p. 307

99 Michael Mills, "Duty of Good Faith: The "Sleeper" of Insurance Obligations?". *Australian Law Journal* 80 (2006) 387 ('*Duty of Good Faith*'); Kenneth Sutton, *Insurance Law in Australia.* 3rd ed. Sydney: LBC, 1999, p. 158.

100 (1766) 97 ER 1662.

101 *Duty of Good Faith,* op cit., p. 388.

102 See, e.g., *Denied: Levelling the Playing Field to Make Insurance Fair,* op cit., p.12; Law Council of Australia, Consumer Law Committee, *Submission: Extending Unfair Contract Terms Protections to Insurance Contracts*, 27 August 2018, p. 16 (§ 62-64); Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the life insurance industry* (Report) pp. 38-39 (§ 3.39-3.40) ('*Joint Committee Report*').

103 *Duty of Good Faith,* op cit., p. 148-9: "… or very poor understanding

done little, if anything, to prevent 'the spread of unfair terms in insurance contracts' nor give the courts 'any power to provide a remedy to consumers', due to its legal imprecision, limited applicability, and lack of consumer understanding.[104]

1. Inaccessibility

This duty is 'little-known' and not often used by consumers.[105] Instead, this duty has been exploited by insurers, often repeatedly, to deny claims for arbitrary reasons.[106] In 83 per cent of cases where this duty was breached, it was the insurer making the claim.[107] The law surrounding insurance contracts is neither clear nor accessible to consumers. Research consistently shows that consumers do not understand the risks associated with unfair terms.[108] Additionally, self-represented parties fail in court due to this.[109] This means consumers need to understand that the duty has been breached in the first place, as well as have the time and resources to bring a case. This is often impossible for much of the population.

Combined with an already unequal playing field in the context of 'take-it-or-leave-it' standard form contracts,[110] the role of an asymmetric power difference leaves open the opportunity for exploitation. It is not to say that there needs to be an equal playing field between insurer and insured, but that the insurer recognises their inherent advantage, and does 'the right thing'. CHOICE notes that these legislative changes will go towards 'removing the loopholes' that allow insurers to both use UCTs and deny claims.[111] It can be questioned, though, whether the insurers will instead simply do what they have always done, which is to say, engage in creative compliance. This is because the financial industry simply innovates too quickly for 'prescriptive, rules-based approaches' to keep up.[112] Put differently, this approach to regulation fails in addressing the underlying cause, or motivation, of poor behaviour, that is, the role played by greed and minimum compliance.

2. Internal Behaviour

It is evident that insurers can, and will, exploit the law for financial gain. This was a major touchstone for Commissioner Hayne in the FSRC, noting that 'self-interest… will almost always trump duty'.[113] The duty is not enough of a deterrent to change the behaviour of insurance companies, and it is not convincing that additional UCT provisions will change this. It is not only a 'box-ticking exercise' mentality of minimum compliance.[114] This is behaviour that is actively below such standards, and it maintains the burden on the consumer of ensuring that the right thing is being done - rather than on the insurer. It effectively requires consumers to have complex insurance and legal knowledge, to ensure that they are getting the appropriate advice from the very entities they are meant to trust.[115] The reason consumers come to insurers is *because* they do not know the kind of, or exactly how much, damage they will suffer.[116] It is unfair to expect consumers to be ready and able to tackle a legal battle while enduring the mental and emotional toll of the problem they were supposed to be adequately insured against. Insurers need to *want* to change their behaviour, to promote better consumer outcomes. This is evidently not the case.[117] The current regime of an incremental patchwork of legislative amendments simply is not enough to adequately

of its scope and operation".

104 *Joint Committee Report',* op cit., pp. 38-39.

105 *Damaging Loophole,* op cit., p. 284.

106 *ALRC Report 137,* op cit., p. 148.

107 *Damaging Loophole,* op cit., p. 285.

108 Ibid p. 291.

109 *Keeping the (good) faith,* op cit., p. 485.

110 Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework.* Productivity Commission Inquiry Report (30 April 2008) vol. 2, p. 149.

111 CHOICE (the Australian Consumers' Association), "Consumer Advocates Welcome Act Implementing Three Key Banking Royal Commission Recommendations." (undated). https://www.choice.com.au/about-us/media-releases/2020/february/consumer-advocates-welcome-act-implementing-three-key-banking-royal-commission-recommendations.

112 Andrew Schmulow, "Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks." *African Journal of International and Comparative Law* 30, no. 1 (2022) p. 31 ('*Laying the Groundwork*').

113 *FSRC,* op cit., p. 3.

114 *FSRC Interim Report,* op cit., p. 290.

115 Kate Booth, Chloe Lucas, and Christine Eriksen. "Underinsurance is entrenching poverty as the vulnerable are hit hardest by disasters." Web page, *The Conversation*. (2021) https://theconversation.com/underinsurance-is-entrenching-poverty-as-the-vulnerable-are-hit-hardest-by-disasters-152083 ('*Entrenching Poverty*').

116 Ibid.

117 See e.g., Andrew Schmulow, "ASIC, now less a corporate watchdog, more a lapdog." *The Conversation*. (2021). https://theconversation.com/asic-now-less-a-corporate-watchdog-more-a-lapdog-167532 ('*Corporate Watchdog*').

protect consumers. As was discussed by the FSRC, poor corporate culture continues to drive misconduct.[118] The insurance market's 'profits-before-people' culture continues to undermine consumers' confidence.[119]

3. Trust and Confidence

Maintaining profits and facilitating positive consumer outcomes does not need to be at odds and could in fact amplify one other. The current practice of corporate greed is unsustainable in the long-term and comes at the expense of consumer trust and confidence, as well as long-term profit and sustainability. Llewellyn notes that consumer trust and confidence is imperative when considering the length and complexity of these contracts.[120] Thus, consumers should be reasonably able to expect insurers to comply with the law 'over and above what is required'.[121]

Positive consumer outcomes promote consumer confidence, which in turn promotes further engagement and demand in the insurance market. This means an increase in long-term, loyal customers who will *want* to engage with insurers,[122] and purchase more from them. Arguably this will lead to a more stable and reliable insurance market. It is uncontroversial to say that less- or under-insured consumers is bad for everyone, and the economy generally. So, promoting consumer trust and confidence should be at the forefront of insurance providers' objectives. The Australian Government, in responding to the FSRC, said their focus will be on restoring consumer confidence and promoting better outcomes.[123] This has yet to be seen.

4. ASIC and Enforcement

To illustrate the apprehension behind the utility of these UCT measures, we must consider whether there has been adequate enforcement of the duty of utmost good faith by ASIC. The FSRC recommended 'extending ASIC's capacity to take enforcement action' regarding the duty,[124] but it should be questioned why ASIC would need that in the first place? ASIC's history of enforcement has been the subject of considerable criticism,[125] and one could speculate as to whether these additional provisions will be effective. ASIC and APRA were privy to much of the systemic misconduct in the financial services sector that led to the FSRC,[126] yet continually failed to act. There is sustained recognition by both Parliament and ASIC that as the financial services industry grows, consumers will need additional protection.[127] However, without a substantial increase in funding for ASIC, there is unlikely to be an increase in their efficiency.[128] Also, considering that ASIC claimed they would not invoke the duty unless there was 'serious and systemic misconduct',[129] this is indicative of an unwillingness to litigate. This unwillingness was criticised by the FSRC - compounded by the Federal Government's aversion to commit to the Report's recommendations.[130] This illustrates the needs for a fundamental shift in corporate culture, since there is little enforcement of the existing penalties, irrespective of ASIC's powers. This is by no means a recent development. Criticism of ASIC's hesitancy to move on 'persistent early warning signs of corporate wrongdoing' has been acknowledged by Federal Government committees as early as 2014.[131]

---

118 *FSRC,* op cit., p. 376.

119 Harlan Loeb, "Principles-Based Regulation and Compliance: A Framework for Sustainable Integrity." *Huff Post*. (2015). https://www.huffpost.com/entry/principlesbased-regulaton_b_7204110.

120 David Llewellyn, "Trust and Confidence in Financial Services: A Strategic Challenge." *Journal of Financial Regulation and Compliance* 13, no. 4 (2005) p. 336 ('*Trust and Confidence*').

121 Ibid.

122 Andrew Schmulow, "Financial services need to wake up to fact that treating customers well is good business." *The Conversation*. (2019). https://theconversation.com/financial-services-need-to-wake-up-to-fact-that-treating-customers-well-is-good-business-121948.

123 Andrew Godwin, "One year on, is our trust being restored?" *Pursuit*. (2020). https://pursuit.unimelb.edu.au/articles/one-year-on-is-our-trust-being-restored.

124 Julie-Anne Tarr, Jeanette Van Akkeren, Amanda-Jane George, and Sue Taylor. "Utmost Good Faith and Accountability in the Spotlight of the Banking Royal Commission - Time to Revisit the Scope, Applicability and Enforcement of the Duty." *Australian Business Law Review* 47, no. 3 (2019) p. 160 ('*Accountability in the Spotlight*').

125 Jason Harris, "Is ASIC the watchdog that no one fears?" *The University of Sydney*. (2019). https://www.sydney.edu.au/news-opinion/news/2019/02/22/is-asic-the-watchdog-that-no-one-fears-.html. ('*Watchdog that no one fears*').

126 Schmulow, Andrew, Paul Mazzola & Daniel de Zilva, "Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority." *Federal Law Review* 49, no. 4, p. 506.

127 Zehra Eroglu Kavame, and K.E Powell. "Role and Effectiveness of ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the United States and Australia." *Journal of Banking and Finance Law and Practice* 31 (2020) p. 75.

128 Jason Harris, "Corporate Law Lessons from the Banking Royal Commission." *Australian Law Journal* 93 no. 5 (2019) p. 365.

129 *Damaging Loophole*, op cit., p. 285; Tarr et al., *Accountability in the Spotlight*, op cit., p. 158.

130 *Corporate watchdog,* op cit.

Ⅳ. United Kingdom

The United Kingdom's TCF approach to financial product regulation provides a useful case study. Its discussion and implementation began circa 2001[132] and, as a result, provides a rich set of data from which analysis can be undertaken. The fundamental premise of this regime is to ensure that all firms can consistently demonstrate that the fair treatment of customers is integral to their business model. In this, it is the structure and hierarchy of norms of conduct, utilised by the FCA, that precipitates strong consumer protections. It is argued here that this shift in mindset, from a pure, blackletter-law, legalistic approach, to a hybrid principles-based and outcomes-determined regime, would provide a discernible benefit to retail consumers in the Australian insurance market. For clarity, the two regimes in question could be thought of as sitting on either ends of a spectrum. Here, a shift is proposed along that spectrum, to incorporate governing norms of conduct, rather than suggesting an isolated principles-based regime.

There are six consumer outcomes that underpin the TCF regime, and that form the base expectations of the FCA. They are outcomes that firms must strive to achieve, as distinct from a demonstration of 'processes used'. These outcomes are tabled below.

To assist and guide firm further, there are eleven principles that seek to align business practices with the statutory objectives. These principles are tabled below.

The United Kingdom's TCF regime has been lauded by many,[133] due to its consumer centric approach to financial services regulation. A correctly distilled principle 'seeks to provide an overarching framework that guides and assists regulated entities to develop an appreciation of the core goals of the regulatory scheme,' and allows regulators to police compliance with the spirit of the law, as distinct from legalistic compliance. Simultaneously, there should be an emphasis on 'outcomes sought' rather than on 'processes used', when determining compliance with any principle. The adoption of such a framework describes, in a very succinct manner, the universe of outcomes that the regulatory framework is intending to achieve. That said, especially in a complex area such as financial services regulation, there still is high level regulation required, albeit where possible, this is minimised. The United Kingdom has many rules[134] that govern product suitability, affordability, and advertising. However, most, if not all, of these rules circle back to principle 6 and principle 7 (Table 2). It is this dominance of the principles and outcomes from which the key benefits of a principles-based regime flow. Detailed rules and guidance will stem from the principles, and the principles will be used to interpret and guide the applicability of the rules.

The *Financial Services and Markets Act 2000* ('FSMA') and Insurance: Conduct of Business Sourcebook ('ICOBS') govern, among other things, the conduct of insurance businesses in the United Kingdom. The FSMA and ICOBS are administered by the Financial Conduct Authority ('FCA'), previously known as the Financial Services Authority. It is pertinent to note that the FCA has a varied range of enforcement powers and, under s 206 of the FSMA, the FCA can impose financial penalties, in an amount it considers appropriate, where it determines that an authorised person has contravened a requirement under the FSMA.[135] Guidance is provided in chapter 7 of its Enforcement Guide, which allows firms to understand the FCA's approach to exercising its powers.[136] It is worth noting that in Australia, ASIC (the FCA's equivalent) must pursue action, other than administrative repercussions, through the courts.

The United Kingdom utilises an interesting array of tools in combination, to effectively regulate and enunciate to both firms and consumers, their rights, and responsibilities

131 Andrew Schmulow, Karen Fairweather, and John Tarrant. "Restoring Confidence in Consumer Financial Protection Regulation in Australia: A Sisyphean Task?" *Federal Law Review* 47, no. 1 (2019) 92 (*'Sisyphean Task'*).

132 Financial Services Authority. *Treating Customers Fairly after the Point of Sale*. United Kingdom, 2001; Rosie Thomas. "Regulating Financial Product Design in Australia: An Analysis of the UK Approach." *Journal of Banking and Finance Law and Practice* 28 (2017), p. 100 (*'Regulating Financial Product Design in Australia'*).

133 *Principles of Financial Regulation*, op cit.; *Regulating Financial Product Design in Australia*, op cit.; Julia Black, "The Rise, Fall and Fate of Principles Based Regulation" in LSE Law, Society and Economy Working Papers, no. 17/2010, Law Department, London School of Economics and Political Science, (2010), p. 18.

134 See e.g., Financial Conduct Authority, "Principles for Businesses - FCA Handbook", August 2022, and pursuant to: *Financial Services and Markets Act 2000*.

135 *Financial Services and Markets Act 2000* s 206.

136 Financial Conduct Authority, "Regulatory Guides: EG The Enforcement Guide - FCA Handbook", August 2022, and pursuant to: *Financial Services and Markets Act 2000*.

Table 1. Six outcomes that underpin the United Kingdom's Treating Customers Fairly Regime

Outcome 1	Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.
Outcome 2	Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.
Outcome 3	Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.
Outcome 4	Where consumers receive advice, the advice is suitable and takes account of their circumstances.
Outcome 5	Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.
Outcome 6	Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

Table 2. The principles that underpin the United Kingdom's Treating Customers Fairly Regime

1. Integrity	A firm must conduct its business with integrity.
2. Skill, care, and diligence	A firm must conduct its business with due skill, care, and diligence.
3. Management and control	A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4. Financial prudence	A firm must maintain adequate financial resources.
5. Market conduct	A firm must observe proper standards of market conduct.
6. Customers' interests	A firm must pay due regard to the interests of its customers and treat them fairly.
7. Communications with clients	A firm must pay due regard to the information needs of its clients and communicate information to them in a way which is clear, fair and not misleading.
8. Conflicts of interest	A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client.
9. Customers: relationships of trust	A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.
10. Clients' assets	A firm must arrange adequate protection for clients' assets when it is responsible for them.
11. Relations with regulators	A firm must deal with its regulators in an open and cooperative way and must disclose to the FCA appropriately anything relating to the firm of which that regulator would reasonably expect notice.

in this complex area. It is a combination of legislation, black-letter, prescriptive law rules, and non-legislative tools, such as guidance documents, all to be interpreted regarding the overriding principles and outcomes. Regarding insurance specifically, ICOBS 4.1.1A and 6A.6.2 are particularly instructive. The former provides: '[t]o comply with the customer's best interests rule and Principle 7 (Communications with clients) a firm should include consideration of the information needs of the customer …' and additionally, ICOBS 6A.6.2 provides, '[t]he purpose of this section is to support Treating Customers Fairly outcome 6 - 'Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint'. Both sections illustrate how the detailed rules can be, and indeed are, informed by normative principles or outcomes. This allows the reader to easily glean the intent of the legislation, and what the detailed rule aims to achieve,

Critically, legislation and rules are instruments of communication from the regulator/governing body to the regulated, communicating what conduct is acceptable. From Part II above, discussing the Australian experience, one can identify the difficulty a reader will have when trying to understand, not only what is required of them, but also what the underlying intent and norms of conduct are, that the governing body/regulator is trying to communicate. The reader is required to consult multiple Acts and regulations that are themselves complex and, must simultaneously ensure they are mindful of the different and sometimes conflicting definitions utilised. Adding

further complexity are the amendments implemented via multiple Acts that must also be understood, without any guiding principles. Some of this legislation stems from the recommendations of the FSRC and can be thought of as 'Tombstone Legislation'. Tombstone Legislation refers to Acts, regulations and legislative amendments that take place after a significant event, inquiry, or deaths occur, in a particular area. It is reactive and generally follows from recommendations to fix identified failings, after an investigation has been performed. While there is a place for this kind of legislation, more must be done to ensure the current framework is preventative, and not reactive. Retail consumers should not have to wait until a Royal Commission, or an inquiry, to ensure that they are being treated fairly, and that the intent of the law is met.

A. Medical Definitions: an Example

Medical definitions are a critically important aspect of life and total and permanent disability insurance. A key factor in assessing whether a claimant will receive the benefit under their policy depends on whether they meet one of the definitions provided in the policy.[137] When offering insurance, insurers can decide to use broad or restrictive medical definitions to increase or decrease the coverage they will provide. Ultimately this is a business decision and will affect the premium the insurer requires. ASIC has taken the view that reliance on an outdated medical definition, in and of itself, is not a breach of the law, provided the relevant definition is disclosed to the insured.[138] Such a conclusion is clearly irreconcilable with the fundamental precepts outlined by Commissioner Hayne, namely: 'do not mislead or deceive; act fairly; provide services that are fit for purpose; and deliver services with reasonable care and skill' and echoed by the community in what they expect of insurers.[139] It is evident that the levels of black-letter law prescription are excessive and, consequently, leads to detrimental results for retail consumers. Under a TCF regime it is likely that an outdated medical definition would fall foul of principles 1, 2, and 6 and, hence, this would potentially have forced insurers to alter their practices to ensure that outdated medical definitions were not evident in their policies.

The Life Insurance Code requires insurers to review medical definitions every three years, and update those definitions where necessary, to ensure that the definitions reflect current practices and understanding.[140] The code also requires that the review process occurs in consultation with medical specialists and, where updates occur, an insured person affected by such a change should be informed accordingly. This requirement only applies to 'on-sale products' and does not address 'off-sale' products. This is a step in the right direction, however (as at the time of writing), the code still does not have 'enforceable code provisions', contrary to the FSRC recommendation to have that in place by 30 June 2021. Under a TCF framework, insureds would have greater access to redress, even if these were not 'enforceable code provisions', as such conduct would still fall foul of the overarching TCF principles.

Previously, in Australia, one of the fundamental factors that led to a review of a product's definitions were competitor reviews. Where the insurer would review what their competitors were offering and, on that basis, determine whether they should subsequently change their definitions.[141] A TCF regime in the UK, and other jurisdictions such as South Africa, has led to increased competition amongst insurers, whereby some advertise their products on the basis of how fairly they treat their customers. It is this shift in mindset, requiring at each stage of the product life-cycle that the insurer ensure that they are putting the customer first - that they are being treated fairly, that gives rise to better outcomes, without the need for a specific rule requiring a firm to do so.

Ⅴ. TCF in Australia

Having illustrated how a TCF regulatory model works in a twin peaks model like Australia, it is clear that it could provide redress for many of the problems Australia is facing in the insurance market, and the financial services sector generally.

137 *FSRC vol 2,* op cit., p. 318.
138 *FSRC vol 2,* op cit., p. 324.
139 *FSRC*, op cit., p. 9.
140 Financial Services Council, *Life Insurance Code of Practice* (Financial Services Council, 2019), p. 5.
141 *FSRC vol 2,* op cit., p. 325.

A. Inaccessibility

A criticism of the duty of utmost good faith was its inaccessibility to consumers, and the Financial Ombudsman Service's use of it was 'minimal and mixed at best'.[142] Consumers lack the ability to absorb and understand the often voluminous and complex information they are given.[143] If Australia were to adopt a UK-style TCF regime, such practices would contravene Outcome 3 and 4 and Principle 7 (tabled above), which emphasise the importance of information that is appropriate and suitable. In other words, providing information that is easily understandable.

The implication is then that since UCTs are grounded in a blackletter-law approach to insurance, inaccessibility for consumers remains unaddressed. The simple, overarching principles, that inform insurers' conduct in a TCF regime, promote better accessibility to, and understanding of, both insurance and the law. These objectives create 'capable and confident consumers'.[144] Anecdotally we have seen evidence that capable and confident consumers are seldom evident.[145]

B. Trust and Confidence

Capable and confident consumers will necessarily have more trust in their insurers, and the regulators. There is a growing deficit of this trust, largely due to personal experience and a general mistrust of the industry.[146] Australian research indicates that, especially for young people, trust in insurance companies is lagging in comparison to every other institution, including banks.[147] Consumers are aware they lack the technical know-how to understand the complexities of insurance, and so rely on these entities to do the right thing.

Trust and confidence appear, therefore, to be integral to the operation and success of the insurance market. As expressed by the FSRC,[148] the insurance sector has exploited the unique features of insurance in pursuing short-term financial gains, at the cost of consumer trust and confidence. Consumers are keenly aware of their lack of knowledge and, without trust and confidence in the industry, this manifests as irrational decisions that motivate inappropriate purchases,[149] or forgoing purchasing altogether.[150]

This illustrates the appropriateness of a TCF regime in the insurance market. TCF's inherent simplicity allows consumers a far greater understanding of insurance because the information given to them should be clear and appropriate.[151] If the information is understandable, consumers have greater confidence in their insurer. And when they have greater confidence through their personal understanding, this in turn will facilitate greater trust in the insurance market.[152] Research indicates that when consumers are more confident in their knowledge, they are more likely to be insured.[153] As such, it is in the best interests of insurers to promote consumer trust and confidence, because this creates stable, long-term financial gain.

C. Internal Culture

TCF would likely have a significant impact on the internal governance of insurers. Insurers would be likely to continue to creatively comply with legislation, which is why the UCT extensions may not be sufficient for promoting consumer protection. Like the duty of utmost good faith, insurers may find a way around the UCT

142 Law Council of Australia, Consumer Law Committee, *Submission: Extending Unfair Contract Terms Protections to Insurance Contracts.* (2018) p. 16.

143 *Accountability in the Spotlight,* op cit., p. 12; Michael Pelly, "Financial Services Rules 'Too Complex, Incoherent and Inaccessible'." Article, *The Australian Financial Review*. (2022). https://www.afr.com/companies/financial-services/financial-services-rules-too-complex-incoherent-and-inaccessible-20220316-p5a52b. (*'Too Complex'*).

144 *Laying the Groundwork*, p. 28.

145 Booth, Lucas and Eriksen, *Entrenching Poverty,* op cit.; Pelly, *Too Complex,* op cit.; Chloe Lucas, "'They lost our receipts three times': how getting an insurance payout can be a full-time job." News Article, *The Conversation*. (2021). Accessed 22 March 2021. https://theconversation.com/they-lost-our-receipts-three-times-how-getting-an-insurance-payout-can-be-a-full-time-job-157588. (*'Insurance payout can be a full-time job'*).

146 *Entrenching Poverty,* op cit.; Bruce Tranter and Kate Booth. "Geographies of Trust: Socio-Spatial Variegations of Trust in Insurance" *Geoforum* 107 (2019) p. 200 (*'Geographies of trust'*).

147 *Geographies of Trust*, op cit., pp. 204-6. It is worth noting that this is a global trend.

148 See *FSRC,* op cit., pp. 267-318.

149 That is to say: under- or over-sold, or unnecessary insurance policies.

150 *Trust and Confidence,* op cit., pp. 336-7.

151 As seen in outcome 3 from the UK and SA's TCF principles.

152 *Trust and Confidence,* op cit., p. 336.

153 *Geographies of Trust*, op cit., p. 201.

provisions. Despite the FSRC's scathing remarks,[154] the 'profits before people' culture for many firms has not changed.[155] A continuation of the prescriptive, black-letter-law will fail to address the causes, rather than the symptoms, of poor corporate culture.[156]

Entities need to *want* to change and, giving them the flexibility to decide how they do that under a TCF regime, appears to be the best way. For example, Westpac's lack of remorse for their conduct is illustrative of this, having failed to learn from the mistakes that were exposed by the FSRC.[157] The UK's Principle 11 illustrates how this can be remediated: it encourages firms to deal openly and cooperatively with the regulators. This promotes a positive and consistent duty to work in conjunction with the regulators, rather than against them. This is certainly something to aspire to.

D. ASIC and Enforcement

TCF means the emphasis is on entities to decide what works for them,[158] and enables utilising an individualised, self-reflective, norms-based process to do this, rather than strict legalistic compliance. This goes towards mitigating the pressure on the regulator to painstakingly detail what compliance means and encourages firms to go beyond minimum compliance.[159]

Part of the reason why the internal cultural changes within entities is imperative, is that ASIC has repeatedly failed to litigate, even when there have been 'repeated and serious contraventions of the law'.[160] If ASIC had adequately addressed and prosecuted these contraventions, the FSRC likely would not have occurred.[161] TCF takes some of the pressure off the regulator by ensuring that firms are actively working towards positive consumer outcomes, rather than merely asking ASIC what they are allowed to do. In other words, firms will take on a qualitative, positive duty to act in accordance with the principles, rather than satisfying a negative duty not to break the law. However, ASIC's willingness to litigate would nonetheless have an important impact on the deterrence in a TCF regime.

Part of the reason Australia have an excessively legalistic regime is the perceived need for strict regulation, due to a distinct lack of trust and confidence in the industry by consumers.[162] But if TCF means firms will want to raise consumer trust and confidence of their own accord, then arguably, it will reduce the need for regulation in the first place.[163]

E. Efficiency of Legislation

A TCF regime accepts the inherent complexity of the subject matter but seeks to do so without the complex drafting that has hitherto accompanied that.[164] Described as an 'inescapably complex' problem, blackletter-law is on out to the backfoot, in its attempt to keep up with the rate of technology and innovation.[165] This can often make the law reactionary and complex, which gives rise to a perceived need for further legislation and regulation. This complexity can lead to misunderstandings and non-compliance, intentional or otherwise.[166] It is worth noting that entities can often divest themselves of responsibility for misunderstandings and non-compliance, because of ASIC's failure to give them proper information, even though the entity should reasonably have known better. But complexity does not necessarily promote certainty, and can even have the opposite effect, introducing ob-

154 *FSRC,* op cit., pp. 277-318.

155 Ben Butler, "Banking Royal Commission One Year On: Optimism over Changes but Banks Fight Back." *The Guardian*. (2020). https://www.theguardian.com/australia-news/2020/feb/01/banking-royal-commission-one-year-on-optimism-over-changes-but-banks-fight-back.; Charlotte Grieve, "'All About Sales': Nab Sales Targets Risk Customer Welfare." *Sydney Morning Herald*. (2022). https://www.smh.com.au/business/banking-and-finance/all-about-sales-nab-sales-targets-risk-customer-welfare-20220310-p5a3jt.html.

156 *Laying the Groundwork*, op cit., p. 31.

157 *Corporate watchdog,* op cit.

158 Jonathon Edwards, "Treating Customers Fairly." *Journal of Financial Regulation and Compliance* 14 (2006) p. 242.

159 Andrew Schmulow and Shoshana Dreyfus, Submission to the Australian Law Reform Inquiry, "Review of the Legislative Framework for Corporations and Financial Services Regulation" Report 137 (2022) p. 9 ('*Legislative Framework Submission*'); *Trust and Confidence,* op cit., p. 346.

160 *Watchdog that no one fears,* op cit.

161 *Sisyphean Task*, op cit., p. 98.

162 *Trust and Confidence,* op cit., p. 344.

163 Ibid.

164 *Legislative Framework Submission,* op cit., p. 5.

165 *Keeping the (good) faith* op cit., p. 456; Mark Steward, "Financial Services Legislation Advisory Committee Member Interview." By Andrew Godwin. 2022. https://www.youtube.com/watch?v=BxQCaYHb8Sk. ('*FSLAC member interview'*).

166 *FSLAC member interview,* op cit.

scurity and absurdity.[167] Similar to Australia, it was found in the UK that even where there was a plethora of laws and guidance given, there were still instances of a failure to comply.[168] This is due to the obscuring effect that over-prescription can have on compliance.

Complex drafting is not always necessary for a complex subject matter, and a recent inquiry by the Australian Law Reform Commission has shown that where possible, it should be reduced.[169] TCF focuses on the outcomes, or the spirit of the law, rather than the process by which to get there. It encourages proactive measures of compliance by the entities themselves, rather than reactions by the regulators. In accepting this inescapable complexity, and the argument that not everything can be covered by blackletter-law, the norms that inform the legislation can be better understood and applied. And when they can be better understood, they are more easily complied with.[170] As outlined above in the UK context, there should still be prescriptive rules that support the TCF principles - clarification where clarification is required. But this is done by understanding the rules within the matrix of the Outcomes and Principles, rather than an over-reliance on ASIC[171] (or its guidance notes). This is described above, where the combination of Principles, in conjunction with existing legislation, provides for the best way to promote Outcomes clearly and coherently. That is, a handbook of sorts can bring together these ideas and show how the legislation is informed by the Outcomes and go towards promoting positive consumer outcomes.

This framework would bring together the intent and goals of the six Acts, regulatory codes and regulations outlined in Part II above. Since general and life insurance products are regulated by their own regulatory architecture, they are strong candidates for an overarching TCF framework. This would not require laborious work on the part of the legislator, as may be required for chapter 7 of the *Corporations Act*, but rather a simple introduction of overarching norms of conduct. Prescriptive rules would assist in carrying out the objects of the TCF principles - provided they are only created where there is a discernible and certain need. Prescriptive rules must only be created where there is no normative way to interpret a principle in respect of a particular matter (for eg: how should advertised interest rates be calculated? What method is fairest for consumers?). They must not be created simply as a form of convenience for a regulated entity to save its compliance leaders from the burden of thinking for themselves; to mitigate decision-fatigue; or to transfer the risk of compliance failures (due to misinterpretations of the rules) from the entity, back to the regulator. Albeit at the core of this galaxy will remain the Principles, which will represent a legal compulsion. The grouping of the relevant outcomes, principles, and legislation, in the form of an Insurance TCF Handbook (like that of the FCA) would assist both industry and consumers understand their rights, obligations and the underlying intent of the law. Moreover, the TCF regime is not an introduction of new or unfamiliar principles. As Commissioner Hayne noted, they are evident throughout the various pieces of legislation.[172] However, one of the FSRC's conclusions was a need for clarity on the norms that underpin the legislation.[173] A TCF regime could provide this, as it 'ventilates and isolates' these values,[174] that have always been the responsibility of firms, but obscured by the overwhelming volume of legislation and rules.

Ⅵ. Concluding Observations

Consumer protection is imperative for a healthy and stable insurance market. For this, we argue, a TCF regime would be an appropriate next step for Australia. As indicated by this article, there are deficiencies in consumer protection which are not adequately mitigated by recent changes to either the *ICA* or the *ASIC Act.* It is evident in light of the findings of the FSRC however, that change should be comprehensive, and overhaul current behavioural and cultural issues within the market. The UK

167 *Legislative Framework Submission,* op cit., pp. 5-6.

168 James Davidson, *The UK Financial Services Authority's "Treating Customers Fairly" Initiative and Its Potential for Application in the Australian Financial Services Industry*: CCCL Research Paper, 2006, p. 6.

169 *ALRC Report 137*, op cit.

170 Steward, *FSLAC member interview.*

171 Ibid.

172 *FSRC,* op cit., pp. 8-11.

173 *FSLAC member interview*, op cit.; *FSRC,* op cit., pp. 8-10.

174 Andrew Schmulow, *Does Australia Need a Treating Customers Fairly (TCF) Regime for the Financial Industry?* Ross Parsons' Centre Law and Business Webinar 2021. https://www.youtube.com/watch?v=JvF9GXzszaY&t=1s.

TCF regulatory model provides a laboratory from which TCF implementation in Australia could benefit. We are of the view that the benefits of TCF are clear and unambiguous, remedying many of the issues identified in the FSRC.

References

Armour, J, Gordon, J.N., Payne, J., Awrey, D., Enriques, L., Davies, P.L. & Mayer, C. (2016). *Principles of Financial Regulation*. 1st ed., Oxford University Press.

Bednarz, Z. & Manwaring, K. (2021). Keeping the (Good) Faith: Implications of Emerging Technologies for Consumer Insurance Contracts. *Sydney Law Review 43*(4), 455-487.

Black, J. (2012). Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis. *The Modern Law Review 75*(6), 1037-1063.

Black, J. (2007) Principles Based Regulation: Risks, Challenges and Opportunities. In: *Principles Based Legislation*, 28 March <http://eprints.lse.ac.uk/62814/>.

Black, J. (2010). The Rise, Fall and Fate of Principles Based Regulation. LSE Law, Society and Economy Working Paper, no. 17/2010. Law Department, London School of Economics and Political Science.

Booth, K., Lucas, C. & Eriksen, C. (2021). Underinsurance is entrenching poverty as the vulnerable are hit hardest by disasters. *The Conversation*, https://theconversation.com/underinsurance-is-entrenching-poverty-as-the-vulnerable-are-hit-hardest-by-disasters-152083

Bourova, E., Ramsay, I. & Paul Ali, P. (2020). A 'Damaging Loophole' 'Long Overdue' for Closing Extending Consumer Protections against Unfair Contract Terms to Insurance. *Competition and Consumer Law Journal 27*(3), 264-294.

Butler, B. (2020). Banking Royal Commission One Year On: Optimism over Changes but Banks Fight Back. *The Guardian.* https://www.theguardian.com/australia-news/2020/feb/01/banking-royal-commission-one-year-on-optimism-over-changes-but-banks-fight-back

CHOICE (the Australian Consumers' Association), (undated). Consumer Advocates Welcome Act Implementing Three Key Banking Royal Commission Recommendations . https://www.choice.com.au/about-us/media-releases/2020/february/consumer-advocates-welcome-act-implementing-three-key-banking-royal-commission-recommendations

Consumer Action Law Centre. (2018). *Extending Unfair Contract Terms Protections to Insurance Contracts*. Treasury, https://treasury.gov.au/sites/default/files/2019-03/Consumer-Action-Law-Centre_0.pdf

Consumer Action Law Centre. (2018), *Denied: Levelling the Playing Field to Make Insurance Fair,* Report.

Davidson, J. (2006). The UK Financial Services Authority's "Treating Customers Fairly" Initiative and its Potential for Application in the Australian Financial Services Industry. CCCL Research Paper.

Edwards, J. (2006). Treating Customers Fairly. *Journal of Financial Regulation and Compliance 14*(3), 1358-1988.

Enright, I. & Merkin, R. (2014). *Sutton on Insurance Law*, 4th ed., Thomson Reuters.

Enright, I. Mann, P, Merkin QC, & Pynt, G. (2018). *General Insurance*. Background Paper 14, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Georgosouli, A. (2011) The FSA's 'Treating Customers Fairly' (TCF) Initiative: What is So Good About It and Why It May Not Work. *Journal of Law and Society 38*(3), 405-427.

Godwin, A., Brand, V., & Langford, R.T. (2021). Legislative Design - Clarifying the Legislative Porridge. *Company and Security Law Journal 38*(5), 280-295.

Hanrahan, P. (2017). Fairness and Financial Services: Revisiting the Enforcement Framework," *Company and Securities Law Journal 35*(7), 420-443.

Harris, Jason, (2019) "Corporate Law Lessons from the Banking Royal Commission. *Australian Law Journal 93*(5), 364-366.

Kahneman, D., & Patrick, E. (2011). *Thinking, fast and slow*, Allen Lane.

Kavame, Z. E., & Powell, K.E. (2020). Role and Effectiveness of ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the United States and Australia. *Journal of Banking and Finance Law and Practice 31*(1), 71-87.

Llewellyn, D. (2005) Trust and Confidence in Financial

Services: A Strategic Challenge. *Journal of Financial Regulation and Compliance 13*(4), 333-346.

Loeb, H. (2015). Principles-Based Regulation and Compliance: A Framework for Sustainable Integrity. *Huff Post*, https://www.huffpost.com/entry/principlesbased-regulaton_b_7204110

Lucas, C. (2021), 'They lost our receipts three times': how getting an insurance payout can be a full-time job. *The Conversation*. https://theconversation.com/they-lost-our-receipts-three-times-how-getting-an-insurance-payout-can-be-a-full-time-job-157588

Mills, M. (2006). Duty of Good Faith: The 'Sleeper' of Insurance Obligations? *Australian Law Journal 80*(6), 387-408.

Nehme, M. (2020). Product Intervention Power: An Extra Layer of Protection to Consumers. *Journal of Banking and Finance Law and Practice 31*(1), 88-102.

Pearson, G. (2017). Suitability. *Company and Securities Law Journal 35*(7), 464-480.

Pelly, M. (2022). Financial Services Rules 'Too Complex, Incoherent and Inaccessible'. *The Australian Financial Review*, https://www.afr.com/companies/financial-services/financial-services-rules-too-complex-incoherent-and-inaccessible-20220316-p5a52b

Roddan, M. (2021). APRA probes insurers after pandemic snafu," *Australian Financial Review,* 30 July Sydney.

Schmulow, A. (2019). Financial services need to wake up to fact that treating customers well is good business. *The Conversation*, https://theconversation.com/financial-services-need-to-wake-up-to-fact-that-treating-customers-well-is-good-business-121948

Schmulow, A. (2021). ASIC, now less a corporate watchdog, more a lapdog. *The Conversation*, https://theconversation.com/asic-now-less-a-corporate-watchdog-more-a-lapdog-167532

Schmulow, A. (2022). Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks. *African Journal of International and Comparative Law 30*(1), 25-38.

Schmulow, A., Fairweather, K., & Tarrant, J. (2019). Restoring Confidence in Consumer Financial Protection Regulation in Australia: A Sisyphean Task? *Federal Law Review 47*(1), 91-120.

Schmulow, A., Mazzola, P. & de Zilva, D. (2021).Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority. *Federal Law Review 49*(4), 505-527.

Surendra A. (2006). Striking a Balance between Rules and Principles-Based Approaches for Effective Governance: A Risks-Based Approach. *Journal of Business Ethics 68*(1), 53-82.

Sutton, K. C. T. & Sutton, K. C. T. (1999) *Insurance law in Australia*, Sydney: LBC Information Services.

Tarr, J., Van Akkeren, J., George, A., & Taylor, S. (2019). Utmost Good Faith and Accountability in the Spotlight of the Banking Royal Commission - Time to Revisit the Scope, Applicability and Enforcement of the Duty. *Australian Business Law Review 47*(3), 148-161.

Thomas, R. (2017). Regulating Financial Product Design in Australia: An Analysis of the UK Approach. *Journal of Banking and Finance Law and Practice 28*(2), 95-116.

Tranter, B. & Booth, K. (2019). Geographies of Trust: Socio-Spatial Variegations of Trust in Insurance. *Geoforum 107*, 199-206.

Van Geelen, T. (2021). Delegated Legislation in Financial Services Law: Implications for Regulatory Complexity and the Rule of Law. *Company and Securities Law Journal 38*(5), 296-314.

Received/ 2022. 12. 11
Revised/ 2023. 01. 31
Accepted/ 2023. 02. 12

The International Review of Financial Consumers, Volume.8 Issue.1(Special Issue, June, 2023), 69-89 pISSN 2508-3155 eISSN 2508-464X
https://doi.org/10.36544/irfc.2023.8-1.5

The International Review of Financial Consumers
www.eirfc.com

Bifurcated Substantive and Legislatively-Technical Understanding of the Differences in the UK Statutory "Consumer" Definitions Applicable to Insurance*

Yong Han†

A B S T R A C T

This paper explains why the two UK statutory definitions of "consumer(s)" are so markedly different in the two strands of relevant statutes applicable to insurance. The basic difference between them is that by the narrow definition an insurance consumer can only be an individual whereas by the broad definition it can be either an individual or a firm, and there are other nuanced differences. This basic difference has begged questions about the protection of financial/insurance consumers. The first reason of such a marked difference is that, as a matter of legislative technique and practice in common law countries, the validity and applicability of its statutory legal definition of a terminology in one particular statute is intended to be limited only to that statute and not extendable by default to the same terminology in other statutes. The second and far more important substantive reason is the actual bifurcation of financial consumer protection practically into the judicial approach and the regulatory approach thereto. Consistent with such bifurcation, the narrow and the broad consumer definitions respectively but non-exclusively serve or match the markedly different judicial approach and the regulatory approach to financial/insurance consumer protection.

Keywords: consumer definition, consumer protection, judicial approach, regulatory approach, insurance contract law, financial regulation, dispute resolution

Ⅰ. Introduction

For financial/insurance consumer protection, it seems that the first question that is often asked is: who is the consumer, or what is the definition of consumer? Certainly, this question is of paramount legal and practical importance and therefore it is often evident in financial consumer protection research. For example, in the edited-book *An International Comparison of Financial Consumer Protection*[1] published in 2018, out of the thirteen chapters about financial consumer protection in thirteen legal jurisdictions not including the UK, six chapters[2] each starts

* I am grateful to the anonymous reviewers and the Editor for their constructive feedback, to Professor Christine Reifa and Professor Robert Merkin KC for their helpful suggestions. I am thankful to Professor Satoshi Nakaide and Dr Andy Schmulow for helpfully sending me their book-chapters, and similarly to Dr Jiajun Wang for sending me relevant journal articles by other authors, during my revising of the recent draft, and also to members of the panels and the audience for their comments and questions on my presentation of an earlier version at the World Bank project (Framework for Financial Consumers Protection) online seminar on 03 April 2021, and to Professor Zi Li Ren as well for kindly inviting me thereto. Thanks are also extended to the University of Reading LLM students in their International Financial Services Law course in March 2023 for their invited and encouraged comments on and appreciation of the hardcopy of this anonymised version in my guest workshop. The usual caveat applies.

† Lecturer in Law, University of Reading, UK, yong.han@reading.ac.uk

usefully with a brief discussion of the definition of consumer(s) and then focuses on financial consumer protection.

The purpose of this paper is to explain why the two UK statutory definitions of "consumer(s)" in relation to consumer protection in the insurance sector are so different from each other. In the UK, there are two consumer definitions applicable to insurance. One is the extremely broad definition in the Financial Services and Markets Act 2000 ("FSMA 2000"). According to its section 1G(1), "consumers" means "persons" who use, have used or may use regulated financial services,[3] who have invested or may invest in financial instruments,[4] who have relevant rights or interests in relation to the financial services or to the financial instruments,[5] who have rights, interests or obligations that are affected by the level of a regulated benchmark,[6] and persons in respect of whom another person carry on a prescribed activity whether it is regulated or not.[7] A number of technicalities in this definition are to be detailed later, and here it suffices to say firstly that the definition is applicable to insurance, which is a regulated financial service to which the FSMA 2000 applies. Secondly, such a definition of financial "consumers" is broad in that "persons", without any qualifying words for it, in legal context includes both natural persons (i.e. individuals) and legal persons such as (business) firms/entities unless stated otherwise. In other words, financial "consumers" under the FSMA 2000 could be not only individuals but also (business) firms/entities. However, similarly broad consumer definitions are not more widely used. For example, in the EU and the USA, both their consumer contract law and financial services law adopt the narrow definition[8] similar to what is described below.

The other, and narrow, consumer definition relevant to insurance is in the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA 2012"). It is also in the Consumer Rights Act 2015 ("CRA 2015") which is applicable to contract for supply of "services"[9] including financial-services consumer contract in general[10] and consumer insurance contract in particular[11] regarding matters other than an insured's pre-contractual representations. According to the CIDRA 2012 section 1, "consumer" means an individual who enters into, or proposes entry into, an insurance contract wholly or mainly for purposes unrelated to the individual's trade, business or profession.[12] This definition is consistent with the conventional and narrow consumer definition currently in the CRA 2015 section 2(3): "'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession." Under both the CIDRA 2012 and the CRA 2015, an insurance "consumer" is only an individual and can never be a (business) firm/entity as under the broad consumer definition in the FSMA 2000.

Similarly different consumer definitions in Asian civil-law jurisdictions, where UK insurance law and (financial) consumer protection is generally well regarded, have perplexed[13] insurance lawyers (academics and/or practitioners)[14] and insurance regulators,[15] and also have caused

---

[1] Chen, T.-J. (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer.

[2] They are the chapters on financial consumer protection in Australian (by Andrew D. Schmulow and James O'Hara, at p 13), the Bangladesh (by Muhammad Ziaulhaq Mamun, at p 51), China (by Xian Xu, at p 133), Korean (by Hongjoo Jung, Misoo Choi, Youkyung Huh, at p 285), Spain (by Montserrat Guillen and Jorge M. Uribe, at p 333), Taiwan (by Jan-juy Lin, at p 345), the USA (by Patricia Born, at p 379), in Chen, T.-J. (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer.

[3] Financial Services and Markets Act 2000, s 1G(1)(a).

[4] Financial Services and Markets Act 2000, s 1G(1)(c).

[5] Financial Services and Markets Act 2000, s 1G(1)(b) and (d).

[6] Financial Services and Markets Act 2000, s 1G(1)(e).

[7] Financial Services and Markets Act 2000, s 1G(1)(f).

[8] Armour, J., & Awrey, D., Davies, P., Enriques, L., Gordon, J. N., Mayer, C., and Payne, J., (2016). *Principles of Financial Regulation*. Oxford University Press. p 52 (note 15).

[9] Consumer Rights Act 2015, Chapter 4.

[10] FCA, (2018). *FG18/7: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015*. Financial Conduct Authority.

[11] The Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR 1999"), which became Part II of the Consumer Rights Act 2015, was applicable to insurance contract. See *Parker v The National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), para. 185.

[12] Consumer Insurance (Disclosure and Representations) Act 2012, section 1.

[13] This was why the author of this paper was invited, by the World Bank research project Framework for the Protection of Financial Consumers, to explain the relevant UK law in an online presentation in April 2021 to the participating lawyers, insurance economists, and insurance regulators from four major Asian civil law jurisdictions (mainland China, Japan, South Korea, and Taiwan).

[14] In relation to China, see for example Hu, W-T., (2017). The Legal Definition of Insurance Consumers Concept. *Journal of Huaqiao University (philosophy and social sciences edition)*. p 110 for the English abstract; Wen, S.-Y., Fan, Q.-R., (2017). An Analysis of the Concept of 'insurance consumer. *Modern Law Science*. 39(2), p 93 for the English abstract.

purported protection gaps for financial consumers potentially in, but not limited to, the insurance sector. For example, in Taiwan, "due to the segregation of investment and consumption" by the judiciary and the executive/administrative, "investors who purchase financial products or services are not eligible for the protection under the Consumer Protection Act."[16] To much extent, this mirrors the differences between the consumer definition under general consumer law (such as, in the UK the CRA 2015 and its predecessor) and the alternative definition under financial regulation law. There is confusion too among academic lawyers in the UK and Ireland, who have raised questions about the black-letter differences between the multiple consumer definitions.[17]

A more in-depth comparison of the two UK statutory definitions of consumer(s), especially when it comes to the broad one in the FSMA 2000, involves understanding the UK insurance regulation. In this regard, however, there has been what could be called "double gaps" in the UK legal academia, where insurance regulation is a marginal area subsumed both in financial regulation/services (law) research and in insurance law research.[18] Studies in financial services/regulation law are overwhelmed by banking law/regulation research, so that books on the law of financial services or financial regulation often have no chapter at all on insurance regulation. Although insurance law books normally have one chapter on insurance regulation,[19] in a single chapter there is little space for intensive discussions of applying the FSMA 2000 consumer definition to insurance, let alone space for comparing that broad definition with the narrow one applicable to insurance.

For that explanatory purpose, Part II briefly explains the legislatively-technical and formalistic reason for the existence of the two vastly different UK statutory definitions for the same terminology "consumer(s)". The other Parts all serve to elaborate on the substantive reasons. Part III sketches firstly the UK contract-law legislative developments leading to the narrow definition, and then the financial regulation law expansions leading to the broad definition, and thereafter analyses additional nuanced differences underlying the two statutory definitions. Part IV bifurcates financial/insurance consumer protection into the judicial approach and the regulatory approach thereto, discussing their fundamental differences in legal nature by analysing their respective key features, on that basis argues for a bifurcated substantive understanding of the definitional differences by explaining how the two consumer definitions respectively serve and match the two financial/insurance consumer-protective approaches. On reflection, Part VI cautions against bifurcating the two approaches or the two consumer definitions too far and wide, by explaining the intersection between the two approaches and also between the two definitions in the Financial Markets Test Case Scheme exemplified by the Financial Conduct Authority's role as a party to the COVID-19 business interruption insurance case, the Insurance Code of Business Sourcebook, and the Financial Ombudsman Service in relation to insurance. Part VI concludes.

---

15 Research Team of the Consumer Rights and Interests Protection Bureau of the China Insurance Regulatory Commission., (2012). Thoughts on Issues in Consumer Rights and Interests Protection, *Insurance Studies*. 9, p 91 for the English abstract.

16 Lin, J.-J., Financial Consumer Protection in Taiwan: Systems and Market Issues, in Chen T.-J. (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer. p 345.

17 By three speakers in the commercial and consumer law conference held at the School of Law and the Centre for Commercial Law and Financial Regulation, University of Reading, in late July 2022 and attended by the author as a member of the audience. The Irish definitions of consumers applicable to insurance seem more complicated and involving more statutes than those two definitions in the UK. For the relevant Irish statutory sections and consumer definitions, see the Consumer Protection Act 2007 section 2(1), the Consumer Rights Act 2022 section 2(1), the Central Bank of Ireland Consumer Protection Code (2012) Chapter 12 (for definitions), the Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Insurance Requirements) Regulations 2022 reg 2, the Consumer Insurance Contract Act 2019 section 1 and the Financial Services and Pensions Ombudsman Act 2017 section 2(1)(a).

18 In contrast, in the USA, insurance regulation researchers sometimes make meaningful comparison between insurance regulation and banking regulation in the USA. See Sharon Tennyson, (2008). *State Regulation and Consumer Protection in the Insurance Industry* (Policy Brief 2008-PB-3). Networks Financial Institute.

19 For succinct but informative and enlightening discussions of insurance regulation in the UK in student textbooks see Chapter 2 (of 15 pages) of Birds, J., & Richards K., (2022). *Birds' Modern Insurance Law*. Sweet & Maxwell.; also Chapter 2 (of 35 pages) of Merkin, R., (2022). *Lowry, Rawlings and Merkin's Insurance Law: Doctrines and Principles*. Hart Publishing. For discussions in more voluminous practitioner's books, see Chapter 34 (of 27 pages) of Birds, J., & B Lynch, B., and Simon Paul S., (2022). *MacGillivray on Insurance Law*. Sweet & Maxwell.; also Chapter 14 (of 50 pages) of Merkin, R., (2022). *Colinvaux's Law of Insurance*. Sweet & Maxwell.

Ⅱ. The Legislatively Technical Reason

Understanding the differences between the two consumer definitions is practically and intellectually relevant. Practically, the differences would have implications for the protection of consumers in various business/financial sectors. Intellectually, when a particular terminology has multiple legal definitions which are obviously different in their wordings, this could perplex ordinarily mindful readers whether they are lawyers or not. In civil-law jurisdictions (mostly in continental Europe, Asia, and South America) where law exists predominantly in statutes and allows little room for making changes to or having flexibility with statutory provisions unless through lengthy legislative process, the understanding of legal rules is intellectually based on the civil/Roman-law tradition of highly systematic legal science in which "[the] emphasis on systematic values tends to produce a great deal of interest in definitions and classification."[20] In pursuit of systemised coherence and certainty in law, readers of statutory law usually tend to expect unitary or consistent legal definitions of almost each and every particular terminology, including "consumer(s)".

Although such an expectation is generally reasonable, it collapses before the specificity of law: statutory definitions are provided always in a specific (part of) Act and they have particular legislative purposes. Any statutory definition in a particular Act is applicable only 'in this Act' (or a specific part thereof[21]) as most statutory definitions often expressly stipulate, but not in other Acts or statutes unless prescribed otherwise. Therefore, technically it is not unusual that different Acts have different definitions even for the same terminology.[22] From this perspective, it is a misconceived intuition or expectation that the definitions of "consumer" in the CIDRA 2012 and the FSMA 2000 *should* be the same.

That being said, such an explanation as above is of pure and mere formalistic technicality in legislation. Beyond the legislative technicality, the substantive and therefore more meaningful query is: why does the FSMA 2000 give so broad a definition whereas the CIDRA 2012 and the CRA 2015 a narrow one? In this regard, although the narrow definition seems to be legislatively made more than ten years after the FSMA 2000, it actually was accepted from continental Europe into UK statutes much earlier.

Ⅲ. The Legislative Developments toward the Two Consumer Definitions

A. The Narrow Consumer Definition: the Evolution and the Application to Insurance

The need for a statutory definition of consumer(s) arose from the statutory law for protection of consumers in contractual transactions. In order for contract law to protect consumers, it must in the first place elucidate and therefore define what or who is a consumer. A brief conceptual history of "consumer" is helpful for understanding the rise of consumer protection and hence the need for a consumer definition.

1. The Rise of Consumer Voice and the Decline of Freedom of Contract

According to Trentmann's fascinating historical research,[23] it was from the late 19th century that citizens started to have their voice as consumers. In England, this started when a Water Consumers' Association was launched in Sheffield in 1871 in protest against water

---

[20] Merryman J. H., & Rogelio Pérez-Perdomo R., (2007). *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. Stanford University Press. p 63.

[21] For example the consumer definition in section 12BC of the Australian Securities and Investments Commission Act 2001 (Cth) is 'For the purpose of this Division' i.e. "Division 2—Unconscionable conduct and consumer protection in relation to financial services", of "Part 2—Australian Securities and Investments Commission and consumer protection in relation to financial services", of the said Act 2001.

[22] For example, in the UK, for the word "property" there are at least three statutory definitions. Law of Property Act 1925 section 205(1)(xx): "'Property' includes any thing in action, and any interest in real or personal property." Sale of Goods Act 1979 section 61(1), "'Property' means the general property in goods, and not merely a special property." In the Insolvency Act 1986 section 436, the "property" definition is more detailed and it is consistent with the one in the Law of Property Act 1925.

[23] The rest of this paragraph benefits from Trentmann F., 'How Humans Became 'Consumers': A History' (2016) 11 The Atlantic; available at <https://www.theatlantic.com/business/archive/2016/11/how-humans-became-consumers/508700/>. It is a concise description of the conceptual history of "consumer". See also Trentmann F., (2016). *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First*. Allen Lane/Penguin.

taxes for the middle-class consumers' use of water for bath. Decades afterwards, the years before the First World War witnessed the starting surge of consumer politics. Nevertheless, the pre-1914 rise of consumer power did not go higher in the UK (and most other parts of the world) until after the slow recovery around the 1960s from the dire consumer-demographic and economic consequences of the two costly World Wars and the further decline[24] in the 1970s of the freedom of contract in English contract law. The clearest evidence of this decline was the Unfair Contract Terms Act 1977, which will later be discussed in some details. However, the resurgence of free market principles in the 1980s spurred essentially by Reaganism and Thatcherism 'has caused another shift in the law, with a judicial return to standard contract principles'[25] underpinned by the principle of freedom of contract.

In relation to insurance, the early history of the conception of "consumer" and the centuries it took to make its presence in English *general* contract law shows why there were no consumer definitions in the very brief Life Assurance Act 1774 and the Policies of Assurance Act 1867. Although both Acts concerned life insurance the policyholders of which have been individuals and therefore consumers as narrowly defined since 1970s, the idea of "consumer" had been just too pre-mature a social-economic concept to merit a legislative concern or attention in the 1770s, 1860s, and the late 1890s for the non-exhaustive codification of the pre-existing common/case law of marine insurance which culminated eventually in the still-effective Marine Insurance Act 1906 ("MIA 1906"). In this regard, an additional reason for the lack of a consumer definition in the MIA 1906 is that by its definition of "contract of maritime insurance",[26] this statute is inapplicable to marine life insurance, the individuals-policyholders of which could be consumers in the narrow sense. Besides, the insureds in marine insurance contracts were mostly merchants,[27] who bought insurance in relation to their business, trade, or profession: they were hardly consumers. For this reason too, there was little need for the MIA 1906 to have a consumer definition.

Nevertheless, in Europe (including the UK) the resurgence was soon restrained by the consumer protectionism which led to the Unfair Terms in Consumer Contracts Directive 93/13/EEC for the European Economic Community. The Unfair Contract Terms Act 1977 and the Directive 93/13/EEC set the two benchmarks, i.e. non-'business' and 'individual', for the narrow consumer definition.

2. Unfair Contract Terms Act 1977 and the Non-'Business' Benchmark

The Unfair Contract Terms Act 1977 is an exercise of legislative policing of the long-upheld contractual freedom in the content of contracts. The purpose of the legislative policing as such was to protect the weak party to standardised contracts and to consumer contracts, by controlling not only the effects of standardised terms and conditions in non-consumer contracts but also contracts between a consumer and a non-consumer. For this purpose, under the original UCTA 1977 section 3, for a contact between X "dealing as consumer" or dealing on Y's written standard terms of business, except the contract term satisfies the requirement of reasonableness, if Y is in breach of the contract, then Y cannot use the contract term as against X to exclude or restrict Y's liability in respect of Y's breach.

The original UCTA 1977 section 12(1) interprets the phrase "dealing as consumer":

> (1) A party to a contract "deals as consumer" in relation to another party if—
>
> (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
>
> (b) the other party does make the contract in the course of a business; and
>
> (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

---

[24] For English contract law, the 1770s to 1870s were the prime period for the principle of freedom of contract whereas the 1870s to the 1970s witnessed its decline; see Atiyah, P. S., (1985). *The Rise and Fall of Freedom of Contract*. Oxford University Press.

[25] Randall, S., (2007). Freedom of contract in insurance. *Connecticut Insurance Law Journal*. 14(1), p 109. See also Buckley, F.H., ed., (1999). The Fall and Rise of Freedom of Contract. Duke University Press.

[26] Marine Insurance Act 1906, section 1 and section 3.

[27] Merkin, R., (2020). *Marine Insurance: A Legal History*. Edward Elgar. para. 2-008.

This is how the original UCTA 1977 effectively defined "consumer". It was not clear whether such a consumer would be an individual or a firm. This consumer definition "has been interpreted widely by the courts to include legal persons (such as companies) where they are acting outside the normal course of their business. In effect, under the UCTA 1977 a company may sometimes be treated as a consumer."[28]

The big surprise, however, is that the UCTA 1977 section 3 on "dealing as consumer" would not—nor would its consumer definition in section 12(1)—be applicable to insurance contracts. This is because it was stipulated in the original UCTA 1977 that "Sections 2 to 4 of this Act do not extend to: (a) any contract of insurance (including a contract to pay an annuity on human life)"[29] and a few other types of contracts. The non-applicability of the UCTA 1977 to insurance contracts resulted from the British insurance industry argument that exclusion clauses in insurance contract, which had usually been criticised as unfair, "go to the very risk written by insurers and so are not appropriately regulated by general measure applicable to other forms of exclusion clause"[30] and the industry's subsequently successful lobbying for exempting insurance contracts from the UCTA 1977.[31] In return, the British insurance industry was committed to self-regulation which set out how certain aspects of the common/case law of insurance would not be relied upon by insurers in consumer cases.

In spite of the exemption of insurance contracts, the indirect definition of consumer in the original UCTA 1977 section 12(1) as quoted above was important as the first UK statutory definition, albeit indirect, of consumer. Whilst this definition did not clearly limit the consumer status to individuals or natural persons, its exclusion of transactions in the course of the consumer's business effectively set non-business as one of the two important benchmarks of the conventional and narrow consumer definition.

3. *The Directive 93/13/EEC Setting the 'Individual' Benchmark*

The other benchmark, i.e. consumer as an individual or a natural person, was set by and brought into the UK firstly by the Unfair Terms in Consumer Contracts Directive 93/13/EEC (the European Economic Community), with its Article 2(b) providing that "'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession". As a Member State of the then EEC (rebranded later in 1993 as the European Union), the UK accepted the Directive 93/13/EEC and adopted it firstly as the UK statutory law of the Unfair Terms in Consumer Contract Regulations ("UTCCR") 1994, though short-lived for not properly reflecting the Directive 93/13/EEC, and again re-adopted as the long-lived UTCCR 1999. The definition of consumer under the UTCCR 1999 is in essence the same as that quoted above from the Directive 93/13/EEC.

In the early 2010s, the Consumer Rights Directive 2011/83/EU updated and replaced the Directive 93/13/EEC and was adopted as the UK domestic law i.e. the Consumer Rights Act 2015 which replaced the UTCCR 1999. It is worth repeating that under the CRA 2015, "'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft, or profession."[32] Although differing in wordings, this definition is homogeneous with the old definition in the Directive 93/13/EEC. Unlike the original UCTA 1977 which is inapplicable to insurance contracts, the UTCCR 1994, the UTCCR 1999, and the CRA 2015 were and are applicable to "services"[33] including the provision of insurance.

---

28 Conway, L., (1996). *The Unfair Terms in Consumer Contracts Regulations* (Research Paper 96/93). House of Commons Library. p 23.

29 Unfair Contract Terms Act 1977, Schedule 1, paragraph 1(a).

30 Merkin, R., (2022). *Lowry, Rawlings and Merkin's Insurance Law: Doctrines and Principles*. Hart Publishing. p 89, also that "Parliament was persuaded that any judicial supervision of exclusions from insurance coverage would amount to a rewriting of the policy."

31 Tyldesley, P., (2008). 'The Reform of Insurance Contract Law - Why Have Consumers Waited So Long?' *Insurance Research and Practice*. pp 3-4.

32 Consumer Rights Act 2015, section 2(3).

33 The UTCCR 1994 and the UTCCR 1999 were applicable "to any term in a contract concluded between a seller or supplier and a consumer", and a "supplier" was defined in both as "a person who supplies goods or services". Insurance is a type of "services". see the UTCCR 1994 reg 3(1) and reg 2(1), and similarly the UTCCR 1999 reg 4(1) and reg 3(1), also the CRA 2015 Chapter 4. See also *Parker v The National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), para. 185, confirming the applicability of the UTCCR 1999 to insurance contracts.

4. Insurance Contract Law Reform in the late 2000s and the Consumer Definition

The (English) Law Commission and the Scottish Law Commission jointly launched in 2006 the insurance contract law reform project, after 20 years of inaction since the previous major efforts of reform were stalled in 1984-1986 by the British insurer's successful lobby against insurance law legislation.[34] The early stage of the jointly launched project focused on the long-criticised issues with the common/case law of insured's pre-contractual disclosure and misrepresentation. Such common/case law rules had been codified into the Marine Insurance Act 1906 ("MIA 1906") sections 17 to 20, whose applicability extends beyond marine insurance contract to all insurance contracts:[35] life and non-life, marine and non-marine, consumer, and non-consumer. Under the pre-reform MIA 1906 section 18, when buying insurance the insured must voluntarily disclose to the insurer every material circumstance which is known to the insured so that the insurer could make risk-assessment for deciding whether to make the insurance contract and if so on what terms. This duty of pre-contractual disclosure has three major aspects. First, "every circumstance material" is anything which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.[36] Second, the insured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him.[37] Third, a non-disclosure by the insured entitles the insurer to avoid the insurance contract[38] and therefore to fully reject the insured' any insurance claim under the contract in question.

The pre-contractual duty of disclosure is particularly onerous to an insured who is a consumer and hence inexperienced in insurance matters. This is because it could be difficult for the insured at the time of buying the insurance to know what information would influence the judgment of a hypothetical prudent insurer (rather than the actual insurer) and therefore be material and hence must be disclosed voluntarily. It is also because the rule of the insured's deemed knowledge would practically mean that the insured must disclose circumstances which it arguably should know but actually does not know. How could the law oblige a person to disclose what this person does not know? Whether this person should know the circumstance is always arguable. In addition, the consequence of the insured's breach of the onerous duty is very harsh: regardless of whether the non-disclosure is intentional or merely negligent or even innocent,[39] as long as there is even just a slight non-disclosure that induced the insurer to enter into the contract, the insured cannot get any insurance payment at all under the contract. All these are similar, according to the MIA 1906 section 20, for the insured's misrepresentation. The data on insurance complaints in 2006-2007 shows that issues of non-disclosure and misrepresentation cause significant problems for life insurance, vehicle insurance and building/contents insurance claims, and can also occur across a variety of other products, including pet insurance and private medical or dental insurance.[40] Absolutely most these insurance products, as a whole, are consumer insurance.

The insurance contract law reform project in its early stage prioritised solving these issues for insureds or policyholders who are consumers, because consumers are the most vulnerable to these harsh rules. For that purpose, there must be a definition of "consumer" in insurance. The conventional narrow consumer definition from the Unfair Terms in Consumer Contracts Directive 93/13/EEC has been adopted in the UTCCR 1999. At the time of the insurance contract law reform leading firstly to the CIDRA 2012, the Consumer Rights Directive 2011/83/EU, which was yet, but expected, to be adopted as UK statutory law continued to use the conventional narrow definition. So the insurance contract law reform project saw no need to reinvent the wheel. That being said, there were substantial discussions[41] of whether small businesses should

---

34 Tyldesley, P., (2008). 'The Reform of Insurance Contract Law - Why Have Consumers Waited So Long?' *Insurance Research and Practice*. pp 7 and 10.

35 *Cantiere Meccanico Brindisino v Janson ELR* [1912] 3 KB 452 (CA), at 467 per Moulton LJ; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 (HL), at 518D per Lord Mustill. See also Birds, J., & B Lynch, B., and Paul S., (2022). *MacGillivray on Insurance Law*. Sweet & Maxwell. para.16-103, with footnotes 330 citing five other cases.

36 Marine Insurance Act 1906, section 18(2).

37 Marine Insurance Act 1906, section 18(1).

38 Marine Insurance Act 1906, section 18(1) and section 17.

39 Birds, J., & B Lynch, B., and Paul S., (2022). *MacGillivray on Insurance Law*. Sweet & Maxwell. para.16-103, with footnotes 329 citing twelve cases.

40 LC and SLC, (2009). *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Cm 7758). Law Commission and Scottish Law Commission. para. 1.35.

and/or could be included in the definition of "consumer" in insurance, and eventually not included therein due to more practical considerations.[42] Hence the CIDRA 2012 has accepted and adopted the conventional and narrow consumer definition.

B. The Expansions to the Broad Consumer Definition in the FSMA 2000

The main reason for having the broad definition of "consumers" in the current FSMA 2000 is to ensure that an increasingly wider scope of persons engaging in dealings with the rapidly growing and expanding finance services providers could be protected through financial regulation. Two legislative expansions have built up toward the formulation of the current broad definition in the FSMA 2000.

1. The First Expansion: the Great Leap Forward from "Investor" to "Consumer"

Before the major expansion from the Financial Services Act 1986 ("FSA 1986") to the original FSMA 2000, the protection offered by the UK financial regulation to financial services users was neither broad nor effective, and such shortcomings were attributable to the narrow scope of the regulatory Prevention of Fraud (Investments) Act 1958 (and an earlier version in 1939) and also four infamous financial scandals in 1981 which demonstrated that a comprehensive review of investor protection was needed.[43] The government commissioned Professor Gower to conduct a review of such protection, and that culminated in the *Review of Investor Protection*[44] ("Gower Report") which proposed passing an Investor Protection Act. The Gower Report and the ensuing White Paper[45] led eventually to the FSA 1986, which was an Investor Protection Act not in name but in substance. Both before and in the FSA 1986, the UK financial services law had hardly used the concept of "consumer". Instead, in the FSA 1986 the terminology for that protective purpose was "investor".

The FSA 1986 indirectly defined "investor" by directly defining "investment". The statutory definition of "investment" was intended to be "specific (to provide certainty for practitioners, customers and investors) and wide (to achieve consistency of treatment between different financial services)."[46] By the FSA 1986 section 1, "'investment' meant any asset, right, or interest" falling within Schedule 1. Included therein as "investments" were shares and stock in the share capital of companies, debentures, government and public securities, instruments entitling to shares or securities, certificates representing securities, units in collective investment scheme, options, futures, contracts for differences etc, long term insurance contracts, rights to and interests an investment.[47] In contrast, non-life insurance were not treated as investment, because non-life policies "are not commonly regarded, or sold, as investments".[48]

For providing tailored protection to different "class(es) of investors",[49] the FSA 1986 distinguished between "professional investors"[50] (also known as business investors, or experienced investors) and occasional customers or ordinary investors.[51] It was noted:

> The conduct of business rules and the other rules and regulations made under Chapter V of Part I of this Act must take proper account of the fact that provisions that are appropriate for regulating the conduct of

41 LC and SLC, (2006). *Insurance Contract Law Issues Paper 1 Misrepresentation and Non-disclosure*. Law Commission and Scottish Law Commission, paras 7.96 to 7.105.

42 *LC and SLC,* (2014). *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Cm 8898). Law Commission and Scottish Law Commission. paras 2.22 to 2.28.

43 Pilmlott, G. F., (1985). The Reform of Investor Protection in the UK－An Examination of the Proposals of the Gower Report and the UK Government's White Paper of January 1985. *Journal of Comparative Business and Capital Market Law*. 7(2), pp 145-147. See also Ryder, N., (2001). Two plus two equals financial education. *The Law Teacher*. 35(2), pp 216-218.

44 Gower, L.C.B., (1984) *Review of Investor Protection* (Cmnd 9125). UK Department of Trade and Industry.

45 UK Department of Trade and Industry, *Financial Services Regulation: A New Framework for Investor Protection* (1985).

46 UK Department of Trade and Industry, (1985). *Financial Services Regulation: A New Framework for Investor Protection*. para. 4.2. See also Leigh, L. H., & Rutterford J., (1984). Investor Protection: the Gower Report. *Business Law Review*. 47(5), pp 89-90.

47 Financial Services Act 1986, Schedule 1, paras. 1 to 10.

48 UK Department of Trade and Industry, (1985). *Financial Services Regulation: A New Framework for Investor Protection*. para. 4.6.

49 Financial Services Act 1986 s 206, para. (e). see also Financial Services Act 1986, Schedule 8, para. 12.

50 Financial Services Act 1986 s 195, para. (a).

51 Barnard, D. M., (1987). The United Kingdom Financial Services Act 1986: a new regulatory framework. *International Lawyer*, 21(2), pp 351-353.

> business in relation to some classes of investors may not (by reason of their knowledge, experience or otherwise) be appropriate in relation to others.[52]

In spite of that, the protection of what was more often plainly known as private investor or ordinary investor or small investor, who "in the contemporary financial world is not unlike a consumer"[53] (known more as "retail investor"), was inadequate and ineffective. According to the finding by JUSTICE (i.e. the British Section of the International Commission of Jurists), with increasing investments and swindles involving the public, the 1980s (including after April 1988 when the FSA 1986 took effect) in the UK was "a decade of disasters"[54] for private investors suffering losses from the financial industry's mis-sale of personal pensions, mismanaged unit of trusts, home-income plans sold to the elderly, and the failure to secure convictions in many highly publicised fraud cases.[55] The regulatory regime under the FSA 1986 was akin to 'a lake of blancmange'.[56]

Through the Financial Services (Glossary and Interpretation) Rules and Regulations 1990, the Securities and Investments Board, one of the statutory regulators created under the FSA 1986, distinguished "business" and/or "professional" investors from "private investors" who were like consumers. The FSA 1986 (rev.1990) section 61A allowed private investors (i.e. financial consumers) the right to sue for the investment business' breach of regulatory rules. For this purpose, as the Department of Trade and Industry ("DTI") tentatively proposed for consultation, "private investor" would mean

> … an investor whose cause of action arises as a result of anything he has done or suffered (a) in the case of an individual, otherwise than in the course of carrying on investment business; and (b) in the case of any other person, otherwise than in the course of carrying on business of any kind, but does not include a government, local authority or public authority.[57]

This was close to a narrow consumer definition. As pointed out however,[58] this definition overlooked the possibility that an individual could be an experienced or even professional investor. In addition, it excluded considerable number of small businesses which might have no expertise in financial investments.

The FSA 1986 was eventually repealed by and replaced with the FSMA 2000. In the original and un-amended FSMA 2000, "consumer" is defined for the purposes of stating the regulator's consumer protection objective[59] and of setting out the consumer factors to which the regulator must have regard when considering the appropriate degree of consumer protection.[60] The original section 5(3)(a) of the FSMA 2000 stipulates that "'Consumers' means persons who are consumers for the purposes of section 138." The original section 138 focuses on empowering the financial regulator to make general rules, which can only be consumer-protective[61] and are applicable to authorised financial institutions regarding their conducting of regulated and unregulated activities.

It was in the context very specific to section 138 which the original FSMA 2000 section 138(7) defined "consumer" as users of services provided by authorised persons in carrying on regulated activities; or persons having rights or interest in the use of such services, and person whose rights or interest in the use of such services may be adversely affected by their agents' conduct. It seems that users and (financial) services referred to in section 138(7) would include "investor" and "investment" respectively. Otherwise, "the differing degrees of risk involved in different kinds of *investment* or other transaction",[62] which are one of the factors for regulatory consideration of meeting the consumer protection objective, would make little sense.[63]

---

52 Financial Services Act 1986, Schedule 8, para. 12. The said Chapter V is on "Conduct of Business".

53 JUSTICE, (1992). *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 2.21.

54 JUSTICE, (1992). *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 2.21.

55 Ryder, N., (2001). Two plus two equals financial education. *The Law Teacher*. 35(2), p 216 (note 4).

56 JUSTICE, (1992) *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 1.11.

57 UK Department of Trade and Industry, (1990). *Defining the Private Investor*. p 11.

58 JUSTICE, (1992) *The Protection of the Small Investor*. JUSTICE Educational & Research Trust. para. 2.19.

59 Financial Services and Markets Act 2000 (original), section 2(2).

60 Financial Services and Markets Act 2000 (original), section 5(2).

61 UK Parliament, (2000). *Explanatory Notes to Financial Services and Markets Act 2000* (original), para. 253.

62 Financial Services and Markets Act 2000 (original), section 5(2)(a), emphasis added.

63 This is collaborated by the more relevant section 425A of the FSMA 2000 (rev.2010). For general regulatory purposes, section 425A(2)

The re-definition, in the FSMA 2000 (rev.2010) section 425A, of consumers was still homogeneous to the definition in the original section 138(7).

The definition of "consumers" under the original FSMA 2000 expanded the relatively narrow FSA 1986 definitions of "investment" and "investor". In spite of the FSA 1986 Schedule 1 list of financial products for the purpose of defining "investment" directly and "investor" indirectly, the scope of "investor" thereunder was not as broad as the original FSMA 2000 definition of "consumers", which broadly are users of financial services; in contrast, "investor" under the FSA 1986 did not include users of financial services. This is because, by definitionally limiting the investment "asset, right, or interest" to financial products specified in the FSA 1986 Schedule 1, the "investment" definition effectively narrowed down the scope of itself and the scope of "investor". For example, an individual policyholder of his or her own long-term life insurance which was an "investment" as specified in the FSA 1986 Schedule 1, was an investor. However, the same individual as the policyholder and user of general insurance (like auto insurance or home insurance) was not an investor under the FSA 1986. Nevertheless, in the latter scenario such an individual policyholder certainly would be a "user" (of financial services, i.e. insurance) falling within the broad consumer definition in the original FSMA 2000. This exemplifies the narrow scope of protection under the FSA 1986 relative to and compared with that under the FSMA 2000.

2. The Second Expansion

Through further amendments in 2012 and 2018, the FSMA 2000 section 425A has expanded its consumer to further include persons "whose rights or interests or obligations are affected by the level of a regulated benchmark"[64] and persons "in respect of whom a person carries on [a specified activity whether or not it is a regulated one]."[65] A "regulated benchmark" means,[66] by referring to EU legislation,

> any [regulated] index by reference to which the amount payable under a financial instrument or a financial contract, or the value of a financial instrument, is determined, or an [regulated] index that is used to measure the performance of an investment fund with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees.[67]

The extremely broad consumer definition in the current FSMA 2000 section 1G is a further expansion of the already expanded consumer definition in the amended section 425A referred to above. More importantly, investors become another prominent part of the broad consumer definition in section 1G. This is because both "persons who have invested, or may invest, in financial instruments" and "persons who have relevant rights or interests in relation to financial instruments"[68] also fall within the broad consumer definition. The need for such a broad definition as in section 1G arises because the FCA's general functions as provided for in section 1B extend to those functions under the FSMA 2000 Part 6 (official listing). So it is appropriate, for example, for the consumer definition to extend to "listed issuers" (under the FSMA 2000 Part 6) in their capacity as "consumers" of the regulated financial services of issuing securities or other financial instruments in regulated financial markets.

C. Additional Nuanced Differences between the Two Consumer Definitions

Between the CIDDA 2012 (and the CRA 2015) and

defines consumers as current and past and potential users of financial services, or persons who have relevant rights or interests in relation to any of those services. Further interpreted in section 425A(3)(b), financial services include those provided by "authorised persons who are investment firms". The "investment firms" can be either legal persons or natural persons as per the definition in Article 4.1(1) of the Markets in Financial Instruments Directive 2004/39/EC (known often as the "MiFID" and effective until replacement by "MiFID II" i.e. Directive 2014/65/EU) implemented in the UK through the Commission Regulation (EC) No. 1287/2006. Resultantly, it became clearer that users/consumers of financial services include investors, which could be either natural persons (hence individual investors) or legal persons (hence investment firms or even institutional investors).

64 Financial Services and Markets Act 2000, section 425A(2)(c), as revised in 2012.

65 Financial Services and Markets Act 2000, section 425A(2)(d), as revised in 2018.

66 Financial Services and Markets Act 2000, section 425A(7), as revised in 2018.

67 Benchmark Regulation (EU) 2016/1011, Article 3(3).

68 Financial Services and Markets Act 2000(rev.2013), sections 1G(1)(c) and 1G(1)(d).

the FSMA 2000 definitions of consumer(s), in addition to the clearest difference pointed out in the Introduction, there are other nuanced differences which are also practically and legally relevant. Firstly, under the CIDRA 2012 an insurance consumer is strictly an individual who is, or proposes to become, a party to an insurance contract, whereas financial or insurance "consumers" under the FSMA 2000 are not limited to a party to financial services contracts. Instead, under the FSMA 2000 financial "consumers" extend to persons having "relevant rights or interests in relation to any [regulated] financial services"[69] or "relevant rights, interests in the financial instruments",[70] or "rights, interests obligations that are affected by the level of a regulated benchmark"[71] but nonetheless are not a party to the relevant financial services contract. Due to such a broad consumer definition, far more insureds or policyholders could be protected under the FSMA 2000 as broadly defined "consumers" than under the CIDRA 2012 and the CRA 2015 as "consumers" narrowly defined under an individual and a contractual party to insurance policies. For example, a firm having business insurance, a beneficiary of a life insurance but is not the policyholder, and an heir to a life insurance policy are not protected as (insurance) consumers under the CIDRA 2012 and the CRA 2015. This is because they are not consumers as narrowly defined thereunder: the firm is not an individual, whereas the beneficiary and the heir are not even a party to the life insurance contract. In contrast, the firm is a person using insurance, the beneficiary and the heir have "relevant rights, interests" in the life insurance contract, and therefore they are all consumers in the FSMA 2000 and are protected thereunder.

Secondly, by the CIDRA 2012 section 1(b),[72] the "consumer" status of the insurer's counterparty does not hinge upon whether the insurer carries out its insurance business with or without authorisation as per regulation under the FSMA 2000, whereas the financial "consumer(s)" status is tied to the financial services provider's regulated status in relation for example to the "regulated financial services"[73] or "regulated activities"[74] of the financial services provider. This difference means that, unlike under the CIDRA 2012, a person in financial transactions with its counterparty which has none of the regulated status would *not* at all be a "consumer" under the FSMA 2000.

Ⅳ. Bifurcated Understanding of the Differences between Two Consumer Definitions

Why does the FSMA 2000 give so broad a definition whereas the CIDRA 2012 a narrow one? The key to answering this question is to see the different nature of the two statutes which are oriented toward two different approaches to consumer protection. This can be generalised and juxtaposed as below and explained in this Part with more details.

A. The Judicial Approach to Consumer Protection

In the judicial approach to consumer protection, a claimant who actually or arguably is a consumer brings disputes with traders to a court, making substantive claims against the traders mainly on the basis of the contract which sets out their respective rights and obligations in the dealings between them. The immediate purpose of this approach is the judicial resolution of consumer disputes brought before the court. The judicial approach is an *ex post* response to such disputes. Judicial resolution of contractual disputes is not based upon a judicial agenda of protecting either party to the disputes. This is because the UK judiciary are duty-bound to be apolitical, neutral, impartial. Any agenda of protecting either party to disputes could be pre-set in law mainly by the legislature and through legislation, not by or through the judiciary. Courts only apply such laws which have the legislatively pre-set

69 Financial Services and Markets Act 2000, section 1G(1)(b).

70 Financial Services and Markets Act 2000, section 1G(1)(d).

71 Financial Services and Markets Act 2000, section 1G(1)(e).

72 Under the CIDRA 2012 section 1(b), the insurer as a party to the consumer insurance contract is "a person who carries on the business of insurance and who becomes a party to the contract by way of that business (*whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000*)." Emphasis in italics added.

73 Financial Services and Markets Act 2000, section 1G(a)(i).

74 Financial Services and Markets Act 2000, section 1G(a)(ii). Similarly, "the level of a regulated benchmark" and "an activity which is specified", as per the FSMA 2000 sections 1G(e) and 1G(f) respectively.

Table 1. Comparing the two sets of statutes defining "consumer(s)" in relation to insurance

CIDRA 2012; CRA 2015	FSMA 2000
(largely) contract/private law	Regulatory/public law
consumer rights to bring legal action thereunder	generally, no consumer rights to bring legal action thereunder
ex post	*ex ante*
judicial resolution of disputes	regulatory protection
remedial	preventative

agenda, and the judicial decisions, particularly the judicial reasoning therein, could be followed by lower courts as judicial precedents. However, depending on the particular facts and circumstances of the disputes brought to courts, the judicial application of consumer-protective statutes whose *legislative intention* is to protect consumers does not necessarily have the *judicial effect* of protecting an apparent consumer or even an actual consumer when such consumers lose their cases in courts. This is so even if the relevant statute is intended to be consumer-protective.

The Court of Appeal case *Ashfaq v International Insurance Company of Hannover Plc*[75] illustrates the gap between the legislative intention and the judicial effect. On 1 February 2012, Ashfaq entered into an insurance contract with the insurer under a one-year Residential Let Property Insurance Policy. The property actually under letting and insurance coverage was damaged in a fire in June 2012. In response to Ashfaq's claim for insurance money, the insurer made interim payment, but refused to pay further because it discovered that Ashfaq had lied in the insurance proposal form about his past criminal conviction. Such information was one of the Statement of Facts which, by the terms, "will form the basis of any contract entered into with Insurers." So this lie was a breach of the "basis of contract" clause. As per the then effective common/case law of insurance thereon, such a breach by insured persons could entitle the insurer to avoid/cancel the contract and to reject insurance claims.[76] In the High Court trial, this legal rule was applied, leading to judgment against Ashfaq. In appeal, Ashfaq argued that he was a consumer as defined in the UTCCR 1999 and that a "basis of contract" clause in insurance contract was an unfair term that the UTCCR 1999 rendered non-binding to consumers.

Each of the Court of Appeal judge (also known as Lord of Justice) hearing the case agreed with Lord Justice Flaux's lead judgment against Ashfaq. The applicable law was not the CIDRA 2012 (or the much later CRA 2015) but the UTCCR 1999 which was in force when the insurance contract in question was entered into more than one year before the CIDRA 2012 took effect in April 2013. Under the UTCCR 1999, "consumer" means any natural person acting for purposes which are outside his trade, business, or profession.[77] On the face of the documentation evidencing Ashfaq's application for insurance and also of the Residential Let Property Insurance Policy itself, the purpose of the insurance was to protect the property against fire and other risks. Ashfaq was using the property for the business of letting to students for rent. Therefore, although in layperson's eyes he apparently seemed to be a consumer of the insurance, the purpose of the insurance was related to Ashfaq's business of property-letting, and hence the Court held that Ashfaq was actually *not* a consumer[78] under the UCTTR 1999.

As a corollary, the then existing and effective common/case law on "basis of contract" clauses in insurance contract would *not* be rendered non-binding to Ashfaq, because he was not a consumer. Resultantly the insurer was entitled to reject Ashfaq's insurance claim due to Ashfaq's breach of such clauses through Ashfaq's lie about his criminal conviction. It is also very noteworthy that if Ashfaq's insurance contract/policy in question had been entered into after the CIDRA 2012 took effect and then CIDRA 2012 would apply, but considering other facts mentioned above Ashfaq would still lose the case,[79]

[75] *Ashfaq v International Insurance Company of Hannover Plc* [2017] EWCA Civ 357.

[76] *Genesis Housing Association Ltd v Liberty Syndicate Management Ltd* [2013] EWCA Civ 1173, paras. 50-57 summarising the case law from the early 1920s to late 1990s.

[77] Unfair Terms in Consumer Contracts Regulations 1999, reg 3(1).

[78] [2017] EWCA Civ 357, para. 46.

[79] Ashfaq would still not be an insurance "consumer" under the CIDRA 2012. The abolition under the CIDRA 2012 section 6(2) of the insurance

even if under the CIDRA 2012 he were an insurance consumer.[80]

The legal basis of the judicial approach to consumer protection is largely contract law and private law. As a matter of general legal principle, contract-law doctrines, and rules, including legal definitions, are and should be applicable to (insurance) contract disputes brought to courts. The consumer definitions in the UTCCR 1999, the CIDRA 2012 and the CRA 2015 are binding to both parties to consumer insurance contract and courts are bound to apply them. In reaching (consumer) contract dispute resolution decisions, courts are bound more by contract law doctrines/rules than by rules and principles in regulatory law such as the FSMA 2000. Although judges may take into account the regulatory scheme as the relevant legal background for interpreting contractual terms and implying terms into contract,[81] the regulatory rules and principles are not decisive for, but only at most complementary to, judicial decision-making in contract cases.

The narrow scope of the conventional consumer definition in the CIDRA 2012 and the CRA 2015 is related also to the contractual and contract-law basis of the judicial resolution of consumer disputes. The business deal (including insurance) disputed before court is almost always based on a contract. The consumer seeking judicial resolution of the dispute over the deal and contract must in principle be a party to or a privy to the contract. This follows from the legal principle of the privity of contract, under which only a party or privy to the contract can sue (and/or enforce its rights against) the other party, and can be sued (and/or be subject to enforcements of rights) by the other party.[82] So, unlike the broad consumer definition in the FSMA 2000, other persons "who have relevant rights or interests in relation to"[83] the financial contract and/or "who have rights, interests or obligations that are affected by a regulated benchmark"[84] are not consumers in relation to the contract-based judicial resolution of disputes, because such a person is not actually a party to the contract as is a consumer of the narrow definition under the CIDRA 2012 or the CRA 2015.

Last but not least important, the judicial resolution of financial disputes is available to all financial consumers and is by no means limited only to the narrowly defined consumers. That is why in relation to financial services including insurance, not only almost all individuals in transactions for business, profession, or trade purposes, but also almost all non-individuals for such purposes can also bring lawsuits in courts to seek judicial intervention to protect their rights and interests.

B. The Regulatory Approach to Consumer Protection Applicable to Insurance

1. The FSMA 2000 for Financial Consumer Protection through Regulation

Under the FMSA 2000, "the protection of consumers" is one of the three "operational objectives"[85] which the regulator i.e. the Financial Services Authority ("FSA", in 2001-2013) and its rebranded successor the Financial Conduct Authority ("FCA", as of 2013) must meet in discharging its general functions.[86] Unlike the contract-law statutes such as UTCCR 1999, the CIDRA 2012 and most parts of the CRA 2015, the FSMA 2000 does not set out substantive rules about the private-law rights and obligations of its defined (financial) consumers and their counterparties. Nor is the FSMA 2000 intended for

contracting practice of "basis of contract clause" in consumer insurance contracts and the related old rules would not be applicable to Ashfaq's policy—in other words, Ashfaq would still be subject to the old rules about "basis of contract clause" and would still lose his case.

80 Although the abolition of "basis of contract clause" would be applicable to his consumer policy and he would not be subject to the old rules about "basis of contract clause", he would still lose the case. This is because his lie was very probably a 'deliberate or reckless misrepresentation' under the CIDRA 2012, Schedule 1 para. 2 which entitles the thus misrepresented insurer to 'avoid the contract and refuse all claims'.

81 *Bank of Credit & Commerce International SA v Ali* [2001] UKHL 8, at [39] per Lord Hoffmann. See also *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 at [154] per Leggatt LJ and *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, at [37] and [38] per Lord Sumption.

82 For the statutory exceptions to this principle, see Contracts (Rights of Third Parties) Act 1999.

83 Financial Services and Markets Act 2000, section 1G(1)(b) and 1G(1)(d).

84 Financial Services and Markets Act 2000, section 1G(1)(e).

85 Financial Services and Markets Act 2000, section 1B(3); previously known as "regulatory objectives" as per the Financial Services and Markets Act 2000 (original) section 2(2) until amended in 2012.

86 Financial Services and Markets Act 2000 (original), section 2(1). See also Financial Services and Markets Act 2000 (rev.2012), section 1B(1).

judicial resolution of (financial) consumer disputes,[87] as those contract-law statutes are.

In a strong sense, the FSMA 2000 is predominantly a public-law statute of regulatory nature. It sets out regulatory principles, objectives, powers, procedures for financial regulators, which as of 2013 are the conduct regulator i.e. the FCA, and the prudential regulator i.e. the Prudential Regulation Authority ("PRA")—for this purpose being the Bank of England, and the PRA's powers do not directly concern consumer.[88] The FSMA 2000 also prescribes more compliance obligations than rights for regulated financial services institutions and activities. In essence, the FSMA 2000 regulates the relationship of powers and obligations between the financial regulators and the regulated/authorised persons. Where this regulated relationship does not work well for the regulators, they can exercise and escalate their enforcement powers against the regulated/authorised persons concerned. Where it works to the substantial detriment of the regulated/authorised persons, these persons can file a lawsuit for judiciary review of the regulators' exercise of regulatory powers, as was so for example in *R (On the Application of Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd*[89] where Bluefin the regulated insurance broker, which was regulated under the FSMA 2000, filed the lawsuit for judicial review of a decision of the Financial Ombudsman Service, which under the FSMA 2000 provides non-judicial resolution of consumer financial disputes.

The regulatory approach to protecting finance (including insurance) consumers is primarily *ex ante* and preventative: by regulating the solvency standards for and the business conduct of the financial services providers, this approach protects financial consumers *before* losses would incur to them. It provides indirect protection to financial consumers, indirect in that it does not directly grant remedies thereto like under the judicial approach. They are indirectly protected, broadly speaking by the PRA "promoting the safety and soundness of PRA-authorised persons"[90] and by the FCA ensuring that the relevant financial markets function well on good financial business conducts and advancing its three operative objectives of competition, integrity[91] and consumer protection which are interconnected.[92]

In contrast to regulators' little role in the judicial approach to consumer protection, they have a variety of regulatory powers exercisable for their consumer-protection objective. One of the major regulatory powers is for the FCA (formerly the FSA) to make general rules and specific rules, to make technical standards, to prepare and issue codes, to give general guidance, and to determine the general policy and principles for performing particular functions.[93] For the FCA's power to make general rules, "there need not be a direct relationship between the authorised persons to whom the rules apply and the consumers who are protected by the rules"[94] and this is confirmed in the FSMA 2000 section 137A(3). In addition, the FCA has the power make general rules "to protect the interests of beneficiaries of trusts".[95] This, as an example, shows why the consumer definition under the FSMA 2000(rev. 2012) includes not only financial services users and financial investors but also those other persons (such as trust beneficiaries) "who have relevant rights or interests in relation to"[96] the regulated financial services that are used and investments made.

All the statutory factors which the FCA must consider for meeting the consumer protection objective and the

87 An exception thereto is private person's suit for a firm's breach of an FSA/FCA rule. See FMSA 2000, section 138D; Financial Services and Markets Act 2000 (Rights of Action) Regulations (SI 2001/2256); *Sivagnanam v Barclays Bank Plc* [2015] EWHC 3985 (Comm).

88 Except in the FSMA 2000 section 2C only for the PRA in relation to policyholders who are consumers, probably broadly defined, and also section 3B(1)(d) and 3B(1)(e) for both the PRA and the FCA in relation to broadly-defined consumers' responsibility for their consumer-decisions and the responsibilities of the senior management in relation to requirements affecting consumers broadly defined.

89 [2014] EWHC 3413 (Admin).

90 Financial Services and Markets Act 2000, section 2B(2).

91 i.e. the integrity objective "of protecting and enhancing the integrity of the UK financial system" and the competition objective "of promoting effective competition in the interests of consumers in the financial markets"; see the Financial Services and Markets Act 2000, sections 1B, 1C, 1D and 1E.

92 Financial Services and Markets Act 2000, section 1B(4): "The FCA must, so far as is compatible with acting in a way which advances the consumer protection objective or the integrity objective, discharge its general functions in a way which promotes effective competition in the interests of consumers."

93 Financial Services and Markets Act 2000 (rev.2012), section 1B(6).

94 UK Parliament, (2000). *Explanatory Notes to the Financial Services and Markets Act 2000*. para. 253.

95 UK Parliament, (2000). *Explanatory Notes to the Financial Services and Markets Act 2000*. para. 253.

96 Financial Services and Markets Act 2000, section 1G(1)(b) and 1G(1)(d).

competition objective inevitably involve a broad range of consumers, who are not limited only to contracting individuals as consumers conventionally defined in the UTCCR 1999, the CIDRA 2012 and the CRA 2015. Those statutory factors under the FSMA 2000 are the different consumers' differing degrees of financial sophistication,[97] their needs for the timely provision of information and advice,[98] the level of care appropriate in relation to their capabilities that is owed and provided to them by financial services providers[99] and their differing expectations.[100] This variety of such factors reflects the variety and broad scope of the ambit of financial consumers.

Ⅴ. Caution against Bifurcating too Far and Wide: Examples in Relation to Insurance

It must be noted that the differences between the two consumer definitions cannot and shall not be pushed too far and wide or water-tightly compartmentalised into the judicial approach and the regulatory approach to financial/insurance consumer protection respectively and exclusive to each other. This is in the first place generally because insurance consumers as narrowly defined certainly are also protected, as are the broadly defined financial consumers, through financial regulation applicable to insurance, and likewise, the judicial approach is also open to protecting broadly-defined financial consumers in the insurance sector, only not as insurance "consumer" defined narrowly in the CIDRA 2012 and the CRA 2015. In addition, there are other three specific reasons for which insurance can be an example, or specific to insurance, or in relation to insurance.

A. Financial Markets Test Case Scheme: the COVID-19 Insurance Case

In the judicial approach to consumer protection, owing to judicial independence from interference, there is usually no space or role for regulatory participation or intervention in cases brought to courts. Exceptionally, however, since late 2015 in the UK, there was opportunity available for cooperation between a financial regulator and the High Court to resolve financial disputes and protect at least the broadly defined consumers in finance. Specifically, with the permission of the Chancery Division or the Commercial Court of the High Court, a financial regulator can join a financial markets test case as a party to the case or to be represented in such a case.[101] This is part of the Financial Markets Test Case Scheme ("FMTCS"), which is applicable "to a claim started in the Financial List which is a Financial List claim and which raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed".[102]

A more recent example in this regard is the COVID-19 business interruption insurance test case[103] under the FMTCS. During the pandemic, the Financial Conduct Authority, as the relevant regulatory body and hence an eligible party to the case, filed a lawsuit at the High Court. In this case, the FCA argued for thousands of small-business policyholders whose business was interrupted by the COVID-19 pandemic. Although not consumers under the CRA 2015 because the insurance in question was for business purposes, these policyholders or insureds undoubtedly were "consumers" as broadly defined under the FSMA 2000. Hence, they were under the regulatory protection of the FCA which as a financial regulatory body could bring the lawsuit under the civil procedure

97 Financial Services and Markets Act 2000, section 1C(2)(b).
98 Financial Services and Markets Act 2000, section 1C(2)(c).
99 Financial Services and Markets Act 2000, section 1C(2)(e).
100 Financial Services and Markets Act 2000, section 1C(2)(f).

101 CPR: Rules and Direction, Practice Direction 63AA.6.5.A, see https://www.justice.gov.uk/courts/procedure-rules/civil/rules/financial-list/practice-direction-63aa-financial-list, updated 7 February 2023, last visit 23 February 2023.

102 CPR: Rules and Direction, Practice Direction 63AA.6.1, see the same webpage ibid. "Financial List claim" means any claim which principally relates to designated types of financial products or financial transactions for more than £50 million or equivalent, or requires particular expertise in the financial markets, or raises issues of general importance to the financial markets; see CPR: Rules and Direction, Part 63A, 63A.1(2), see https://www.justice.gov.uk/courts/procedure-rules/civil/rules/financial-list, updated 30 January 2017, last visit 23 February 2023.

103 *The Financial Conduct Authority v Arch Insurance and others* [2020] EWHC 244 (Comm). The appeal was fast-tracked to the UK Supreme Court, and the FCA substantially won the case. For the press summary of the UKSC judgment, see <https://www.supremecourt.uk/press-summary/uksc-2020-0177.html>. For the UKSC judgment, see *The Financial Conduct Authority v Arch Insurance and others* [2021] UKSC 1.

rules quoted above even though the FCA was never a contractual party to those insurance policies. In its judgments, the UK Supreme Court interpreted the standardised insurance policy/contract terms in question in favour of the policyholders. This had wider protective effects for all similarly situated insurance consumers broadly defined in the FSMA 2000 and beyond the numerable policyholders who were business parties to the insurance policies/contracts concerned in the test case.

B. The FSMA 2000-mandated ICOBS and its Insurance Consumer Definition

Specifically for the UK insurance sector, the FSA made *Insurance: Conduct of Business*—also known as the 'ICOB', effective as of 14 January 2005 until 5 January 2008—and the subsequent ICOBS for non-investment insurance product sales. In addition, the FSA also made the *Conduct of Business Sourcebook* ("COBS") mostly for designated (non-insurance) investment business and to relatively less extent also for long-term insurance business in relation to life insurance policies. The FCA has been administering and constantly updating the ICOBS and the COBS. The ICOBS is the set of rules and guidance made by the FSA/FCA under the mandate of the FSMA 2000. In spite of the general and broad consumer definition in the FSMA 2000 section 1G, the ICOBS distinguishes the consumers falling under the narrow definition from those falling outside. In the ICOBS (paragraph) 2.1, "consumer" is only a sub-category of "customer". "Only a policyholder or a prospective policyholder who makes the arrangements preparatory to him concluding a contract of insurance (directly or through an agent) is a *customer*. In this source book, *customers* are either *consumers* or *commercial customers*."[104] "A *consumer* is any natural person who is acting for purposes which are outside his trade or profession."[105] "A *commercial customer* is a *customer* who is not a *consumer*."[106]

The fine difference between the ICOBS 2.1 definition of consumer and the narrow definition in the CIDRA 2012 (and also the CRA 2015) is eased out by the ICOBS 2.1 rule that "If it is not clear in a particular case whether a customer is a consumer or a commercial customer, a firm must treat the customer as a consumer."[107] The fine difference lies in the text of the CIDRA 2012 (and also the CRA 2015) definition, which has the wording "wholly or mainly for purposes unrelated to the individual's trade, business or profession." The wording "wholly or mainly" expressly provides for situations where an insurance policy covers some private and some business use of the property that is insured. In such scenarios, one needs to consider the *main* purpose of the insurance. For example, private motor insurance covering a limited amount of business use would be "consumer" insurance, so would home contents insurance covering some business equipment; however, insurance on a car used mainly as a taxi which is used occasionally for private trips would be a "non-consumer" insurance.[108] Fine as the difference is, in difficult scenarios it is resolved by the rule in the ICOBS 2.1.2 quoted above.

The legal basis of the regulatory protection of financial (including insurance) consumers is the FSMA 2000 and the relevant black-letter norms, including the ICOBS, which are set according to the FSMA 2000. Although the FSMA 2000 and the ICOBS impose statutory duties of insurers and intermediaries,[109] they are not applicable for determining the *contractual* rights and obligations of the parties in financial/insurance disputes. This is partly because some of the ICOBS written norms in their nature are not legally binding rules. For example, the ICOBS 2.1 classification and definitions of "customers" and "consumers" are guidance, made by the FCA as per the FSMA 2000 section 139A(1). However, any such guidance, including the ICOBS definitions, "is not binding on those to whom the FSMA applies, or the courts, nor does it have any evidential effect".[110] As part of the financial regulation regime, these guidance definitions are only the regulatory scheme or legal background which courts may take into account in interpreting contractual terms and implying terms into contract.[111] They are not decisive

104 ICOBS 2.1.1(2), emphasis original.
105 ICOBS 2.1.1(3), emphasis original.
106 ICOBS 2.1.1(4), emphasis original.
107 ICOBS 2.1.2.
108 LC and SLC, (2009). Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation (Cm 7758). Law Commission and Scottish Law Commission. p 147 (para. A5).
109 Birds, J., & Richards K., (2022). *Birds' Modern Insurance Law*. Sweet & Maxwell, p 17.
110 Robert Merkin, *Lowry, Rawlings and Merkin's Insurance Law: Doctrines and Principles* (Hart Publishing 2022) pp 33-34.
111 *Bank of Credit & Commerce International SA v Ali* [2001] UKHL

for judiciary decision-making in resolving financial contract disputes. For example, although in addition to applying the consumer definition under the applicable UTCCR 1999, the Court of Appeal in the *Ashfaq* case also considered[112] the consumer definition in the ICOBS 2.1, such considerations were made not because courts are generally obliged to apply the ICOBS 2.1 as a legally binding rule—it was not. Instead it was mainly because Ashfaq invoked the ICOBS to argue his case and the judges would better respond to that line of argument. It does not mean that courts are legally bound to (pro)actively consider or invoke the ICOBS 2.1 definitions, whose nature, as pointed out above, is a guidance which courts are not obliged to consider or apply as law.

C. The FSMA 2000-mandated FOS and Insurance Dispute Resolution

Under the regulatory approach to the protection of financial/insurance consumers, the original FSMA 2000 section 225(1) has authorized the then Financial Services Authority to set up an "ombudsman scheme" "under which certain disputes may be resolved quickly and with minimum formality by an independent person." Accordingly the FOS is set up in 2001 as an independent, non-judicial, informative alternative to courts for resolving financial disputes including those in the insurance sector. On the one hand, to financial/insurance disputes resolution, the FOS does not take the judicial approach by which the contract law rules are strictly applied. On the other hand, although the mandate of FOS non-judicial decision-making powers lies in the regulatory FSMA 2000 Part XVI (sections 225 to 234B) and Schedule 17, the FOS is not regulatory in law, but it is regulated by the FSA/FCA.

As a mechanism for alternative dispute resolution, the FOS is for *ex post* protection to financial consumers, but it is different from the also ex post judicial approach: it is non-judicial, informal, and more importantly it operates under the broad definition of consumers in financial services. The person who brings to the FOS the financial/insurance disputes with a financial service provider is a "complainant" and the latter is the "respondent". The FCA Handbook, for regulatory purposes for and regulatory powers over the FOS, set the complainant eligibility rule[113] under which an eligible complainant must, generally speaking, be a person that is a consumer, or a micro-enterprise, or a charity or trustee of a trust, or a small business, or a guarantor. For this rule, the FCA Handbook describes consumer as including both as narrowly defined consumers in European Union consumer laws which have been accepted into UK statutes and also as broadly defined consumers in the FSMA 2000.

It must be noted that the FOS was not entirely new when it was set up in 2001: apparently similar ombudsman scheme had existed, for example the Insurance Ombudsman Bureau ("IOB") had been set up in 1981 and the Pensions Ombudsman in 1991. The FOS brought most of the private-sector financial ombudsman schemes together under one single umbrella for financial consumer protection via non-judicial disputes resolution. The FOS jurisdiction over consumer insurance disputes has its root in the dominant role of the former IOB in non-judicial resolution of consumer insurance disputes. The IOB was founded and incorporated by UK insurers in January 1981. In subsequent years most life insurers in the UK voluntarily became IOB members, whose dispute with consumer insureds/policyholders were within the IOB's jurisdiction.

The IOB model had a few key features,[114] which the FOS also has generally and is applicable to the FOS resolution of insurance disputes. First, the IOB scheme would be paid for by insurers, and access to the ombudsman would be free for consumers. Similarly, under the FSMA 2000 section 234, the FOS is funded by financial services providers as per the requirement of the financial regulators. Second, the IOB would be a private dispute resolution scheme, confidential between parties. Its decisions were not published, as were judicial judgments. Likewise, the FOS also has this private and confidential nature. Although the FOS does regularly publish summary cases and deci-

8, at [39] per Lord Hoffmann. See also *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 at [154] per Leggatt LJ and *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, at [37] and [38] per Lord Sumption.

112 *Ashfaq v International Insurance Company of Hannover Plc* [2017] EWCA Civ 357, para. 48.

113 FCA Handbook DISP 2.7.3; see also https://www.handbook.fca.org.uk/handbook/DISP/2/7.html#

114 Tyldesley, P., (2003) The Insurance Ombudsman Bureau—the early history. *Journal of Insurance Research and Practice*. 18(2), p 39. The five IOB features described in this paragraph and the next two paragraphs are based on and paraphrased from this excellent historic paper. In the meantime, the author of this current paper makes the comparison with the FOS.

Table 2. Special features of the FOS

FOS (independent, free, non-legalistic, user-friendly informal procedure, 'fair and reasonable' solution)	
• mandated by and based on the FSMA 2000	• *ex post*
• operation by the FCA Handbook	• non-judicial
• complainant eligibility rules aligned with broad consumer definition (FSMA 2000)	• remedial

sions, such publications are invariably anonymised for confidentiality. Third, consumer insurance complaints could be examined by the IOB ombudsman only after the insurer had given the consumer a final decision on a complaint. Similarly, the FOS will handle a consumer complaint only if the consumer has made the complaint to the financial firm in question and the financial firm has communicated its final decision to the consumer.[115] Fourth, the IOB ombudsman's decision would bind the insurer only if the consumer accepted the decision, but would not so bind if it was not accepted by the consumer. Likewise, as per the FSMA section 228(5), this is also the same for the FOS. In addition, for the remedy award to (insurance) consumers, a monetary limit would apply, which was £100,000 from an IOB award, and initially £150,000 but now £375,000 (as of 1 April 2022, subject to adjustment as per the Consumer Price Index) from an FOS award.

Fifth and finally, in resolving the disputes and complaints, the IOB ombudsman until 1992 was enjoined to consider the terms of the contract, the applicable law and judicial authority, good industry practice as expressed in trade association codes and statements, and regulatory rules—and since 1992 to look for solutions that would be "fair and reasonable" in all the circumstances. By the FSMA 2000 section 228(2), the FOS is obliged to make its decisions also "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case." It is not 'fairness and reasonableness' in the opinion of judges who made decisions in similar disputes, or of the legislation or of any other public authorities, but of the ombudsman of the FOS. Nor is it 'fairness and reasonableness' in particular circumstances but 'in all circumstances' of the case. So, for example, the fairness standard in the CRA 2015 s 62(5), which is both legalistic and relatively limited, is not relevant or binding to the FOS dispute resolution. Similarly, nor the UCTA 1977 Schedule 2 which sets the "Guidelines" for application of reasonableness test.

For that approach which seeks "fair and reasonable" results, a most notable example of the IOB's non-legalistic, non-formalist, and consumer-friendly resolution of consumer insurance disputes was in the 1990s. Having realised that commercial shipping insurance law was too harsh when applied to consumers and to retail insurance contracts like motor insurance or travel insurance, the IOB developed and applied a proportionate remedy in cases where the consumer's non-disclosure or misrepresentation was found and accepted not to have been deliberate. Under the proportionality, there was an adjustment in the premium or in the level of cover, rather than a cancellation of the insurance policy and the retention of the premium and insurer's recovery of any amount that had already been paid to the consumer policyholder.[116] The FOS has continued to take this approach when dealing with insurance disputes involving pre-contractual non-disclosure or misrepresentation, and this proportionate approach was adopted by the CIDRA 2012.

During its twenty years of life, the IOB maintained both the confidence of the public[117] and consistent standards and practices of independence from the insurance industry[118] which sponsored this ombudsman scheme. Considering that, it is natural that IOB has had a new lease of life in the FOS which amassed all financial om-

[115] See the FOS webpage: https://www.financial-ombudsman.org.uk/consumers/how-to-complain last update 4 January 2023. In non-technical and reader-friendly language and format, the FOS website 'Who we are' pages and 'For consumers' pages very helpfully describe relevant information for these two purposes.

[116] Mitchell, C., (2012). 'Protecting the Public: The Ombudsman's Impact Is "Just"' in Charted Insurance Institute (eds), *Upon the Door of Every Cottage: Protecting the Public through General Insurance*. p 34.

[117] Clarke, M., (2005). *Policies and Perceptions of Insurance Law in the Twenty-First Century*. Oxford University Press. p 204.

[118] Clarke, M., (2005). *Policies and Perceptions of Insurance Law in the Twenty-First Century*. Oxford University Press. p 239; see also Munro, N., (1994). The Insurance Ombudsman Bureau and Financial Services Disputes: An Obituary?. *Journal of Financial Regulation and Compliance*. 2(3), p 225.

budsman schemes under one umbrella.

Like the IOB, the FOS independently offers free and impartial dispute-resolution services for consumer complaints. Though its authority resides in the FSMA 2000 which is an Act of Parliament, as per the original FSMA 2000 section 225(2) the FOS is not a government agency, therefore consumers do not have to be bound by FOS decisions. If dissatisfied with the FOS decision, the consumer is free to reject it—this is the end of the FOS involvement in its non-judicial resolution. Then the consumer is also free take legal action against the financial firm (such as the insurer), and the FOS will not be involved in such judicial proceedings. Nevertheless, if the consumer complainant accepts an FOS ombudsman's decision, then the decision is binding on both the consumer and the financial firm involved, hence the firm (such as the insurer) has to do what the FOS decision has told it to do.

Ⅵ. Conclusion

This paper has explained why the UK statutory definition, in the Consumer Insurance (Disclosure and Representations) Act 2012 and also in the Consumer Rights Act 2015 applicable to insurance, of consumer is so different from and much narrower than the broad definition of "consumers" in the Financial Services and Markets Act 2000. The technical and formalist reason for the definitional differences is that a statutory definition of a terminology is in principle limited only to that particular statute in which the terminology is defined and not extendable by default to the same terminology in the other statutes.

More importantly, the substantive reason for the definitional differences lies in the bifurcation of "financial consumer protection". Although this phrase and conception is most often referred to generically, in the real-world financial consumer protection practices are largely bifurcated into the judicial approach thereto and the regulatory approach. The judicial approach operates largely within the confines and the intricate common-law technicalities of private law, especially of contract law, to offer *ex post* and remedial protection in financial/insurance consumer disputes. The rights of financial/insurance consumers are based on their financial/insurance contracts with their insurers or their providers of the financial services in question, and the judiciary solve such disputes by applying contract law to identify and enforce the contract-based rights of both parties to the contract at issue.

In contrast, operating within the regulatory statutes which set out the power of financial regulators and the corresponding compliance obligations of financial services providers but hardly set rights for financial consumers the regulatory approach offers *ex ante* and preventative protection: it protects financial/insurance consumer mainly by preventing, through financial solvency/prudence regulation and financial conduct regulation, disputes from befalling on consumers. This preventative protection shall be and indeed is legislatively intended to cover very broadly almost all users of financial services and interested persons, regardless of whether or not they are individuals (or natural persons) and regardless of whether or not their engagements in the financial services are mainly for purposes related to their business, trade, or profession. This is why for the regulatory approach to financial consumer protection; the broad consumer definition is adopted.

These two approaches to financial/insurance consumer protection are very different, and it is only natural that the narrow consumer definition is oriented toward the judicial approach that is aligned with the technical and narrow rules of contract law whereas the broad definition is oriented toward the regulatory approach under which financial/insurance-users-as-consumers of much wider scope are protected ex ante through regulation. The narrow consumer definition serves the judicial approach whereas the broad consumer definition serves the regulatory approach.

In explaining the differences in the two approaches to financial/insurance consumer protection, this paper also has two unintended effects. First, it has generally justified the differences in the two UK statutory definitions of consumer(s); second and more importantly, but also it has in effect argued that for financial/insurance consumer protection, we need to think more about the approaches to the protection before thinking about what or which consumer definition is applicable thereto: this is because, as explained, the narrow consumer definition and the broad consumer definition each serves a different approach to (financial/insurance) consumer protection.

This bifurcated substantive understanding of the differences between the narrow and the broad statutory definitions of financial/insurance consumers in the UK would

help to understand similar statutory consumer definitions in any other particular country of civil law, or of common law such as Ireland.[119] The extent and degree of the helpfulness in the particular country depends on the relevant details of its financial regulation law and its (consumer) contract law.

References

Armour, J., & Awrey, D., Davies, P., Enriques, L., Gordon, J. N., Mayer, C., and Payne, J., (2016). *Principles of Financial Regulation*. Oxford University Press.

Atiyah, P. S., (1985). *The Rise and Fall of Freedom of Contract*. Oxford University Press.

Barnard, D. M., (1987). The United Kingdom Financial Services Act 1986: a new regulatory framework. *International Lawyer*, 21(2), pp 343-356.

Birds, J., & B Lynch, B., and Paul S., (2022). *MacGillivray on Insurance Law*. Sweet & Maxwell.

Birds, J., & Richards K., (2022). *Birds' Modern Insurance Law*. Sweet & Maxwell.

Clarke, M., (2005). *Policies and Perceptions of Insurance Law in the Twenty-First Century*. Oxford University Press.

Conway, L., (1996). *The Unfair Terms in Consumer Contracts Regulations*. (Research Paper 96/93). House of Commons Library.

FCA, (2018). *FG18/7: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015*. Financial Conduct Authority.

Hu, W-T., (2017). The Legal Definition of Insurance Consumers Concept. *Journal of Huaqiao University* (philosophy and social sciences edition). pp 99-110.

JUSTICE, (1992). *The Protection of the Small Investor*. JUSTICE Educational & Research Trust.

LC and SLC, (2014). *Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment* (Cm 8898). Law Commission and Scottish Law Commission.

LC and SLC, (2009). *Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation* (Cm 7758). Law Commission and Scottish Law Commission.

LC and SLC, (2006). *Insurance Contract Law Issues Paper 1 Misrepresentation and Non-disclosure*. Law Commission and Scottish Law Commission.

Leigh, L. H., & Rutterford J., (1984). Investor Protection: the Gower Report. *Business Law Review*. 47(5), pp 553-566.

Lin, J.-J., Financial Consumer Protection in Taiwan: Systems and Market Issues, in Chen, T.-J., (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer. pp 345-377.

Mitchell, C., (2012). 'Protecting the Public: The Ombudsman's Impact Is "Just"' in Charted Insurance Institute (eds), *Upon the Door of Every Cottage: Protecting the Public through General Insurance*. CII.

Merkin, R., (2022). *Lowry, Rawlings and Merkin's Insurance Law*. Hart Publishing.

Merkin, R., (2020). *Marine Insurance: A Legal History*. Edward Elgar.

Merkin, R., (2022). *Colinvaux's Law of Insurance*. Sweet & Maxwell.

Merryman J. H., & Rogelio Pérez-Perdomo R., (2007). *The Civil Law Tradition.* Stanford University Press.

Munro, N., (1994). The Insurance Ombudsman Bureau and Financial Services Disputes: An Obituary? *Journal of Financial Regulation and Compliance*. 2(3), pp. 220-226.

Pilmlott, G. F., (1985). The Reform of Investor Protection in the UK—An Examination of the Proposals of the Gower Report and the UK Government's White Paper of January 1985. *Journal of Comparative Business and Capital Market Law*. 7(2), pp 141-172.

Randall, S., (2008). Freedom of contract in insurance. *Connecticut Insurance Law Journal*. 14(1), pp 107-147.

Ryder, N., (2001). Two plus two equals financial education. *The Law Teacher*. 35(2), pp 216-232.

Schmulow, A., and James O'Hara, J., Protection of Financial Consumers in Australia, in Chen, T.-J., (ed). (2018). *An International Comparison of Financial Consumer Protection.* Springer. p 13-49.

Tennyson, S., (2008). State Regulation and Consumer Protection in the Insurance Industry. *Networks Financial Institute: Policy Brief.* 2008-PB-3.

Trentmann, F., (2016). 'How Humans Became "Consumers": A History. *The Atlantic*. 11, available at <https://ww

[119] See footnote 17 to the relevant text in the Introduction.

w.theatlantic.com/business/archive/2016/11/how-humans-became-consumers/508700/>.

Tyldesley, P., (2008). 'The Reform of Insurance Contract Law - Why Have Consumers Waited So Long?' *Insurance Research and Practice*. January (2), pp 1-13

Tyldesley, P., (2003) The Insurance Ombudsman Bureau —the early history. Journal of Insurance Research and Practice. 18(2), p 39.

UK Department of Trade and Industry, (1985). *Financial Services Regulation: A New Framework for Investor Protection*.

UK Parliament, (2000). *Explanatory Notes to Financial Services and Markets Act 2000*.

UK Parliament, (2012). *Explanatory Notes to the Financial Services Act 2012*.

UK Parliament, (2015). *Explanatory Notes to Consumer Rights Act 2015*.

Wen, S.-Y., Fan, Q.-R., (2017). An Analysis of the Concept of 'insurance consumer. *Modern Law Science*. 39(2), pp 79-93.

Research Team of the Consumer Rights and Interests Protection Bureau of the China Insurance Regulatory Commission, (2012). Thoughts on Issues in Consumer Rights and Interests Protection, *Insurance Studies*. 9, pp 86-91.

Received/ 2022. 10. 30
Revised/ 2023. 01. 16
Accepted/ 2023. 03. 19

Editorial Principles

1. Mission

The International Review of Financial Consumers (IRFC) aims to offer a communication platform for scholars, regulators, and practitioners to share their latest academic research on financial consumers and related public policy issues in both advanced economies and emerging market countries. All theoretical, empirical, and policy papers of relevancy are welcome, with the following as the topics to cover:

① protection for financial consumers
② business ethics of financial institutions
③ market discipline of financial industries
④ corporate social responsibility of financial institutions
⑤ renovation or innovation of law and regulations related to financial consumption
⑥ public policies for financial consumption
⑦ fair trading of financial products
⑧ dispute resolution for financial consumption
⑨ case studies of best practices for financial consumption
⑩ international comparison on any of the above topics

2. Publication schedule and contents

IRFC, the affiliated journal of the International Academy of Financial Consumers (IAFICO), will be published twice a year - April and October each year - and will pursue to be the first international academic journal focusing on the research related to financial consumers. As the contribution of financial consumption becomes increasingly important to the national economy for most countries, how to maintain an efficient and equitable financial market is an imminent issue for research. The trend of globalization and liberalization policies has reinforced the challenges in financial markets. Not only the financial instruments become more complicated and hard to understand by the public, but also the frequent changes in regulations and business practices cause confusions to the financial consumers. Consumption disputes regarding the financial products have drawn attention by the media in recent years. IRFC attempts to serve as a forum to publish and share original and innovative research, both academic and policy-oriented, on all the above issues.

3. On ethics for research

The range of research misconducts

① Misconducts related to academic research (“misconducts” hereafter) means that fabrication, falsification, plagiarism, unfair showing of papers' author, during research proposal, research performing, research report and research presentation,

etc. It is as follows.

1) “Fabrication” is the intentional misrepresentation of research results by making up data or research result.

2) “Falsification” is the distortion of research contents or results by manipulating research materials, equipment and processes, or changing or omitting data or results.

3) “Plagiarism” is the appropriation of another person's ideas, processes or results, without giving appropriate approval or quotation.

4) “Self-plagiarism” is the reusing a large portion of their own previously written research.

5) “Unfair showing of papers' author” is not qualifying people, who have been contributing to research contents or results scientifically, industrially and politically, as an author without just reason, or qualifying people, who have not been contributing the same, as an author with an expression of thanks or respectful treatment.

6) Obstructing investigation about misconducts of their own or others, or harming an informant.

7) Action which is out range of usually acceptable in the course of the research.

8) Action which is suggestion, pressure or threat to others to do the above things.

4. On plagiarism

Types of plagiarism

Following two forms are defined the representative action of research misconducts (Plagiarism).

① Using the original author's idea, logic, unique terms, data, system of analysis without indicate the source.

② Indicating the source but copying the original paper's words, idea, data and so on without quotation marks.

Author Guidelines

General

The IRFC publishes rigorous and original research related to protection of financial consumers. IRFCs shall be published twice a year, in April and in October. Papers submissions shall be accepted throughout the year. Editorial Board will evaluate manuscripts in terms of research contribution to the field and paper's quality. Research area includes but is not limited to the following topics:

1. Protection for financial consumers
2. Business ethics of financial institutions
3. Market discipline of financial industries
4. Corporate social responsibility of financial institutions
5. Renovation or innovation of law and regulations related to financial consumption
6. Public policies for financial consumption
7. Innovation or fair trading of financial products
8. Dispute resolution for financial consumption
9. Case studies of best practices for financial services or their consumption
10. International comparison of protection for financial consumers.

Publication Ethics

When authors submit their manuscripts to IRFC for publication consideration, they agree to abide by IRFC's publication requirements. In particular, authors confirm that:

- The manuscript is not under review for publication elsewhere, and will not be submitted to another publication entity during the review period at IRFC
- The empirical results of the manuscript have not been previously published.
- The manuscript has not previously been submitted to IRFC for review. Submission of manuscripts previously presented at a conference or concurrently considered for presentation at a conference does not disqualify a manuscript from submission to IRFC.
- Working papers, prior drafts or final versions of the submitted manuscripts posted on a website will be taken out of it during the review process for the purposes of blind review.

Submission Fee

There is no fee for a submission of an article at the IRFC journal.

Preparing a Manuscript for Submission

1. Papers must be submitted in Microsoft Word format. The structure of the work should be as suggested by the Publication Manual of the American Psychological Association 6 edition:
   - Title
   - Author's name and institutional affiliation
   - Author note
   - Abstract
   - Introduction
   - Method
   - Results
   - Discussion
   - References
   - Appendices and supplemental materials.

2. Manuscripts should be written as concisely as possible without sacrificing meaningfulness and clarity. They should be no longer than 40 double-spaced pages with one-inch margins and Times New Roman 12-point font, including references, tables, figures and appendixes.

3. Submitted papers should be in English, with grammar, spelling and punctuation thoroughly checked.

4. Make sure lettering and sizing of your manuscript, as well as bullet points and numerals are uniform.

5. The title page must include the title of the paper and an abstract of no more than 200 words. Indicate not more than seven key words after the abstract.

6. Please provide author name(s) contact information in a separate page.

7. Sections, including introduction, should be numbered in Roman numerals. Subsection headings should be in letters, e.g. A, B, C.

8. Tables must be typewritten, not in the form of pictures, and given Arabic numerals. They should have a descriptive name following the table number. Tables can be placed either after the text in the paper or in appendix section, if too detailed.

9. Figures must be given Arabic numbers as well and must not include any explanatory materials, which should go to the legend or to the caption. Captions should include a brief description of the figure. Please ensure that figures are of as high quality as possible.

10. The last section of a paper should include main conclusions of the research.

11. References should be placed at the end of the paper. All references must be in the style of American Psychological Association 6th edition, the basics can be found here. Make sure all in-text citations are presented in the reference list. The examples of reference entries are as follows:

For monographs:

Henderson, J. (2012). *Health economics and policy* (5th ed.). Mason, OH: South-Western, Cengage Learning.

For contributions to collective works:

Leonidou, L. (Eds.). (2018). Advances in global marketing: A research anthology.

For periodicals:

Nam, S. (2006). A study on the causality between the insurance and economic growth, *Korea Insurance Journal* 74, 169-197.

Communication

With any issues regarding the publication of your paper, please email the IRFC Editor, Professor Sharon Tennyson, at irfc@cornell.edu.

Review Process

- Initial review process
  When a manuscript is first received, the editor makes a preliminary screening of a manuscript to assess whether it fits the criteria of IRFC's mission and publication principles.

- Normal review process
  For each manuscript that passes the initial review stage, the editor assigns one qualified reviewer from the IRFC's Editorial Board and one other qualified reviewer. All submissions will be blind reviewed.

Research Ethics

We are committed to publishing only high quality research. Our policy on research ethics is based on recommendations of the Committee on Publication Ethics (COPE). COPE is an internationally recognized non-profit organization, dedicated to educating editors and publishers in publication ethics. Hence, authors are encouraged to study the IRFC's ethics principles and abide by them.

Authorship and Contributorship

Authorship misconducts (or "misconducts") may include fabrication, falsification, plagiarism, unfair representation of some authors. Misconduct may occur during research proposal, research performing, and research report and research presentation. By submitting their manuscript, authors confirm they are not engaged in any of these actions:

1) Fabrication is the intentional misrepresentation of research results by making up data or research result.
2) Falsification is the distortion of research contents or results by manipulating research materials, equipment and processes, or changing or omitting data or results.
3) Plagiarism is the appropriation of another person's ideas, processes or results, without giving appropriate approval or quotation. We define two types of plagiarism:
   3.1) Using the original author's idea, logic, unique terms, data, system of analysis without indicating the source.
   3.2) Indicating the source but copying the original paper's words, ideas, data and so on without quotation marks.
4) Self-plagiarism is the reusing of a large portion of author's own previously written research.

Other misconducts include:

5) Indicating as authors those who did not contribute but are credited ("guest", or "gift" authorships), and those who contributed but are not credited ("ghost" authors).
6) Obstructing investigation of their own or other authors' misconducts.
7) Pressure on, suggestion or threat to others to do the above things.
8) Any other action which is usually unacceptable in the course of research.

In case that the Editorial Board reveals or suspects any misconduct, it will contact the author for clarification or contact an author's institution for further investigation. Allegations of ethical misconducts may lead to rejection of the manuscript submitted for publication. If an ethical misconduct is revealed after publication of a manuscript, the article may be retracted or removed. We encourage authors and readers of the Journal to notify the Editorial Board of any alleged misconducts. The Board will keep the names of those who have notified anonymous.

Conflict of Interest

We are committed to identifying a conflict of interest whenever it arises. IRFC policies on the conflict of interest include responsibilities for authors, editors, board members and reviewers.

Conflict of interest arises whenever a personal interest of an author, editor, board member or reviewer may affect objectivity of the research or the fulfillment of journal related obligations. This may include financial (e.g. employment, stock ownership, providing consulting services), intellectual (e.g. patent ownership), political, religious or other personal interests. Authors should disclose their conflict of interest in a Manuscript submission form when sending their manuscript. Editors, editorial board members and reviewers should submit a statement prior to engaging in these roles for a manuscript.

Funding information is considered separately from conflicts of interest. IRFC requires authors to whether funding has been received for research, as well as funding sources.

Complaints and appeals

If you are a Journal reader and recognize any thoughts, ideas or other materials that are used in a published IRFC article without giving credit to the initial author, we encourage you to notify the Editorial Board. Authors who contributed to the published research but were not given credit for it should also contact the Journal's Board. The Board will reply to all complaints and notify the complainant of its decision and following actions. The Board shall not reveal any information on those who notify it on possible misconducts. All notifications will be considered and investigated.

In case of any complaints against the Journal, its staff or Editorial Board members, you should submit your statement to the Board explaining your position and reasoning. Staff or Board members against whom a complaint is submitted will not participate in further investigation and consideration of the case.

Data and Reproducibility

IRFC does not charge for access to our journals, and makes all articles available online.

The Journal may ask authors to provide any raw data necessary to understand and assess the research, including input data and computer codes. Any restrictions and objections to this policy should be disclosed when submitting the article, otherwise will not be considered as valid later.

Research Ethics

Authors should comply with all standards adopted by their institution and industry in relation to research involving hazards, human or animal objects. If a manuscript contains images or personal data of individuals participating in the research, authors should have individuals' consent and ethics committee approval. When submitting an article,

an author should provide necessary statements of compliance.

Fundamental Errors

If an author identifies any significant error in their paper after its publication, it is the author's responsibility to notify the Editorial Board promptly. Authors should provide their assistance in implementing retractions or corrections of the paper. We also encourage readers to notify the Board should they identify any errors in the published materials.

Bylaws of the International Academy of Financial Consumers (IAFICO)

March 31, 2015
First revision on April 19, 2016
Second revision on September 30, 2019

Section 1 General Provisions

Article 1 (Official Name)

The official name of this academic society shall be the "International Academy of Financial Consumers (IAFICO hereafter)".

Article 2 (Registered office and Branch offices)

The registered office is to be in Seoul, South Korea. Branch offices may be established in provincial cities in Korea or overseas should the need arise.

Section 2 Objectives and Undertakings

Article 3 (Objectives)

*Pending
The IAFICO is a non-profit association aiming at promoting and developing at an international level collaboration among its members for the study of various issues relating to financial consumers, including its education, legislation, creation of best practices, supervision, and policy advancement to contribute to the development of the global economy and financial market, through investigation or research into financial consumers, and other academic activities.

Article 4 (Undertakings)

The following activities shall be carried out in order to achieve the objectives of the IAFICO.
1. Publication of journal and other literature
2. Hosting of academic conferences
3. Additional undertakings corresponding to the objectives of the academic society which are deemed necessary at the board of directors meeting or the general meeting

Section 3 Membership

Article 5 (Requirements and Categories)

The IAFICO shall have following categories of membership:

① Individual member

Individual members are categorized further into a regular member or an associate member.

1. Regular member shall be a specialist in the area such as finance, consumer studies, economics, management, law, or education etc, and must be a full-time instructor at a domestic or overseas university, a researcher at a research institute with equivalent experience, or should hold equal credentials to those mentioned previously, and shall become its member by the approval of the board of directors. Regular members attend general meetings and may participate in discussions, hold the right to vote, and are eligible to be elected to a director or other status of the IAFICO.
2. Associate members shall be divided into either a student member, who is a current domestic or overseas graduate school student, or an ordinary member, who works for a financial institution or a related organization. Associate members do not hold the right to vote and are not eligible to be elected to a director or other status of IAFICO.
3. Both regular member and associate member must pay the membership fee to the IAFICO every year.
4. In the case that a decision is made by the Board of Directors to expel a member due to a violation of the objective of the society, or demeaning the society, or in the case that a member fails to pay the membership fees for two years continuously without prior notice, their membership shall be revoked.

② Institutional member

1. Institutional member shall be organizations related to financial consumers who do not damage the impartiality of the IAFICO subject to approval of the Board of Directors. Institutional members do not hold the right to vote and are not eligible for election.
2. Institutional member must pay its membership fee to the IAFICO every year.

Section 4 Organization

Article 6 (Designation of Board of Director)

The following Directors are designated to constitute the Board of Directors to run the IAFICO.

1. Chairperson
2. Vice-Chairperson
3. President
4. Vice-President
5. ordinary Directors
6. Auditor

Article 7 (Election of Board Members and Director)

① The Chairperson, Directors, and Auditors shall be elected or dismissed at the general meeting.
② Appointment of the Directors may be entrusted to the Chairperson pursuant to the resolution of the general meeting.
③ The Vice-Chairperson, President, and Vice-President shall be appointed and dismissed by the Board of Directors.

Article 8 (General Meetings)

① General meeting shall decide following matters relating to the activities of the IAFICO.
1. Amendments to the Bylaws
2. Approval of the budget and settlement of accounts
3. Election or Dismissal of the Chairman
4. Election or dismissal of Auditors
5. Regulations concerning the duty and rights of members
6. Resolutions regarding items submitted by the President or Board of Directors
7. Other important matters

② The Chairperson must call a regular general meeting at least once a year and report on the undertakings of the IAFICO. Provisional general meetings may also be held by the call of the Chairperson, or at the request of at least a quarter of current regular members, or according to the resolution of the Board of Directors.
③ At a general meeting, a quorum is formed by one third of regular members. However, regular members who are not able to participate in the general meeting in person may be represented by proxy, by entrusting a specific regular member attending the general meeting with their attendance or voting right. In this case the letter of proxy is included in the number of attendees.
④ Resolutions at the general meeting will be made according to the majority vote of the attending members who hold the right to vote.
⑤ In principle, the general meeting shall be held with face-to-face meeting, however, it may be held web-based meeting when needed.

Article 9 (Auditors)

① The auditors shall audit financial affairs, accounts and other transactions of IAFICO, shall participate in, and may speak at board meeting, and must present an auditor's report at the regular general meeting.
② There shall be two appointed auditors.
③ Auditors are elected at the general meeting.
④ An auditor shall serve a term of two years and may be reappointed.

Article 10 (Board of Directors)

① The Board of directors shall be made up of chairperson and fewer than 80 directors.
② The Board of Directors shall decide a plan of operation and establish the budget, in addition to matters on the running of IAFICO.
③ Board meeting requires a quorum of at least one third of current board members. Resolutions at the Board meeting will be made according to the majority vote of the attending members. However, board members

who are not able to participate in the board meeting in person may be represented by proxy, by entrusting another specific board member attending the board meeting with their attendance or voting right.

④ A board member shall serve a term of two years, with a possibility of serving consecutive terms.

⑤ A number of sub-committees or branches in each country or region may be set up under the Board of Directors to support the running of the IAFICO.

Article 11 (Steering Committee)

① The Board of Directors may entrust some decisions relating to the conducting of business to the Steering Committee.

② The Steering Committee shall be comprised of the Chairperson, Vice-Chairperson, President, and the heads of each subcommittee.

③ Temporary task forces may be established by the Steering Committee when necessary to run the business of the Steering Committee.

Article 12 (Chairperson)

① The Chairperson shall represent the IAFICO and chair its general meeting and board meeting.

② There shall be one appointed Chairperson who serves a term of three years.

③ In the case of an accident involving the Chairperson, the Vice-Chairperson shall complete the remaining term of office of less than one year. If it lasts longer than one year, a new Chairperson shall be elected at the general meeting.

④ A new Chairperson should be elected at the general meeting one year prior to the end of the current Chairperson's term of office.

⑤ Should it be judged that it is difficult for the Chairperson to carry out their duty any longer, he or she may be dismissed from their post by the decision of the Board of Directors and general meeting.

Article 13 (Vice-Chairperson)

① The Vice-Chairperson shall assist the Chairperson, and serve as a member of the Board of Directors.

② The Vice-Chairperson shall serve a term of two years, or the remaining term of office of the Chairperson, whichever is shortest.

③ The Vice-Chairperson shall be elected from one of the regular members at a meeting of the Board of Directors, according to the recommendation of the Chairperson.

④ The Vice-Chairperson may be reappointed.

Article 14 (President)

① During its term of office, the President shall become the head of the organizing committee supervising international conferences, and serves for a term of one year. The President shall attend the board meeting as a member of the Board of Directors.

② The succeeding President shall be elected by the Board of Directors after considering their ability to organize and host the following year's conferences. The succeeding President shall also attend board meeting as a member

of the Board of Directors.

③ The Board of Directors may elect the next succeeding President should the need arise. The next succeeding President shall also attend board meeting as a member of the Board of Directors.

④ The President, succeeding President, and the following President may appoint a Vice- President respectively by obtaining approval of the Board of Directors.

⑤ The appointment and dismissal of the President is decided at the board meeting.

Article 15 (Vice-President)

① A Vice-President is a member of the Board of Directors and shall assist the President, supervise applicable international conferences.

② A Vice-President is recommended by the President and shall be approved by the Board of Directors.

③ Multiple Vice-Presidents may be appointed.

④ A vice-President shall serve a term of one year, the same as the term of President.

⑤ In the event of an accident involving the President, a Vice-President shall fulfil the President's duties during the remaining term of office.

Article 16 (Editorial Board)

① The Editorial Board shall be responsible for editing of journals and other materials to be published by the IAFICO.

② The head of the Editorial Board shall be appointed by the Board of Directors, and shall serve a term of office decided by the Board of Directors.

③ The head of the Editorial Board shall be a member of the Board of Directors.

④ Additional matters concerning the running of the editorial board shall be decided separately by the Board of Directors.

Article 17 (Advisory Board and Consultants)

① The Chairperson may select individuals who could make a large contribution to the development of the IAFICO, and appoint them as advisors subject to the approval of the Board of Directors.

② The Chairperson may appoint consultants subject to the approval of the Board of Directors in order to receive advice relating to all business matters of the IAFICO, such as development strategies, conferences, research plans, and research projects etc.

③ Advisors and consultants shall serve terms of one year and may be reappointed.

Section 5 Financial Affairs

Article 18 (Accounting and Revenue)

① The fiscal year of the IAFICO shall run from the 1st of January to the 31st of December each year.

② The finance required to operate the IAFICO shall be sourced from membership fees, member contributions, society participation fees, and other incomes. Related matters shall be decided by the Board of Directors or the Steering Committee.
③ Should the need arise, the IAFICO may accept sponsored research, donations or financial support from external parties in order to support the business performance of the IAFICO. The Chairperson shall report the details of these at the board meeting.
④ Chairperson should report all the donation from outside and their usage of the year at the IAFICO homepage by the end of March of the next accounting year.

Section 6 Supplementary Rules

Article 19 (Revision of the Bylaws)

① Any other matters not stipulated by this Bylaws shall be resolved by the Board of Directors.
② Revision of the Bylaws shall be carried out, by the proposition of the Board of Directors, or at least one-tenth of regular members, at a general meeting where at least one-third of the total regular members are in attendance, or at a provisional general meeting, with the agreement of at least two-thirds of current members.

Article 20 (Dissolution)

Should the IAFICO intend to be dissolved, it must be decided upon at a general meeting with the agreement of at least two-thirds of current members, and permission must also be received from the Fair Trade Commission. Except for bankruptcy, the dissolution must be registered and reported to the Ministry of Strategy and Finance within three weeks, accompanied by a certified copy of register.

Article 21 (Residual Property upon Dissolution)

Should the IAFC be dissolved, according to article 77 of the Korean civil law, all remaining assets of IAFICO shall belong to the state, local government, or other non-profit corporations carrying similar objectives.

Additional Clause

These Bylaws shall become effective from the 1st April 2015

The International Review of Financial Consumers

Vol.8 No.1

Printed	2023. 06. 30.
Published	2023. 06. 30.
Publisher	Man Cho
Editor-in-Chief	Sharon Tennyson
Publishing Institute	The International Academy of Financial Consumers
	32516 Dasan Hall of Economics, SKKU, 25-2, Sungkyunkwan-ro, Jongno-gu, Seoul, Korea
	Tel : +82 2 760 1283
	Fax : +82 2 766 0527
	E-mail : iafico@kdis.ac.kr