

**CASES AND TRIBUNAL DECISIONS**

# AFCA Group – Avoidance by later in time insurer

In August 2019, AFCA published decisions (613562 and 619820) which considered the scenario of whether underwritten cover initially entered into by the earlier group insurer but now sitting with a later insurer, could be subject to a s29 of an ICA avoidance or variation, by the later insurer.

**Facts**

- Claim for an underwritten insured death benefit on the fund by the beneficiary.
- Cover applied for in November 2009 when the cover was issued by the earlier insurer. The later in time insurer assumes the risk in December 2011.
- The life insured died in December 2016.
- Post December 2016 the cover was avoided by the later in time insurer under s29(2) of the ICA using a retro underwriting opinion of the earlier insurer.

**Decision**

AFCA found:

1. There was relevant fraudulent misrepresentation by the life insured in the application for the underwritten cover AND the previous insurer's retro underwriting opinion was sufficient for it to avoid the cover.
2. However, because the relevant pre-contractual misrepresentation was not made to the later in time insurer (it was made to the earlier insurer – which is 'the insurer' for the purposes on s29) the later in time insurer could not avoid the cover.

AFCA rejected the following arguments:

- The 'insurer' in s29 is a floating concept – given a purposive

construction, it must mean 'the insurer holding the risk at the relevant time' in circumstances of a take over on the same terms of an existing book of cover.

- AFCA rejected this argument and stated '*There is nothing in the wording of section 29 to treat a misrepresentation made to one insurer as a misrepresentation made to another insurer*'.
- The 'insured' in s29 includes a legal personal representative so it follows that 'the insurer' should include a successor in title (to all intents and purposes, the later insurer is a successor in title to the earlier insurer).
- AFCA rejected this argument and stated '*the later insurer is not a successor in title to the previous insurer*'.
- Section 29 should be interpreted so that insurers do not lose rights when a trustee changes insurance cover. To do so would encourage fraudulent misrepresentation.
- AFCA rejected this argument and stated '*It is for Parliament to change the law, not AFCA*'.
- The FSC supports seamless cover for members transferring cover when a trustee switches insurers. A narrow interpretation of 'insurer' is therefore not consistent with good industry practice.
- AFCA rejected this argument and stated '*there is nothing in the FSC guidance note dealing with assignment of one insurer's rights to another insurer. Insurers may negotiate such arrangements*'.

**Implications**

These findings by AFCA potentially conflict with FOS determination 378061 wherein the FOS stated:

...it is common practice for superannuation trusts to change insurers for group life policies. This can offer important benefits to their members. One of the premises of the ability to move from one group policy provider to another is that insurance companies are willing to take the risk for existing members under a previous policy with a previous insurer. This would support the FSP's submission that "the insurer" in s.29(2) should be interpreted, with this practice in mind, as the insurer holding the risk at the relevant time.'

In any event, the AFCA decisions carry the following implications:

- Avoidances by later in time insurers in similar scenarios to the present will likely be overturned by AFCA, however, at least where fraud is proven there is still an argument that the benefit should still not be paid consistent with the reasoning of FOS 378061.
- Avoidance/variation needs to be undertaken by earlier in time insurer (there is nothing stopping this even though the earlier insurer is no longer on risk) but note this may not necessarily invalidate the cover under the new policy – NB will need to check the provisions of the transfer terms with the trustee.
- Moving forward assignment of rights between old and new insurers may be required.
- Or transfer terms of new insurer need to carve out cover which could be avoidable or varied. The result being that cover which could be avoidable or varied by the old insurer, never comes across to the new insurer.