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The legal framework regulating the duties of insurance intermediaries.

by

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Declaration

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3. I have not used work previously produced by another student or any other person to hand in as my own.
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LIST OF ABBREVIATIONS

COFI Bill	Conduct of Financial Institutions Bill
FAIS	Financial Advisory and Intermediary Services Act
FICA	Financial Intelligence Centre Act
FSCA	Financial Sector Conduct Authority
FSR Act	Financial Sector Regulation Act
GCC	General Code of Conduct for Authorised Financial Services Providers and their Representative.
IA	Insurance Act
LTIA	Long-term Insurance Act
PPR	Policyholder Protection Rules
PA	Prudential Authority
POPI Act	Protection of Personal Information Act
STIA	Short-term Insurance Act
TCF	Treating Customers Fairly

Abstract

In South Africa, before the *Financial Advisory and Intermediaries Services Act (FAIS Act)* and other insurance laws came into existence, intermediary services regarding the rendering of insurance products have always been regulated by the law of agency and mandate.¹ This means that the *Roman-Dutch principles* provided for the standards to which the conduct of intermediaries was to comply with when rendering insurance services.² The mandate of intermediaries in terms of the *Roman-Dutch Principles* also included the fact that they had to act with care, skill and in good faith.³

¹Hattingh, Millard, *The FAIS Act Explained, A guide to understanding the Financial Advisory and Intermediaries Act 37 of 2002*, 2nd ed, vii (H hattingh, D Millard, *The FAIS Act Explained*).

²Hattingh, Millard, *The FAIS Act Explained*, Vii.

³ Hattingh, Millard, *The FAIS Act Explained*, Vii.

When the *FAIS Act* came into operation, it introduced several detailed rules and minimum standards for insurance intermediaries to comply with, and these minimum standards are not limited to qualifications, experiences and characteristics of honesty and integrity that an intermediary must comply with, but they also stipulated in detail what an intermediary must do when discharging insurance intermediary duties.⁴

The *FAIS Act* is the leading legislation when it comes to the regulation of intermediary services. The *FAIS Act*, under *section 16*, provides for a *General Code of Conduct for Authorised Financial Services Providers and their Representative (GCC)*, which contains a set of rules that are applicable to all intermediaries. These rules under the *GCC* are aimed at ensuring that insurance customers are provided with material facts that will enable them to make a prior informed decision⁵ and that their reasonable financial needs concerning insurance products will be carefully considered so that they can be provided with a product that will be suitable to satisfy their needs.⁶

Furthermore, in terms of South African laws and practices, intermediaries play an essential role in the creation of legally binding insurance contracts.⁷ Insurance businesses are concluded through intermediaries.⁸ Considering that many insurance companies are juristic persons, and they can only conduct business by means of human agents,⁹ insurance laws make it compulsory for intermediaries to have skills, knowledge, and experience regarding insurance products that they are rendering to insurance customers.¹⁰

It is commonly believed that intermediaries with skills, knowledge and experience, they always act in the best interest of the client, and they ask relevant questions to assist the

⁴ *Section 6A & 13 of the FAIS Act.*

⁵ *Section 16 of the FAIS Act.*

⁶ *Section 16 of the FAIS Act; Hattingh & Millard FAIS Act Explained, 3.*

⁷ *Cummins J and Doherty NA 'The economics of insurance intermediaries. Journal of risk and insurance' (2002) 73(3), pp.359-396.*

⁸ *J Lowry, H Rawlings and R Merkin Insurance Law: Doctrine and principles (3rd edn, oxford and Portland, Oregon 2011) 58.*

⁹ *Section 2 of the General Code of Conduct (GCC).*

¹⁰ *Section 6A of the FAIS Act; Section 3 of the GCC.*

clients to disclose all material facts, and they always make sure that material facts are clearly communicated/disclosed to the insurer and insured to avoid future conflicts.¹¹

The legal framework placed a duty on the intermediary to assist the insured to disclose all material facts and to explain all clauses contained in the insurance contract which may lead to the insurer repudiate its liability.¹² Furthermore, an intermediary is at all material times expected to first consider the financial situation of the potential insured before determines a cover that will be best suitable for the insured's needs.¹³

However, despite the best guidelines outlined by applicable insurance laws and regulations, mistakes are still being made by intermediaries, which lead to insurance customers to suffer the consequences of impractical intermediary services, and that has resulted in numerous complaints, legal disputes, debarments, and other regulatory actions.¹⁴

As a result of intermediaries' continuous misconduct, insurers has been repudiating claims, and it has created a presumption that insurers conduct businesses to enrich themselves instead of protecting the interests of their customers as required by regulating legal framework.¹⁵ Therefore, So many people have lost confidence in the insurance industry due to unlimited court cases and complaints arising from misconduct or omissions of intermediaries, such as their failure to disclose material facts to the parties. Once it is found that material facts were not fully disclosed between the insurer and insured, both parties would have been deprived of their right to make an informed decision before consenting or signing a legally binding contract.¹⁶ Therefore, a need is created for intermediaries to be educated of their legal duties when rendering insurance services and that will help strengthen or restore the confidence of the public towards insurance industry.

¹¹ *Havenga, The Law of Insurance Intermediaries*, 36-38; Section 2 of GCC.

¹² Section 7(1) of the GCC.

¹³ Section 7(1) of the GCC; *Financial Advisory and Intermediary Services Act, 2002 (Act No 37 Of 2002)*, Board Notice 194 of 2017: *Determination of Fit and Proper Requirements for Financial Services Providers, 2017*.

¹⁴ *Patrick Bracher, 'The Realities of Intermediary Regulation in South Africa' (Norton Rose Fulbright South Africa, 2010)*.

¹⁵ *Short-term Insurance Act 1998: Policyholder Protection rules under Rule 1.4 (a to f)*.

¹⁶ Section 7(1) of the GCC.

CHAPTER 1

The introduction of the research topic and methodology.

1.1. Definitions:

- i. “advice” means, subject to subsection (3)(a), any recommendation, guidance or proposal of a financial nature furnished, by any means or medium, to any client or group of clients - (a) in respect of the purchase of any financial product; or (b) in respect of the investment in any financial product; or (c) on the conclusion of any other transaction, including a loan or cession, aimed at the incurring of any liability or the acquisition of any right or benefit in respect of any financial product; or (d) on the variation of any term or condition applying to a financial product, on the replacement of any such product, or on the termination of any purchase of or investment in any such product, and irrespective of whether or not such advice - (i) is furnished in the course of or incidental to financial planning in connection with the affairs of the client; or (ii) results in any such purchase, investment, transaction, variation, replacement or termination, as the case may be, being effected.¹⁷
- ii. *Agency “is the relationship that exists between the persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way to be able to effect the principal’s legal position in respect of strangers to the relationship by the making of a contract or disposition of property”.*¹⁸
- iii. *Agency “fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf, and the other of whom similarly consents so to act or so acts”.*¹⁹

¹⁷ Section 1 of the FAIS Act.

¹⁸ GHL Fridman. ‘The law of Agency’ (2003); Mahomed, *An examination of the legal liabilities of insurance intermediaries and the insurance thereof*. Prieiga per internetą: <https://www.insurancegateway.co.za/download/5666>.

¹⁹ Bowstead and Reynolds ‘Agency’ (2001).

- iv. Agency refers to a situation whereby the one-person (agent) acts for another person (the principal) in effecting a contract or transaction with another (the third party).²⁰
- v. Authority means the Financial Sector Conduct Authority established in terms of section 56 of the Financial Sector Regulation Act.²¹
- vi. *Automated advice- means the furnishing of advice through an electronic medium that uses algorithms and technology without the direct involvement of a natural person*".²²
- vii. "financial customer" means a person to, or for, whom a financial product, a financial instrument, a financial service or a service provided by a market infrastructure is offered or provided, in whatever capacity, and includes: - (a) a successor in title of the person; and (b) the beneficiary of the product, instrument or service.²³
- viii. *"Insurance Contract - a contract between an Insurer (or assurer) and an insured (or assured), whereby the Insurer undertakes in return for the payment of price or premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest"*.²⁴
- ix. Insurance contract can also be defined as a form of risk management where the party being insured transfers the cost of possible loss to another entity, basically the insurance company, in exchange for monetary compensation.²⁵

²⁰ GHL Fridman. 'The law of Agency' (2003);.

²¹ Section 1 of the FAIS Act.

²² Section 1 of the BN 194 of 2017.

²³ Section 1 of the FSR Act.

²⁴ Lake v Reinsurance Corporation Ltd 1967 3 SA 124 (w).

²⁵ Reinecke, Van Niekerk and Nienaber South Africa Insurance Law (Lexis Nexis 2013), p 76.

- x. *“insurer- means a person licensed to conduct insurance business under this Act, and includes, unless specifically otherwise provided for in this Act, Lloyd’s, a Lloyd’s underwriter and a reinsurer”.*²⁶

- xi. “Insurance brokers” are intermediaries who act independently of any insurance company. They conclude insurance contracts on behalf of a prospective insured. The general rule is that an insurance broker is an independent intermediary who receives instructions from his or her client, the prospective insured, regarding the nature of the risk(s) and the rate(s) at which he or she wishes to insure, to communicate the material facts to the potential insurer and to find insurance for the insured in accordance with the latter’s instructions and on the best terms available.²⁷

- xii. “Insurance agents” are intermediaries who serve under a contract of employment as employees of an insurer and who are restricted by the insurer regarding the type of work they may perform on behalf of the insurer.²⁸

- xiii. *“Intermediary service means any act other than the furnishing of advice that is performed by a person for or on behalf of a client or product supplier that results in the client entering into or offering to enter into any transaction in respect of a financial product with a product supplier”.*²⁹

- xiv. *Policyholder “means (a) the person with whom or with which an insurer enters into a life insurance policy or a non-life insurance policy; or (b) the successor in title of the person referred to in paragraph.”*³⁰

²⁶ Section 1 of the FAIS Act.

²⁷Havenga, *the law of insurance intermediaries* 17.

²⁸Havenga, *the law of insurance intermediaries* 17.

²⁹ Section 1 of the FAIS Act.

³⁰ Section 1 of the FAIS Act.

- xv. *"Representative referred to in the Act, and a person who qualifies as an independent intermediary in terms of the definition thereof in regulation 3 (1) of the Regulations, and with whom an agreement has been entered into by an insurer in compliance with Rule 5 (1) (a) (i)".*³¹
- xvi. *Representative as "a person who renders a financial service on behalf of an FSP, in terms of conditions of employment or any other mandate"*³².

1.2. Research background

Many South African insurance customers are illiterate. Therefore, it is common cause to believe that those customers primarily rely on the information provided to them by insurance intermediaries before they can enter any insurance contract.³³ Even if the contract copy is furnished to them, they may find it difficult to comprehend the terms and conditions. This reality places an obligation on intermediaries to ensure that they discharge their duties with skill, care, diligence and in good faith by making sure that the insured is provided with the insurance product that best suit his or she financial needs as well as assist him or her to disclose all material facts required by the insurer to assess the extent of liability it is willing to accept.

The law also places an obligation on insurance regulators and insurance institutions to ensure that all insurance intermediaries have those required skills, knowledge, and experience. Further, insurance intermediaries must receive continuous training when rendering intermediary services. In terms of the applicable laws, it is the primary duty of the intermediary to obtain all material facts from the insured and to communicate those material facts to the insurer before the contract can be concluded between the parties.³⁴

Section 16 of the FAIS Act provide that intermediaries are expected to discharge their duties honestly, fairly, with skills, care, and diligence, and in the interests of customers

³¹ *Rule 1 of the Long-term Insurance Act 1998: Policyholder protection rules.*

³² *Section 1 of the FAIS Act.*

³³ *Cohen, The Regulation of Insurance Brokers-Time to Tighten the Reins. S. Afr. Mercantile LJ, 9, p.30.*

³⁴ *Section 3 of the GCC.*

and the integrity of the insurance industry.³⁵ Furthermore, *section 16* provides that intermediaries must obtain from insurance customers appropriate and available facts regarding their insurance situations, insurance products, experiences and objectives in connection with the insurance service required.³⁶ The intermediaries must treat insurance customers fairly in the situation of conflict of interest and comply with the requirements of all applicable laws.³⁷

The *GCC* also provides guidelines that must be followed by intermediaries when discharging their duties to ensure that insurance customers are treated fairly.³⁸ However, despite all the available legislative guidelines, intermediaries still make unjustifiable mistakes. Consequently, there are numerous complaints and cases that the FAIS Ombud is dealing with, and it appears that many sections of the *GCC* are more commonly breached by intermediaries.

For the purposes of this research the term “insurance intermediary or intermediary” will be used throughout the research, therefore, the reader must bear in mind that the former term also includes brokers, agents, employees or representatives of the insurer and representative of the juristic intermediary.

1.3. Research Statement.

In South African, the legality of the insurance contract depends on the meeting of minds between the contracting parties which is the insurer and insured.³⁹ So many insurers are juristic persons, therefore, they need natural person (intermediary) to facility the contact on its behalf. The appointed intermediary or middleman has a duty to act in the best interest of the principal (the insurer).⁴⁰ Furthermore, the intermediary has a duty to ensure that there is a meeting of minds between the insurer and the potential insured before a legal binding contract is concluded.

³⁵ *Section 16 (1) (a) of the FAIS Act.*

³⁶ *Section 16 (1) (c) of the FAIS Act.*

³⁷ *Section 16 (1) (d)&(e) of the FAIS Act; Section 7(1) of GCC.*

³⁸ *Section 7(4) of the GCC.*

³⁹ *Havenga, the law of insurance intermediaries.*

⁴⁰ *Bowstead and Reynolds 'Agency' (2001).*

So many disputes in the insurance industry arises from the fact that intermediaries fail to discharge their duties in the best interest of the contracting parties. Once the parties have not been provided with all material facts from the start, both parties are considered to have been deprived of the right to make an informed decision, consequently, the contract in question is void, and no party may hold other accountable.

The insured had suffered loss in the hands of the broker after the contract it was declared invalid as the result of the broker's withholding material facts from the insurer to secure a less premium for the insured. This case outlined one of the challenges where insured suffers as the result of intermediaries' incompetent. The insured believe that he was covered by the policy while that was not the case.

During *Covid19*, insurers has been repudiating claims resulting from the business interruption policy on the basis that the interruption does not fall within insured peril. The clause contained the business interruption policy stipulated that the insurer will be liable for any loss suffered by the insured business for any disruption caused by the natural disaster. The main issue was the interpretation of the clause in the policy as the insurers argues that the interruption was cause by the of the national shutdown not the natural disaster which was *Covid19*. The intermediary failed to interpret the interruption clause because the court ruled in favor of the insured that *Covid19* is direct cause business interruption as it led to national shutdown.⁴¹

In most cases the intermediaries are the once completing insurance application forms on behalf clients, but they constantly fail to complete information which is more central or material to the validity of the policy. In the intermediary was sued for failure to state in the policy application forms that the insured only have one eye when completing them on behalf of the insured and in his presence. In this event there was no need for the insured to state or disclose that he has one eye because that was clear visible to the intermediary.

⁴¹ *Ma-Afrika Hotels (Pty) Ltd and Another v Santam Limited Case number 6499/2020; [2020] ZAWCHC 160 (17 November 2020); Grassy Knoll Trading 78 CC t/a Fat Cactus and Another v Guardrisk Insurance Company Limited Case number 10035/2020; [2020] ZAWCHC 168 (20 November 2020); Interfax (Pty) Ltd and Another v Old Mutual Insure Limited Case number 10906/2020; [2020] ZAWCHC 166 (25 November 2020); Guardrisk Insurance Company Limited v Café Chameleon CC Case number 632/2020; [2020] ZASCA 173 (17 December 2020).*

In some cases, intermediaries and insurers are sued for disclosing confidential information entrusted to them during consultation without the clients' consent, and it was a central issue in *Registrar of Financial Services Providers v Catsicadellis and Botha (now Greyvenstein)*,⁴² whereby the court held that any information obtained from the clients for the purposes of purchasing the financial products cannot be used by the insurer without the prior consent of the client. Anyone who discloses such information will be in breach of confidentiality.

The objects of this research are to discuss legal framework regulating the duties of intermediaries before and after the sale of insurance product to clients. The primary legislation regulating the duties of insurance intermediary is the *FAIS Act*, however this research will not be limited to it, therefore, other applicable legislations will also form part of this research. I will start by looking at the requirements that one must comply with to become an intermediary, the registration process, then the authority, thereafter, discuss the obligations placed by the legal framework on intermediary when discharging their duties. Additionally, I will discuss the remedial actions that may be imposed against the intermediary for breach of any of the legal duties.

To discuss the legal duties to be brought by the *COFI Bill* once it is passed into law. The *COFI Bill* is said to replace the *FAIS Act* and other insurance laws, therefore, there is a need to discuss the new duties which the intermediaries will be required to comply with when rendering their intermediary duties. Furthermore, to discuss the requirements which need to be met by intermediaries rendering electronic duties or services to the public.

To restore the good reputation of the insurance industry and to educate intermediaries of their legal duties when rendering intermediary services. I believe that once intermediaries are well informed of all their duties, they will discharge their mandates to the satisfactory of insurance customers, and that will help to reinstate the confidence of insurance customers towards the insurance industry, and to believe their financial interest is best protected.

⁴² *the Registrar of Financial Services Providers v Catsicadellis and Botha (now Greyvenstein. N 1 above. FAIS case no. 06 of 06 November 2012, accessed at www.fsb.co.za on 18 February 2013.*

1.4. Research Questions

- What is the legal description of an insurance intermediary?
- What are the legal requirements and procedures to register as an insurance intermediary?
- What are the legal duties of insurance intermediaries and what are the remedial actions that may be taken against an insurance intermediary for breaches of regulatory laws?
- What are the impacts of the *COFI Bill* on the legal framework regulating the duties of intermediary?
- What are the duties of intermediary when the insurance services are rendered electronically or by automated system?

1.5. Research Objectives.

- To ensure that insurance intermediaries meet the fit and proper requirements before rendering intermediary services to the public.⁴³
- To ensure that parties are aware of material facts before and after the insurance contract is concluded.⁴⁴
- To increase customer confidence in insurance institutions by ensuring they are treated fairly.⁴⁵
- To educate insurance intermediaries on the potential consequences of their actions when breaching applicable laws.
- To educate insurance intermediaries of the legal duties before and after the product is sold.
- To educate the public and insurance intermediaries on what to expect from the *COFI Bill*.
- To educate insurance intermediary about they duties when insurance products are rendered electronically by the system.

⁴³ Section 6A of the FAIS Act.

⁴⁴ Policyholder Protection Rules (Short-term Insurance Act) 2017, Section 55, Short-term Insurance Act, 1998 (Policyholder Protection Rules).

⁴⁵ FSCA, "Principle of treating customers fairly".

1.6. Overview of chapters.

Chapter 1: This chapter will focus on the introduction of the research topic, methodology and approach to be used.

Chapter 2: This chapter will focus on the requirements, registration, and authority of insurance intermediaries.

Chapter 3: This chapter will focus on the legal duties of insurance intermediaries and remedial actions available.

Chapter 4: This chapter will focus on the potential impact of the COFI Bill on the legal framework regulating the duties of insurance intermediaries.

Chapter 5: This chapter will focus on the requirements and the duties of insurance intermediaries which renders electronic or automated insurance services.

1.7. Research Methodology and Approach.

There are lots of challenges facing the insurance industry, which also leads to the public losing confidence in insurance institutions. Although the laws are there to provide guidance on how intermediary services should be rendered to the public, the challenges are increasing daily. The presumption is that insurance intermediaries are not well equipped with the skills and knowledge to render intermediary Duties with care, diligent and in good faith.

Therefore, this research will take the direction of the discussion method. In this research, I will discuss the requirements outlined in terms of insurance laws, the process to be followed when registering as an insurance intermediary, the necessary authority required, the laws applicable when rendering intermediary duties to the public, and the remedial actions that are available for any person aggrieved by the misconduct of an insurance intermediary.

The duties of insurance intermediaries will be discussed in more detail since they are a central point of this research, and the fact that insurance intermediaries must be taken step by step on those duties to ensure that they comply and that insurance customers

are treated fairly going forth. Most of the cases that deal with the non-compliance of insurance intermediaries will be discussed to demonstrate different instances where insurance intermediaries fail to comply with their duties under the *GCC*. I believe that lots of complaints and court cases arise because insurance intermediaries are not well equipped of what is required from them when rendering their duties.

Furthermore, it is an undisputed fact that laws regulating intermediary duties become outdated as time goes by, since new insurance products are being introduced, and which require new regulations. The *FAIS Act* is an example of legislation that no longer fits the regulation of the new insurance products. The inapplicability of the *FAIS Act* has led to the introduction of the *COFI Bill* to cater to those loopholes. As the result of the ongoing knowledge that the *FAIS Act* will be replaced by the *COFI Bill*. Therefore, in chapter 4 I will be discussing the intermediary duties that will be introduced by the *COFI Bill*.

Lastly, the traditional way of rendering intermediary services to clients is no longer full effective in the current generation, as they do most of the things digitally, this means that insurers must also come up with the systems that will keep up with digital clients and this has increased a volume of clients that the insurer can sign in a day. Therefore, a duty is created for insurance intermediaries to comply with laws that are applicable to insurers that are rendering electronic or automated services to insurance clients. The *BN 194 of 2017* provides for additional requirements for insurers offering electronic or automated services. The requirements and duties of the intermediaries offering automated services will be discussed in more detail in chapter 5 of this research.

1.8. Conclusion.

The research will focus mainly on the legal framework and duties of the insurance intermediaries, as well as the challenges which arises when they fail to discharge their duties in the best interest of the contracting parties. Though, the main goal of this research is to educate intermediaries of their duties which they are required to discharge towards the insurer and insured, furthermore, to educate the public on the available remedies available whenever they have been aggravated by the intermediary's conduct.

The research will also focus on the requirements that one must meet before he or she may be appointed as an intermediary, and one of the reasons why clients are always suffering in the hands of so-called intermediaries is because those people are allowed to render intermediary services without meeting the fundamental requirements first. Furthermore, I will discuss the procedure to be followed in terms of the *FAIS Act* when an intermediary wants to be approved or been placed in the regulator's register of representative whether under supervision or not.

The *FAIS Act* is the legislation which primarily regulates insurance intermediaries and there is an on-going knowledge that it will be repealed by the *COPFI Bill*, therefore, this research will focus on the duties to be affected by the application of the Bill. Lastly, this research will discuss the requirements and duties of intermediaries when they render intermediary services by means of electronic systems or automated systems.

CHAPTER 2

Requirements, registration and authority of intermediaries.

2.1. Introduction.

The main purpose of this research is to discuss the legal framework regulating the duties of intermediaries but is very important to first outline the requirements and the procedure that one must follow to become a legitimate intermediary. However, those requirements and procedure must at all material times comply with the objects of the Constitution of the Republic of South Africa as the supreme law of the country.⁴⁶ Furthermore, the Constitution stipulated that the said requirements or procedure must not discriminate against anyone on one or more of the listed grounds, which include race, gender, sex, pregnancy, marital status, sexual orientation, age, and disability.⁴⁷

This chapter will be focusing on the requirements that one must have or meet before is appointed as an intermediary, the procedure to be followed when registering the appointed intermediary with the regulation authority, as well as the extent of authority that one must have before discharging intermediary services to the public. I believe it is very important for intermediaries to familiarize themselves with the requirements, process to register, and the extent of their authority when rendering intermediary services.

2.2. Legal requirements for insurance intermediaries.

It has been stated above that before the introduction of laws regulating insurance industry, the intermediary services were regulated by the *law of agency and mandate*, meaning the Roman-Dutch principles used to provide the guidelines on how intermediary services should be rendered.⁴⁸

Since the introduction of insurance laws, the duties of intermediaries have been regulated by those laws.⁴⁹ The *FAIS Act* provide that an intermediary must be registered in the *FSCA* register for representative after that person is appointed by the insurer before he

⁴⁶ Section 2, *The Constitution of the republic of South Africa, Act 108 of 1996 (the Constitution)*.

⁴⁷ Section 9 of the Constitution.

⁴⁸ *Hattingh & Millard, The FAIS Act Explained, Vii.*

⁴⁹ *Long-term & Short-term insurance Act, FAIS Act, Insurance Act.*

or she can render any intermediary services to the public.⁵⁰ The *FAIS Act* and *Insurance Act* has entrusted *FSCA* to regulate and supervise the registration of intermediaries. *FSCA* cannot register any person as an intermediary unless it is satisfied that the said person meets the compulsory requirements of ‘fit and proper’ as stipulated in *section 6A of FAIS Act* and *section 13 of Insurance Act*⁵¹. These requirements of fit and proper are discussed in detail by *FAIS Act, Board Notice 194 of 2017: Determination of Fit and Proper Requirements for Financial Services Providers* (Board Notice 194 of 2017).

The fit and proper requirements are the set of requirements that intermediaries must comply with. These requirements deal with the characteristics of honesty and integrity, competency, operational ability, and financial soundness.⁵²

2.2.1. The Board Notice 194 of 2017 outline the fit and proper requirements for intermediaries as follows:

2.2.1.1 Honesty, Integrity, and good standing: any person to be appointed intermediary must have a character of honesty & integrity and must be in good standing. He or she must not have been found guilty in a criminal or civil court or in any disciplinary committee. The intermediary has a duty to disclose all the relevant information to the *FSCA* so an informed decision can be made on whether he or she meet the requirements relating to honesty, integrity, and good standing.⁵³ Any failure by the intermediary to disclose any material facts constitutes a contravention of the financial sector laws.⁵⁴

In the appeal case *Hamilton Smith & Co (Pty) Ltd and the Registrar of Financial Markets*⁵⁵, the *FSCA* appeal Board outlined the guidelines which may be used to determine the honesty and integrity of an insurance intermediary. It was held that the

⁵⁰ Section 13 of the *FAIS Act*.

⁵¹ Section 6A of the *FAIS Act*; *Financial Advisory and Intermediary Services Act, 2002 (Act No 37 Of 2002)*, *Board Notice 194 of 2017: Determination of Fit and Proper Requirements for Financial Services Providers, 2017 (BN 194 of 2017)*

⁵² *BN 194 of 2017*.

⁵³ Section 9 & 10 of the *BN 194 of 2017*.

⁵⁴ Section 14 of the *FAIS Act*; Section 153 the *FSR Act*.

⁵⁵ *Hamilton Smith & Co (Pty) Ltd and the Registrar of Financial Markets 06/09/2003*.

following persons do not meet the requirement of honesty and integrity if, within five years preceding the period of application for approval, has been:

- a) *“Charged or found guilty of fraudulently, dishonestly, unprofessionally, dishonorably or in breach of a fiduciary duty.*
- b) *found guilty by any statutory professional body or voluntary professional body recognised by the Board, of an act of dishonesty, negligence, incompetence, or mismanagement, sufficiently serious to impugn the honesty and integrity.*
- c) *Denied membership of anybody referred to in subparagraph (b) on account of an act of dishonesty, negligence, incompetence, or mismanagement, sufficiently serious to impugn the honesty and integrity.*
- d) *been disqualified or prohibited by any court of law (whether in the Republic or elsewhere) from taking part in the management of any company or other statutorily created, recognised or regulated body, irrespective whether such disqualification has since been lifted or not.”*

2.2.2 Competency requirements: The intermediary must have adequate, appropriate, and relevant skills, knowledge, and expertise in respect of the insurance services, products, and functions to be rendered to the public.⁵⁶ The key individual, as the central person of the broker company or juristic representative (juristic intermediary), must have adequate and appropriate experience and the relevant qualifications to manage and oversee the rendering of insurance services.⁵⁷ In the case of the juristic intermediary regulatory exams are compulsory for key individuals, representatives, and compliance officers.⁵⁸ When the intermediary is the agent of the insurer, the insurer has a duty to ensure that these requirements are met before authorising an intermediary to render insurance services to the public. When the intermediary does not have experience with respect of the insurance product, he or she must be registered under the supervision of an experienced key person.⁵⁹

⁵⁶ Section 12 of the BN 194 of 2017.

⁵⁷ Section 15 of the BN 194 of 2017.

⁵⁸ Section 22 of the BN 194 of 2017.

⁵⁹ Section 15 of the BN 194 of 2017.

2.2.2.1 Continuous professional development: an intermediaries must always be involved in continuous professional development to ensure that they always perform with due care, skill, and diligence.⁶⁰ The intermediaries must be trained on the specific insurance products that are offered by the insurance company, and it is the duty of the juristic intermediary to ensure that all staff are trained with regard to the information that should be acquired or disclosed to the insured before entering an insurance contract.⁶¹ It is the obligation of the intermediaries to ensure that they always comply with the requirements whenever a new product or regulation is introduced.⁶²

2.2.3 Operational ability: The insurance intermediary is required to have an operational ability which includes, but is not limited to, a “fixed physical address when the business is conducted, full time telephone, adequate storage, and filing system for safe keeping of records, business communications and correspondence, a bank account with registered bank, the governance documents such as policies dealing with compliance and risk assessment, business plan setting out the aims and scope business, and business strategies, procedures on the appointment of brokers or representatives, the duties of all employees, etc”.⁶³ An insurer or a juristic intermediary has a legal duty to comply with this requirement prior to carrying out its business activities.

2.2.4 Financial soundness: the insurance intermediaries must always maintain financial resources that are adequate, both in amount and quality to carry out their activities and supervisory requirements and to ensure that liabilities are paid as they become due. No juristic intermediary will be allowed to operate if it has been declared insolvent or provisionally insolvent; has been placed under liquidation or provisionally liquidation; or has failed to manage any of its financial liabilities satisfactorily.⁶⁴

2.3. Registration of insurance intermediaries.

⁶⁰ Section 29 of the BN 194 of 2017.

⁶¹ Section 28 & 29 of the BN 194 of 2017.

⁶² Section 31-34 of the BN 194 of 2017.

⁶³ Section 35-42 of the BN 194 of 2017.

⁶⁴ Section 43- 46 of the BN 194 of 2017.

In terms of the applicable laws, no person in South Africa may render intermediary services without first being registered as an insurance intermediary.⁶⁵ The regulating authority must first approve an individual before he or she can be registered as an insurance intermediary⁶⁶. His or her approval will solely rely on satisfying characteristics of honesty and integrity, competence, financial soundness, operational ability, and other prescribed requirements.⁶⁷

Sections 8(3)(b) and 8(2)(d) of the Long-term and Short-term Insurance Act state that no person shall render services as an insurance intermediary in relation to a long-term or Short-term policy unless that person does so with the approval of the Authority (*FSCA*).⁶⁸ These sections are applicable to both juristic intermediaries and natural intermediaries. If an intermediary is an agent or employee of the insurer, the insurer has a duty to ensure that the intermediary is registered. This means that once the insurer is satisfied that the requirements have been met, the insurer will then enter into a service level agreement with the intermediary and make an application to the *FSCA* for approval of such person in terms of *section 13* of the *FAIS Act*. The approval of such person may be subject to certain conditions that may be imposed by the Authority.⁶⁹

*Section 13(1)(b) of the FAIS Act*⁷⁰ states that no person may act as a representative of an authorised insurer unless such person, prior to rendering of insurance service, provides confirmation or is certified by the insurer to clients that a service contract or other mandate to represent the insurer exists, and that the insurer accepts responsibility for those activities of the representative performed within the scope of or in the course such contract or mandate, and meets the fit and proper requirements. It is the duty of the insurer to make an application with the *FSCA* to ensure that such a person is registered in the *FSCA* representatives' registrar.⁷¹

⁶⁵ *Section 13 of the FAIS Act.*

⁶⁶ *Section 8 (3) (b) of the Short-term Insurance act 53 of 1998.*

⁶⁷ *Section 6A of the FAIS Act.*

⁶⁸ *Section 8 (3) (b) of the Short-term Insurance act 53 of 1998.*

⁶⁹ *Section 8 (4) (a) & (b) of Long-term Insurance Act 52 of 1998.*

⁷⁰ *Section 13(1)(b) of the FAIS Act.*

⁷¹ *Section 13 (5) of the FAIS Act.*

The juristic intermediaries (broker companies or juristic representatives) must make an application with the Authority for registration in terms of *Section 7 and 8 of the FAIS Act*.⁷² *Section 13(2) of the FAIS Act* state that an authorized juristic intermediary must always be satisfied that its insurance intermediaries and the key individuals are competent before rendering insurance services. The key persons and representatives must comply with the fit and proper requirements. The juristic intermediary must take such steps as may be reasonable in the circumstances to ensure that the representatives comply with any applicable code of conduct as well as with other applicable laws when conducting insurance services.⁷³

Once the regulator (*FSCA*) is satisfied that all the requirements of fit and proper have been met, the juristic intermediary will be registered and be issued with a Financial Service Provider (*FSP*) number and, thereafter, be authorized to render intermediary services to the public.⁷⁴

2.4. The Authority of the Insurance Intermediary.

The Constitution is the supreme law of the Republic of South Africa, and any law or contract that is in contradiction with it is invalid.⁷⁵ Hence, the mandate or authority of an insurance intermediary to render insurance services on behalf of the insurer or insured must not be in violation of the Constitution or of public policy.⁷⁶

Before an insurance intermediary perform any duty on behalf of the insurer or insured, he or she must produce the necessary authority from the prospective principal showing that he or she is authorised to do so. In the event the insurance intermediary acts on behalf of the principal without necessary authority, the principal will not be bound by his or her acts. However, if the principal rectifies the conduct of the insurance intermediary who

⁷² *Section 7 & 8 of the FAIS Act.*

⁷³ *Section 13(2) of the FAIS Act.*

⁷⁴ *Section 9 of the FAIS Act.*

⁷⁵ *Section 2 of the constitution.*

⁷⁶ *Section of the constitution.*

acted without authority, therefore, the principal will be jointly liable for any damage arising from the conduct of unauthorised insurance intermediary.⁷⁷

Havenga divides intermediaries' authority into the following categories:

First category - brokerage agreement: in terms of this agreement the broker is not tied to a specific insurer and in most cases the broker acts primarily on behalf of the insured. As far as the legal relationship between the broker and the insurer is concerned, it seems that the relationship is one in which the broker performs a mandate on behalf of the insured⁷⁸. The broker may act outside the scope of his or her authority, but such act is always subject to ratification by the principal. All the duties to be discharged by the broker must be discharged with reasonable care and skill.

The broker operates as an independent contractor and not as an employee of the principal. Consequently, when a client (the insured) is not satisfied with the services rendered by such an intermediary or broker, the client has an action against the broker and not against the insurance company.⁷⁹

Second category - the representative agreement: differs from the one above in that it regulates the full-time employees of insurance company which are called representatives as per the statutory definitions or tied agents who work in terms of binder agreements, these agents being primarily controlled by the insurer. Before the introduction of the *FAIS Act*, the agreements between these agents, clients, and insurance companies were based on the law of agency, and all common rules were applicable.⁸⁰ In terms of the agreement, the agent is an employee of the insurance company, and consequently, the insurance company is vicariously liable for all the actions of the employee.⁸¹

In *Dicks v South African Mutual Fire and General Insurance Co Ltd*⁸² the Court stated as follows: “*The function of an insurance agent is generally to canvass insurance business*

⁷⁷ *Havenga, The law of insurance intermediaries, 8.*

⁷⁸ *Havenga, the law of insurance intermediaries, 81.*

⁷⁹ *Section 3 & 7 of the GCC.*

⁸⁰ *Havenga, The law of insurance intermediaries, 114, para 4.*

⁸¹ *Havenga, The law of insurance intermediaries, 113 para 3,4.*

⁸² *Dicks v South African Mutual Fire and General Insurance Co Ltd 1963 (4) SA 501 (NPD).*

for his principal and to this end he is normally supplied with proposal forms and authorised to receive duly completed and signed proposals for transmission to the appropriate office of his principal.”

The agreement must stipulate the powers of an agent while discharging his or her duties. The main duty of the insurance agent is to secure insurance clients on behalf of the insurer and to ensure that insurance contracts are concluded between the insurers and insured.⁸³

Third category, Lloyd’s intermediary agreement- Lloyd’s underwriters are not insurers, but are authorised to carry on short-term insurance business in South Africa.⁸⁴ As underwriters, they have the authority to conclude all ordinary insurance business in South Africa. They are legally the agents of the members of the syndicate on whose behalf they perform these underwriting services.⁸⁵ The activities of Lloyd’s are regulated by the STIA. Once again, any act performed by a Lloyd’s intermediary is regulated by the common law rules pertaining to agency and representation.⁸⁶ This research will not focus any further on the Lloyd’s intermediaries but primarily focus on the intermediaries mentioned above.

The principal may have an action against its agent (intermediary) for any damages suffered as the result of the agent acting outside the scope of his or her authority not against the third party. Therefore, the intermediaries must always keep in mind the extent of their authority when discharging their intermediary duties.

2.5. Conclusion.

This chapter focused on the fit and proper requirements that one must meet before being appointed and registered as an insurance intermediary, the procedure for registration and the authority that determines the scope of the insurance intermediary when discharging his legal duties. It is important for insurance institutions to familiarize themselves with all the applicable laws and regulations which they are required to comply with when

⁸³ Havenga, *The law of insurance intermediaries*, 113 para 3,4.

⁸⁴ Havenga, *The law of insurance intermediaries*, 147, para 1.

⁸⁵ Havenga, *The law of insurance intermediaries*, 147, para 1.

⁸⁶ Havenga, *The law of insurance intermediaries*, 147, para 1.

rendering intermediary services. The *COFI Bill* is not included in the legislation above because it is not yet effective. However, the potential impacts that are to be imposed by the Bill if it is later passed into law will be discussed in more detail in chapter 4 of this research.

CHAPTER 3

Legal duties of insurance intermediaries and remedial actions

3.1. Introduction.

This chapter is regarded as the central discussion of this research. Therefore, in this chapter, I will be discussing duties placed by the legal framework on intermediaries rendering insurance intermediary services and the main objective is to ensure that customers feel confident that they are dealing with insurers where *Treating Customer Fairly* is central to the insurance industry, that products and services marketed and sold to the customers are specifically designed to accommodate the needs of targeted insurance customer, the customers must be provided with clear information which will keep them informed before, during and after point of sale, in the event where an advice is given, it must be suitable and taking into account the financial situation of the customers, that the customer must be provided with the exact product that it is been advertised together with the standards and conditions that they have been led to expect, and that the customers are not going to face any unreasonable post-sale barriers, imposed by the insurer, when they changing products, changing insurer, submit a claim or make a complaint.⁸⁷

For the purposes of this chapter, the term intermediary will be divided into two categories namely “the broker” and “the insurance agent or representative.” This division is necessary to clearly discuss their duties as they do not act for the same principal.

3.2. The general rule and duties of the insurance broker

3.2.1. The general rule

The general rule is that an insurance broker is an independent intermediary who receives instructions from his or her client (the prospective insured) regarding the nature of risk or risks and the rate or rates at which the prospective insured wishes to insure.⁸⁸ The insurance broker must communicate all reasonable material facts to the potential insurer

⁸⁷ FSCA, *Principle of Treating Customer Fairly*.

⁸⁸ Havenga, *The law of insurance intermediaries*, 18, para 1.

on behalf of the insured and obtain insurance coverage for the insured in accordance with the instructions and on the best terms available.⁸⁹ A broker mediates an insurance contract on behalf of the insured.⁹⁰ This means that a broker acts primarily on behalf of the insured and only in a few instances where he or she can act on behalf of the insurer.⁹¹

It is important for insurance brokers to discharge all their duties before an insurance contract can be concluded between the insurer and the insured. The insurers primarily rely on the information provided to them by the insurance brokers to determine the risk needed to be covered and the premiums to be charged. When the insurance broker fails to disclose all the material information, the insurer will not be able to make an informed decision with respect to the extent of risk and the appropriate cover required.⁹²

3.2.2. The duties of insurance brokers.

a) Duty to act in good faith.

The duty to act in good faith entails three categories. Firstly, the broker must perform the mandate in the principal's interest. This means opting for a course of action that will be beneficial to the principal.⁹³ Secondly, the broker must be open and honest in all his dealings, which means that a broker may not use any information gathered in his dealings with the principal for his own benefit.⁹⁴ Thirdly, the mandatary is not allowed to make a secret profit out of the mandate.⁹⁵

The broker is expected to disclose to the customer/ principal any existence of personal interest in the relevant service, or any circumstance which may give rise to actual or potential conflict of interest in respect of such service and take all reasonable steps to ensure that a customer is treated fairly⁹⁶. Furthermore, the service must be rendered in accordance with the contractual relationship and reasonable requests or instructions of

⁸⁹ *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk 1962 (4) SA 646 (T), supra (n 7, 0 18, Para 1).*

⁹⁰ *Havenga, The law of insurance intermediaries, 19, para 1.*

⁹¹ *The Regulation of Insurance Brokers-Time to Tighten the Reins, 30, para 2.*

⁹² *Havenga, The law of insurance intermediaries, 25, para 4.*

⁹³ *Hattingh, Millard, The FAIS Act Explained, 80.*

⁹⁴ *Hattingh, Millard, The FAIS Act Explained, 80.*

⁹⁵ *Hattingh, Millard, The FAIS Act Explained, 80.*

⁹⁶ *Section 3(1)(b) of the GCC.*

the customer and must be executed as soon as possible and in favor of the customer's interests, which must be prioritised over the interests of the insurer.

This duty requires the insurance broker to be honest with the insured at all relevant times; for example, he or she may not forge the signature of the insured and, may not provide incorrect information to the insurer to secure the insurance contract. If the insured fails to benefit from the insurance cover as the result of the actions of the insurance broker, the broker will be held legally liable for any loss suffered.⁹⁷

b) Duty to act with reasonable care and skill.

This is one of the important duties arising from the brokerage agreement and applies by law to every brokerage agreement. The broker is expected to perform his or her mandate with reasonable care and skill.⁹⁸ The acceptance of the insured's instructions by the broker is regarded as accepting contractual obligations for which the broker can be held liable for any breach without even considering the question of whether the broker acted with reasonable care and skill.⁹⁹ The broker will be regarded as in breach of the agreement if he or she fails to act with reasonable care and skill.

In terms of *sections 3 & 4 of Insurance Act and the Code of Conduct*, it is stipulated that an insurance intermediary must render insurance services in a way that is honest, fair, and performed with skill, care and due diligence, and is in the best interests of the clients and the integrity of insurance service industry.¹⁰⁰

Rule 1.2 of the *Policyholder Protection Rules*, provide that insurance intermediaries must at all reasonable "times act with due skill, care and diligence when dealing with policyholders".¹⁰¹ This rule places an obligation on the insurance intermediary to communicate all proper information, act honorably, professionally and with due regard to the fair treatment of the policyholder".¹⁰² Hence, before an insurance contract can be

⁹⁷ *Havenga, The law of insurance intermediaries, p 24.*

⁹⁸ *Section 4(b) of the Insurance Act, Havenga, The law of insurance intermediaries, 21, para 3.*

⁹⁹ *Dickson v Devitt (1916) 21 Com Cas 291, (1916) LJBK 315, supra (n 4).*

¹⁰⁰ *Section 3 & 4 of Insurance Act.*

¹⁰¹ *Rule 1.2 of the Policyholder Protection Rules.*

¹⁰² *Rule 1.3(a) Policyholder Protection Rules.*

concluded each party must be provided with the necessary material information to enable the parties to make an informed decision.

c) Duty to obtain insurance coverage.

The primary duty of the insurance broker is to attempt to obtain a cover within a reasonable time. Once the cover is obtained, he or she should promptly advise the insured of the terms of the cover.¹⁰³ It is common practice that the broker may conclude the contract without consulting with the insured about the terms of the cover; however, this may not be done in the case where specific instructions were given to the broker. That said, the broker must first discuss the terms of the cover with the insured before signing, and in this case, he or she may not sign without prior discussion with the insured.¹⁰⁴

When the broker fails to obtain the required cover, he or she must inform the insured within a reasonable time. What constitutes a reasonable time will depend on the nature of the risk and the needs of the insured. There are instances where the broker can be held liable for not obtaining the cover.¹⁰⁵

The case of *Gafoor v Unie Versekeringadviseur (Edms) Bpk*¹⁰⁶ is one of the few South African cases dealing with the liability of the insurance broker for failure to obtain the cover. The insurance broker provided the insured with a letter stating that he had obtained the required cover. The condition of the cover was that the insured must sign and submit the policy document to the insurer within 28 days to secure the cover. The insured signed all the necessary documents and gave them to the broker to submit to the insurer. The broker delayed in submitting the forms, but notified the insured that the documents had been submitted to the insurance company and that the insurer was preparing the policy, and that the interests of the insured had been covered. The insured subsequently suffered a loss before the insurer issued the policy and after the lapse of the 28-day period for which the cover was valid had expired. The case was decided on

¹⁰³ Havenga, *The law of insurance intermediaries*, p 25.

¹⁰⁴ Havenga, *The law of insurance intermediaries*, p 26.

¹⁰⁵ Havenga *The law of insurance intermediaries*, p 26.

¹⁰⁶ *Gafoor v Unie Versekeringadviseur (Edms) Bpk* 1961 (1) SA 335 (A),

the question of whether a reasonable person might hold the broker liable for the delay in submitting the policy forms to the insurer on time. The court ruled in favor of the insured and further state that the broker must be held liable for loss suffered by the insured, since the loss emanate from his failure to submit the policy documents to the insurer on time.

d) Duty to prepare the policy wording.

The brokers are sometimes responsible for drafting the policy wording. In this situation, the broker may then draft the contract and approach an insurer to market it for a group of persons belonging to a specific organization.¹⁰⁷ For example, the broker will draft the contract at the rate required by the members of a trade union or employees of a large institution and find an insurer willing to cover the risk.

In the case where the broker drafts the policy, he or she is working on behalf of the insured and will be liable for failing to cover a specific interest of the insured. In *Forsikringsaktieselskapet Vesta v Butcher*,¹⁰⁸ it was held that the liability of the broker for failing to consider a specific interest is a consequence of the *contra proferentem* rule. In the context of insurance, this rule provides that if there is a real ambiguity in the policy, the insurance contract must be interpreted against the person who had drawn it up. This rule also applies in the case where the contract is drafted by the insurer, in such cases, the ambiguity must be interpreted against the insurer. The consequences will be that if the broker fails to draft the policy in the best interests of the insured or fails to consider other interests of the insured, the insurer will not be held liable for damages caused by the broker's failure.

In terms of the GCC, when the broker drafts the wording of the policy, he or she must make sure that the information or clauses contained in the policy are factually correct, in plain language and avoid uncertainty, confusion or misleading, be adequate and appropriate considering the knowledge and financial situation of the customer.¹⁰⁹

e) The duty not to insure with an unregistered or insolvent insurer.

¹⁰⁷Havenga, *The law of insurance intermediaries*, 32.

¹⁰⁸*Forsikringsaktieselskapet Vesta v butcher* (1989) 1 All ERZ 402 (HL).

¹⁰⁹ Section 3(1)(a) (i to viii) of the GCC.

In terms of the *LTIA* and *STIA*¹¹⁰ an insurer must be registered in terms of the *FAIS Act*¹¹¹ before rendering insurance services to the public. Therefore, it is the responsibility of the insurance broker to ensure that the insurer is registered with FSCA before insuring the insured with that insurer. The failure by the insurance broker to verify the registration of the insurer may result in the insured being a victim of a fraudulent deal and not receiving a benefit in the event the peril is insured against, occurring. The insurance broker may be sued for his or her failure to verify the insured.

Furthermore, the insurance broker also has a duty to verify whether the insurer is solvent or not. *Board Notice 194 of 2017*,¹¹² stipulates that the insurer must financially sound and must be able to cover its liabilities once they are due and payable. Generally, the broker has a duty not to insure with an insolvent insurer, however, this duty will be breached only if the broker fails to act the necessary skill and care, as it may will difficult for the broker to have access in the financial records of the insurer.

In *Beck Helicopter Ltd V Edward Lumley & Sons (NZ) Limited*,¹¹³ the broker was held liable because it had failed to warn the insured that there was cause for concern as to the insolvency of the insurer, as was evident from the books of the company and from the rumors in the marketplace. Another case where the broker breached the duty not to insure with an insolvent insurer is in *Osman v J Ralph Moss Ltd*¹¹⁴. In this case, the broker had recommended to the insured to conclude a motor policy with an insurer who was already well known in the insurance circles as having serious financial difficulties. The insurer was later placed under liquidation, and the broker then sent a letter to the insured asking him to insure elsewhere. The insured, whose knowledge of English was limited, failed to do so. consequently, when the insured was involved in an accident for which he was liable, he found that he was left without insurance. The insured was sued by a third party, and as he did not have insurance, he was unable to cover those damages. The insured subsequently sued the broker for the fine and the damages that he had paid.

¹¹⁰ Section 3 of the Long-term & Short-term Insurance Act.

¹¹¹ Section 8 of the FAIS Act.

¹¹² *Havenga, the law of insurance intermediaries*, 43 to 36.

¹¹³ *Beck Helicopter Ltd V Edward Lumley & Sons (NZ) Limited* (1990) 6 ANZ Insurance Case at 76,635.

¹¹⁴ (1970) 1 Lloyd's Rep 313 (CA). this is the referring I am used to.

The court held that the broker had been negligent in recommending to the insured to insure with a company known to be in financial difficulties. The insured was awarded damages against the broker for premiums, the fine, the cost of the criminal proceedings, the cost of repairing the other car and the hiring of a replacement car.

f) The duty to assist the insured to disclose material information.

The duty to disclose material information is provided for in terms of *section 4, 5 & 7* of the GCC.¹¹⁵ The rule is that the prospective insured has a duty to disclose all material information and not to make misrepresentations to enable the insurer to evaluate the risk. Failure to disclose material information will entitle the insurer to repudiate liability from the policy, which has often led to litigation.¹¹⁶ In most cases the insured uses the services of the broker to secure cover, and when the broker fails to disclose material information or furnishes incorrect information to the insurer, the insured is bound by the acts or omissions of the broker. This is the primary duty that the broker must take into consideration when discussing the insurance cover with the insurer.¹¹⁷

It is the duty of the insurance broker to warn and assist the insured in disclosing all material information that should be made available to the insurer. The broker may be held liable should the insured fail to benefit from the insurance cover as the result of the broker's failure to assist the insured in disclosing material facts.¹¹⁸

In *Warren v Henry Sutton & Co*,¹¹⁹ the question of whether the broker has a duty to assist the insured to disclose material information not covered by the questions in the proposal form it was a central issue in this case. The court ruled that even though it is the responsibility of the insured to disclose material facts, the broker still have a duty to assist the insured to disclose all material facts that may prohibit him to benefit from the policy.

¹¹⁵ Section 4, 5 & 7.

¹¹⁶ *Rabinowitz and Another NNO v Ned-Equality insurance Co Ltd and Another 1980 (1) SA 403 (w) 407H.*

¹¹⁷ Section 8(1) of the GCC.

¹¹⁸ *Havenga, The law of insurance intermediaries, 35, para 8.*

¹¹⁹ (*Warren v Henry Sutton & Co 1976) 2 Lloyd's rep 276 (CA).*

In *Claude R Ogeden & Co Pty Ltd v Reliance Fire Sprinkler CO Pty Ltd and Another*,¹²⁰ the court stretched the duty to disclose to include two obligations for the broker, namely: “(a) an obligation to collect such information regarding the nature of the insured’s business and its claim history as the underwriters could properly require, and (b) an obligation to pass on the information to the underwriters.”

g) Duty to deliver a copy of a policy and to advise the insured with the meaning.

The broker acts as a middle person between the insurer and insured. Commonly, the broker is the one who deliver the policy documents to the insured. The broker also has a duty to explain the meaning of clauses in the policy documents.¹²¹

In *Melik & Co Ltd v Norwich Union fire insurance Society Ltd and Kemp*,¹²² the broker misinterpreted the policy, and he then advised the insured that his cover remains effective, even in the situation where his alarm system was temporarily out of action. That information was it found to be incorrect. The court ruled that the broker must be held accountable for a loss suffered by the insured on the basis that he advised him that he remains covered even if his alarm is not working while that was not the case.

Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd,¹²³ in this case the court dealt with the question of whether the broker had a duty to explain the wording of the policy to the insured. In answering, the court provided that this duty to explain the wording of the policy is available from the inception of the contract, the broker must explain the policy to the insured. The broke does not have a to explain the wording of the policy if it is renewed and no clauses that has been changed.

h) Duty to assist with claims or to cancel the policy.

The broker has a duty to assist the insured to submit a claim if the peril insured against occurs, this duty also includes receiving and submitting of a claim to the insurer. In

¹²⁰ *Claude R Ogeden & Co Pty Ltd v Reliance Fire Sprinkler CO Pty Ltd and Another* [1975] 1 Lloyd’s Rep 52 (Sup Ct NSW).

¹²¹ *Havenga, The law of insurance intermediaries*, 40 & 41, para 9& 10.

¹²² *Melik & Co Ltd v Norwich Union fire insurance Society Ltd and Kemp*, [1980] 1 Lloyd’s rep 523

¹²³ *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd*

Hosken Employee Benefits (Pty) Ltd v Slabe,¹²⁴ the court held that the broker is the agent of the insured, he or she act on behalf of the insured and the insured relies on him or her for any communication and claim processes. The broker may be authorised to negotiate settlement on behalf of the insured. This duty includes accessing whether the loss is covered, completing claim forms, accepting notifications from the insurer and to receive payment. The authority of the broker to carry on these duties may be limited when it is specifically stated in the mandate.

The broker has a duty to assist the insured with cancellation of the policy. The broker may not cancel the policy without a clear specific instruction from the insured. In *Cherry Ltd v Allied Insurance Broker Ltd*,¹²⁵ this is one of the cases where the unauthorised cancellation of the policy has cause loss to the insured. The insured instructed his broker to cancel his policy with the first insurer and open another new policy with the second insurer. The first insurer refused to cancel the policy. The second insurer rejected the new policy as the result of the current existing policy. The first insurer later cancels the existing policy, but broker failed to inform the insured that his policy is cancelled. The insured find out later after a loss that he is no longer covered as first insurer cancelled his policy. In this case the broker was sued for his failure to notify the insured that his policy is cancelled.

i) Duty to advise the insured on the lapse of cover.

In terms of the GCC, the broker has a duty to keep the insured informed of all changes or amendments effected in respect of the policy. this include that the broker is expected to notify the insured about the lapsing or termination of the policy.¹²⁶

A broker is deemed to have knowledge on when will the policy lapse, and when that time comes, the broker must notify the insured immediately. In *London Borough of Bromley v Ellis, A Luff & Son (Third Party)*,¹²⁷ the broker was the one who was facilitating the policy on behalf of the insured. The broker had a duty to notify the insured when the policy lapse

¹²⁴ *Hosken Employee Benefits (Pty) Ltd v Slabe* [

¹²⁵ *Cherry Ltd v Allied Insurance Broker Ltd* [1978] 1 Lyods rep 274.

¹²⁶ Section 3 of the GCC.

¹²⁷ *London Borough of Bromley v Ellis, A Luff & Son (Third Party)* [1971] 1 Llyod's Rep 97 (CA).

or cancelled. When the policy lapsed, the broker failed to notify the insured and was held liable for his failure to notify the insured that his policy has lapsed.

j) Duty to renew the policy.

The broker does not have a duty to renew the policy unless he was instructed to do so by the insured. Upon expiration of the contract, the insured may elect to renew the policy, and if the policy is renewed, the insured must be placed in the position that he was before the expiration of the contract, and the broker will have a duty to disclose any new information that ought to be known by the insurer. In some of the policies, before the expiration of the policy, a notice must be given by the insured stating whether he or she is willing to renew the policy or not. It is the duty of the broker to advise the insured of such clauses.¹²⁸

In *Morash v Lockart & Ritchie Ltd*,¹²⁹ the broker represented the insured for 20 years in his fire insurance policy, which was for a three-year term. At the end of each term the broker would, without receiving any instruction from the insured, send a renewal policy to the insured accompanied by an invoice for the premium. At the end of one of the terms, the broker failed to send the renewal policy as he used to do. The insured was not aware that his cover had lapsed, and he is no longer covered. The insured's house was destroyed by fire. He brought an action against his broker claiming the cover amount and the court held as follows:

"It is a matter of common knowledge that insurance agents, motivated by their own interest in retaining insurance business, as a matter of practice, forward to their clients' renewals of policies without any request being made therefor, and that where such a practice has been adopted clients expect the service and rely upon it for protection against the lapse of their policies. The standard of reasonable care called for in circumstances such as were disclosed in the instant case required the broker to notify the insured in the same way that his policy was being renewed and that the omission to do so constituted negligence on the part of the broker." However, the court find that there

¹²⁸ Havenga, *The Law of Insurance intermediaries* 44, para 12.

¹²⁹ *Morash v Lockart & Ritchie Ltd*, [1979] 95 DLR (3d) 647.

is a contributory negligence on the side of the insured and the damages were apportioned.

3.3. The general rule and duties of the insurance agent or representative.

3.3.1 The general rule applicable to insurance agents.

The general rule is that when an intermediary is an employee of an insurance company, the insurance company is vicariously liable for all the actions of the employee. What this implies is that an insurance company, as employer, can be sued for any loss or damage resulting from the wrongful, culpable acts of its employee for damages caused to the insured.¹³⁰

*In Dicks v South African Mutual Fire and General Insurance Co Ltd,*¹³¹ the court held that, in order to establish whether an agent is an employee for purposes of vicarious liability, one should look at all the factors which are relevant to a specific case. As far as the tasks of the mandatory are concerned, the court further ruled as follows: *“The function of an insurance agent is generally to canvass insurance business for his principal and to this end he is normally supplied with proposal forms and authorised to receive duly completed and signed proposals for transmission to the appropriate office of his principal.”*

The insurer’s agent has a duty to perform any task that he or she has undertaken to perform in terms of the contract. If, by any reason, the agent fails to carry his or her mandate he or she will be held liable for damages. However, the agent may not perform any transaction that is illegal, null and void or against the public policy.¹³²

3.3.2. The duties of an insurance agent or representative.

a) Duty to act honestly, fairly, and with care and diligence.

¹³⁰ Havenga, *The law of insurance intermediaries*, 105, para 1.

¹³¹ *Dicks v South African Mutual Fire and General Insurance Co Ltd* 1963 (4) SA 501 (NPD).

¹³² *An examination of the legal liabilities of insurance intermediaries*, 23.

This duty is provided for in terms of *section 3* of the *Insurance Act* and the *Policyholder Protection Rules*.¹³³ The insurer's agent is expected to act with care, fairly, diligently and in the best interests of the insured. *Rule 1.2* of the *policyholder Protection Rules* also states that the agent of the insurer must, at all reasonable times, act with due skill, care, and diligence.¹³⁴ The agent's duty to act with care is not only limited to the insured, but it also includes the insurer. The agent must ensure that he or she acts in the best interests of the insurer.

In *National Employers Mutual General Insurance Association v Gany*,¹³⁵ the agent of the insurer provided untruthful answers on the proposal forms while assisting the insured. The insurer denied liability and claimed that some of the answers in the proposal forms were not true. The insured confirmed that the answers were indeed incorrect but argued that the insurer's agent was the one who completed the forms with full knowledge of the material facts to be untrue. The court ruled that the fact the insurer agent was aware the information provided was untrue, therefore, it is deemed that the insurer was aware through its representative. It was further held that the insurer was aware, but it continued collecting premiums from insured while waiting to repudiate insured's claim based on the untrue statement.

b) Duty to assist the insured with a product that meets their financial needs.

In terms of the *Policyholder Protection Rules*, the agent or representative of the insurer must ensure that the insured is provided with the financial product that meets his or her financial needs.¹³⁶ The agent may not mediate the conclusion of contract between the parties, unless he or she is satisfied that the cover will be in the best interests of the insured. Should the insurance product not meet the needs of the insured, the insured must be advised to approach another insurer to secure a cover that best meets his or her needs. The agent of the insurer who fails to advise the insured properly and instead misleads him or her, will be held liable for any damages that might arise.

¹³³ *Section 3 of Insurance Act.*

¹³⁴ *Rule 1.2) of the Policyholder protection rules.*

¹³⁵ *National Employers mutual General Insurance Association v Gany 1965 (2) SA 456 (w)*

¹³⁶ *Rule 1.4) of the Policyholder protection rules.*

c) Duty to keep the information of the insured confidential.

The *Protection of Personal Information Act* places various obligations on the insurers and their agents. This *Act* provides for the lawful processing of personal information. Insurance agents should only use operators that can meet the requirements of lawful personal information processing as prescribed by the *POPI Act*.¹³⁷ All the information entrusted to the insurance intermediary must be protected from the public. The *POPI Act* provides guidelines on how information can be processed without breaching the confidentiality requirement. Some insurance policies require that the medical health of the insured must be disclosed to the insurer. In such cases, the insurer may be sued if the confidential information is disclosed without prior consent.¹³⁸

Section 3(3) of the *GCC* places an obligation on the intermediaries that all information obtained from the customer must be kept confidential and may not be disclosed without the consent of the customer unless it is required for public interests or is provided for in the applicable legislation.

It was confirmed in the case of *the Registrar of Financial Services Providers v Catsicadellis and Botha (now Greyvenstein)*,¹³⁹ that any information obtained from the clients for the purposes of purchasing the financial products cannot be used by the insurer without the prior consent of the client. Anyone who discloses such information will be in breach of confidentiality.

d) Duty to assist the insured to disclose material information.

The agent of the insurer has a duty to disclose all the material facts to the insured. This duty goes beyond the insurer's agent's obligation to assist the insured in disclosing material information, and it requires that the agent ask relevant questions to get all the information required to make an informed decision. The agent must keep records of the facts communicated to the insured. If the insured denies that certain information has been disclosed to him or her, the insurer will bear the onus to prove that material information

¹³⁷ *Section 2 (a) of the Protection of Personal Information Act 4 of 2013 & the Constitution right to privacy.*

¹³⁸ *Section 3 of the POPIA Act.*

¹³⁹ *the Registrar of Financial Services Providers v Catsicadellis and Botha (now Greyvenstein. N 1 above. FAIS case no. 06 of 06 November 2012, accessed at www.fsb.co.za on 18 February 2013.*

has indeed been disclosed. The disclosure must be made using plain language to ensure that the insured is fully aware of the terms and conditions prior to the conclusion of the contract and to afford him or her the opportunity to make an informed decision.¹⁴⁰

In *Pretreas & Co v London Guarantee and Accident Co Ltd* and in *African Guarantee and Indemnity Co Ltd v Master*,¹⁴¹ the insurers repudiated claims on the basis that the policy proposal forms contained incorrect information that the insured warranted to be true. The insured argued that the insurer was aware of the facts through its agents. In the latter case, the insured argues that the insurer's agent completed the policy proposal forms after the true information has been given to him. The court ruled in favor of the insured and stated that the insurer was aware of the incorrect information through the agent who had knowledge of the information. In this case, the insurer's agent failed to disclose material facts after he was made aware of it.

In *Bawden v London Edinburgh and Glasgow Assurance Co*,¹⁴² the insurer's agent completed a proposal form for accidental injury insurance on behalf of the insured, who was illiterate and had lost an eye. The forms contained a warranty that the applicant was free from any physical infirmity, although this was untrue. The insured was later involved in an accident in which he lost his other eye. The insurer rejected the insured's claim on the grounds that it was not disclosed that the insured had only one eye. The court held that the insurer was liable to indemnify the insured on the basis that the insurer's agent had knowledge of the insured's condition upon the conclusion of the contract but chose not to disclose this while completing the forms on behalf of the insured.

e) Duty to assist with claim processes.

The agent has a duty to advise the insured on the extent of the cover, the premiums, and the procedure regarding claims.¹⁴³ These three things are considered as material facts, and the insured must be aware of the procedure to be followed upon the happening of

¹⁴⁰ Rule 1.4 policyholder Protection rules.

¹⁴¹ *Pretreas & Co v London Guarantee and accident CO Ltd and African Guarantee and Indemnity Co Ltd v Master* 283 S.W. 1051 (Ky. Ct. App. 1926).

¹⁴² *Bawden v London Edinburgh and Glosgow Assurance Co* (1892) 2QB 534.

¹⁴³ Rule 15.5 & 2A o the Policyholder Protection Rules.

the event insured against or covered. Some insurance contracts require the insured to supply specified information to keep the insurer updated, and failure by the insured to do this may lead to his cover lapsing, or the insured may be regarded as not complying with certain requirements. The agent must ensure that all processes that need to be followed during the duration of the contract are communicated to the insured in due time.¹⁴⁴ In terms of the Terms and Conditions of the company “Cartrack”, the insured has an obligation to contact them every three months to verify that the tracking device installed in the car is still working.¹⁴⁵ Failure to do that will mean that Cartrack will not cover the owner if his or her stolen car is not recovered.

The duties of the insurer’s agent, such as the duty to assist with the interpretation, renewal, cancellation, and lapse of the policy, have already been discussed above under the duties of the broker. Meaning they will not be repeated as the same principle apply to the representatives or agents of the insurer.

3.4. Remedial actions imposed by the legal framework.

The legislation imposes remedial actions against any insurance intermediary who breaches or contravenes insurance sector laws of for failure to discharge legal duties with skill, care, diligence and in good faith.¹⁴⁶

*Section 14(1) of the FAIS Act*¹⁴⁷ states that an insurer must debar its representative from rendering insurance services if the insurer is satisfied that the representatives no longer meet the fit and proper requirements or has contravened or failed to comply with any provision of the Act in a material manner. It further states that the juristic representative must debar its key individual from rendering insurance services if the juristic representative is satisfied that the key individual does no longer meet the fit and proper requirements or has contravened, or failed to comply with, any provision of the Act in a material manner.

¹⁴⁴ *Financial Advisory and Intermediary Services Act: General code of conduct for authorised Financial Services Providers and their representatives, Sec 4(1).*

¹⁴⁵ *Rule 10.1.3.4 of the Cartrack, Service Agreement: Standard Terms and Conditions.*

¹⁴⁶ *Section 14(1)(i) to (iv) of the FAIS Act.*

¹⁴⁷ *Section 14(1) of the FAIS Act.*

In terms of *section 153 of the FRS Act*,¹⁴⁸ the responsible authority (FSCA) for financial sector law may make a debarment order in respect of a natural insurance intermediary if the person has contravened a financial sector law in a material way; has contravened in a material way an enforceable undertaking that was accepted by the responsible authority in terms of *section 151(1)*; has attempted or conspired with, aided, abetted, induced, incited or procured another person to contravene a financial sector law in a material way; or has contravened in a material way, a law of a foreign country that corresponds to a financial sector law.

The *FAIS Act* provides for the establishment of an Ombud for Financial Service Providers, to consider and dispose of complaints under the Act and complaints for which the Adjudicator is designated in terms of *section 211* of the *Financial Sector Regulation Act* in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and to the provisions of this Act and the *Financial Sector Regulation Act (FSR Act)*.¹⁴⁹

In terms of *Section 167* of the *FSR Act*, the responsible authority may impose an appropriate administrative penalty on the insurance intermediary when he or she has contravened insurance sector laws or has contravened an enforceable undertaking accepted by the responsible authority.¹⁵⁰

Section 219 of the *FRS Act*¹⁵¹ provides for the establishment of the Financial Services Tribunal to reconsider decisions as stated in *section 218* and to perform the other functions conferred on it by this Act and specific insurance sector laws. This means that any insurance intermediary that is affected by the decision of the responsible authority may apply for reconsideration of the decision by the Tribunal.

¹⁴⁸ *Section 153 of the FSR Act.*

¹⁴⁹ *Section 20 of the FAIS Act.*

¹⁵⁰ *Section 167 of the FRS Act.*

¹⁵¹ *Section 219 of the FRS Act.*

*K & Brokers CC v Financial Sector Conduct Authority*¹⁵² dealt with an application for reconsideration in terms of *section 230* of the FSR Act.¹⁵³ The applicant, a sole proprietor and key individual, had applied for exemption from the examination requirement as envisaged in the determination of fit and proper requirement for a financial service provider in terms of *section 44* of the FAIS Act.¹⁵⁴ The respondent refused to grant the applicant an exemption in terms of *section 44* of the *FAIS Act*. The respondent's view on refusal was that the applicant had sufficient time to comply with the examination requirement. The conduct of the applicant indicated a lack of commitment and a disregard for the peremptory requirement of the *FAIS Act*. The respondent argued that granting the exemption would conflict with the public interest, prejudice the interest of the clients, and frustrate the achievement of the objective of the *FAIS Act*.¹⁵⁵

The Financial Service Tribunal had to determine whether the respondent's decision regarding the application was justified. During the reconsideration it was found that the applicant did not have *RE1* and *RE5*, which is not in the public's best interest and may result in potential harm to consumers of the applicant. This served as evidence that the business cannot be conducted by a person who does not know and understand the obligations and responsibilities imposed on himself or herself by the *FAIS Act*. The Financial Service Tribunal found that the respondent's decision to refuse the application for exemption was justifiable, and the application for reconsideration was dismissed.

3.5. Conclusion.

In this chapter, the research focused on the duties of insurance intermediaries which must be discharged by the brokers or agents of the insurer before a contract is concluded and during the product life cycle. Most of the complaints and cases arise from the intermediaries' failure to discharge certain duties, which would have assisted the insurer or insured to make an informed decision and to comply with compulsory clauses of the contract. Many insurance companies are being sued as the result of the insurance

¹⁵² *K & Brokers CC v Financial Sector Conduct Authority* [2019] JOL 46215 (FST).

¹⁵³ *Financial Sector Regulations Act 9 of 2017, Sec 230.*

¹⁵⁴ *Section 44 of the FAIS Act.*

¹⁵⁵ *K & Brokers case.*

intermediary's failure or omission to disclose material facts at an early stage. When all the duties are complied with, the insured will be able to determine whether the insurance product meets his or her financial needs, and the insurer will be able to determine the extent of risk it is willing to inherit. This chapter has considered several cases in which the insurance intermediary may be held accountable for damages resulting from their negligence.

Furthermore, this chapter has dealt with remedial actions that may be imposed legal framework against the insurance intermediary who is found to be in breach of the duties or applicable insurance laws.

CHAPTER 4

The impact of the COFI bill on the legal framework regulating the duties of insurance intermediaries.

4.1. Introduction.

The *COFI Bill* is aimed at promoting the fair treatment and protection of insurance customers by insurance institutions and intermediaries¹⁵⁶, and it thus so by supporting fair, transparent and efficient insurance markets, promoting trust and confidence in the industry, supporting innovation and the development of and investment in sustainable, innovative technologies, processes and practices, supporting sustainable competition in the provision of insurance products and services, promoting financial inclusion, promoting transformation of the industry, and assisting regulatory authorities in maintaining insurance stability, and providing for matters connected therewith.¹⁵⁷

It is an ongoing knowledge that the *COFI Bill* will be replacing other existing financial laws e.g. the *FAIS Act*, since the Bill is designed to provide a holistic and flexible law that will set minimum requirements at high level, for all insurance institutions. This also means that the insurance intermediaries will not have to worry about complying with the requirements of multiple laws that are currently applicable.¹⁵⁸

Once the *COFI Bill* is enacted, it will be an easily understood piece of legislation as it avoids unnecessary complexities. The Bill's appropriate chapters and specific parts contain clauses setting out the purpose of the chapter or part, and it makes it easy to identify the intended purpose of the legal provisions, and that will make the interpretation of the legislation simpler to insurance intermediaries and customers.

This chapter will focus mainly on the impact to be brought by the bill on legislation regulating the duties of insurance intermediaries. Each effected insurance legislation will be interpreted or be discussed simultaneously with the bill.

¹⁵⁶ Section 3 of the *COFI Bill*.

¹⁵⁷ *Explanatory Policy Paper accompanying the Conduct of Financial institutions Bill (Paper accompanying the first draft of the COFI Bill)*.

¹⁵⁸ *Paper accompanying the first draft of the COFI Bill*.

4.2. Insurance legislation versus the *COFI Bill*.

4.2.1. The *Financial Sector Regulation Act* versus the *COFI Bill*.

Section 3 of the COFI Bill states that the Bill was established to provide for a consolidated, comprehensive, and consistent regulatory framework for the conduct of insurers and insurance intermediaries, and to support the *FSCA* to achieve its objective and functions as set out in *sections 57 and 58 of the Financial Sector Regulation Act*.¹⁵⁹

The *COFI Bill* forms part of the Twin Peaks model introduced by the *FSR Act* for establishment of the two regulatory frameworks, namely, the *PA* to manage the prudential risks and the *FSCA* to manage the market conduct risk.¹⁶⁰ The *COFI Bill* is intended to strengthen the regulation strategies of the *FSCA* and *PA* to ensure that insurance intermediaries treat insurance customers fairly.¹⁶¹ The *COFI Bill* is designed to broaden the mandate and to empower the regulator (*FSCA*), so that it may supervise and regulate insurance institutions and intermediaries by ensuring compliance with all conduct standards in order to achieve the object of The *COFI Bill* and *FSR Act*.¹⁶²

The *COFI Bill* is recognized as one of the key pillars in government's Twin Peaks financial sector regulatory reform process that aims to establish better financial customer outcomes in the South African financial industry. The bill requires insurers and intermediaries to comply with specified requirements.¹⁶³

The *FSR Act* and *COFI Bill* work hand in hand. The *FSR Act* provides insurers and insureds with information regarding what they may expect from the *FSCA and PA*.¹⁶⁴ On the other hand, the *COFI Bill* provides customers with information regarding what they must expect from the insurers and intermediaries. Furthermore, the *COFI Bill* places an obligation on the regulators to ensure that insurers and intermediaries comply with all the

¹⁵⁹ *Section 3 of the COFI Bill.*

¹⁶⁰ *Section 32 & 56 of the FSR Act, Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill (Paper accompanying the first draft of the COFI Bill)*

¹⁶¹ *Section 32 & 56 of the FSR Act, Paper accompanying the first draft of the COFI Bill.*

¹⁶² *Section 3 of the COFI Bill, Paper accompanying the first draft of the COFI Bill.*

¹⁶³ *Media statement, second draft of conduct of financial institutions bill published for public comment, 1.*

¹⁶⁴ *Section 34 and 58 of the FSR Act.*

conduct standards outlined by the *COFI Bill*.¹⁶⁵ It is evident that the *COFI Bill* together with the *FSR Act*, will promote and achieve the objective of *treating customers fairly*.

4.2.2. Insurance Act versus the *COFI Bill*.

Before the introduction of the Insurance Act, insurers were regulated and licensed in terms of the *LTIA*, *STIA*, as well as the *FAIS Act*.¹⁶⁶ After the *insurance act* became effective, it repealed the *LTIA* and *STIA*, from the effective date of insurance act, insurers were now licensed under its provisions, as well as the *FAIS Act*.¹⁶⁷ However, the applicability of these two acts is questionable as the definition of intermediation activities differs, as did disclosure and marketing requirements, and this result in confusion in the financial industry. The *COFI Bill* significantly streamlines the current legislative framework. The Bill will for the most part replace existing conduct requirements across all existing financial sector laws. It is designed to instead provide a holistic and flexible law that sets consistent high-level minimum requirements on all financial institutions.

Once the *COFI Bill* become effective, it will take over the licensing provisions, those licenses authorized under the *FAIS Act* and the *Insurance Act* will remain effective but going fought they will be regulated in terms the bill. The new insurers will be licensed in terms of the provisions of the bill.¹⁶⁸

The *COFI Bill* is designed to strengthen the objectives provided for in *section 3* of the *Insurance Act*. These objectives will promote the establishment of a fair and stable insurance market for the benefit and promotion of the insured.¹⁶⁹ The Bill enhances this section by providing conduct standards to be complied with by the insurer and the intermediaries. The *Insurance Act* obligates the regulating authority to ensure that intermediaries meet all the necessary requirements, as discussed in Chapter 2 above.

The *COFI Bill* and the *Insurance Act* place an obligation on insurers to ensure that insurance intermediaries meet the fit and proper requirements before they can be

¹⁶⁵ *Section 3 & 8 of the COFI Bill.*

¹⁶⁶ *Section 9 of the FAIS Act.*

¹⁶⁷ *Section 9 of the FAIS Act; Section 23 of the Insurance Act.*

¹⁶⁸ *Section 9 of the COFI Bill.*

¹⁶⁹ *Section 3 of Insurance Act.*

authorised to render intermediary services.¹⁷⁰ Furthermore, the insurers must ensure that insurance services are rendered in such a way that they will increase the customer's confidence that they are dealing with an insurer where the principle of treating customers fairly is at the forefront and that their insurable interests have been protected at all costs¹⁷¹.

The main object of the *COFI Bill* is “*the protection of financial customers and the promotion of the fair treatment...*”.¹⁷² The *COFI Bill* and *Insurance Act* both provide that a person may not act or offer to act as an insurance intermediary unless that person is appointed by an insurer or registered as an insurer, representative or juristic representative. Hence, an insurance intermediary, must prior to the appointment to render insurance service, meet the requirements of “fit and proper”. Furthermore, the appointment of such a person may not materially increase any risk to the insurance customer, may not materially impair the governance arrangements of the insurer, including the insurer's ability to manage its risks and meet its legal and regulatory obligations, may not compromise continuous and satisfactory service to insurance customers, may not prevent or hinder an insurer or intermediary from acting in the best interest of insurance customers, and may not result in key decision-making responsibilities being removed from the insurer.¹⁷³

Section 8(1)(a) of the COFI Bill places an obligation on the insurer, a key person, or a representative to put arrangements in place to ensure compliance with the requirements of the Bill on an ongoing basis and to identify any non-compliance with those requirements.¹⁷⁴ In the event that all the persons mentioned above comply with the requirements, the positive result will be that the insurance customers will be treated fairly. Once the insurance customer is treated fairly, their confidence in the insurer will increase and they will feel that they are dealing with a trustworthy financial institution.

¹⁷⁰ *Section 12, 13 and 14 of the COFI Bill; Section 5 of the insurance act.*

¹⁷¹ Jackson, “*Guidance on conducting insurance business in terms of section 5 of the Insurance Act*”.

¹⁷² *Short title of the COFI Bill, Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill, page 14, para.*

¹⁷³ *Section 12 & 13 (1) (a- e) of the COFI Bill.*

¹⁷⁴ *Section 8(1)(a) of the COFI Bill.*

The *COFI Bill* was enacted to amend some of the provisions in the *Insurance Act* and to ensure that the objectives of the *Insurance Act* are strengthened to achieve the principle of treating insurance customers fairly.¹⁷⁵

4.2.3. Financial Advisory and Intermediary Services Act versus the COFI Bill.

The insurance industry changes every day, and therefore, legislations regulating intermediaries also becomes outdated and fails to provide for new challenges within the insurance industry.¹⁷⁶ The *FAIS Act* primarily regulate advice and intermediaries, but it contains very little “flesh” to its structure. Most of the provisions addressing conduct matters lies in subordinate legislation such as the *GCC* and *PPR*'s.¹⁷⁷ It's worth mentioning that the provisions in the *GCC* and *FAIS Act* aims to ensure that consumers are being treated fairly.¹⁷⁸ It's also noteworthy that although *FAIS Act* is applicable to all financial advisory and intermediary services, in practice, most intermediaries sell insurance (a specific financial service). Thus, making it difficult for *FAIS act* to apply to the various types of financial services/products available to consumers.

The *COFI Bill* is designed to cater to new changes in the insurance industry that are not provided for in the *FAIS Act*. The fact that *FAIS Act* is silent on other issues arising with the industry, thus, create `challenges for regulators to perform its regulatory duties towards intermediaries.¹⁷⁹ The *COFI Bill* is said to replace the *FAIS Act* on the basis that it is now outdated or that the *COFI Bill* will provide more applicable solutions to insurance problems.¹⁸⁰ The *FAIS Act* focuses only on advice and intermediary services, and it does not provide much detail on financial products or services. On the other hand, the *COFI Bill* focuses on all the financial problems that are found in the financial industry by providing detailed conduct standards that the financial institutions must comply with.¹⁸¹

¹⁷⁵ FSCA, *Principle of Treating Customers Fairly*.

¹⁷⁶ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*.

¹⁷⁷ *Section 3 of the GCC; section 2 f the PPR*.

¹⁷⁸ *FAIS Act; GCC*.

¹⁷⁹ *Section 3(1) of the COFI Bill*.

¹⁸⁰ *Section 26 of the FAIS Act*.

¹⁸¹ *Section 19 & 24 of the COFI Bill*.

The regulating authorities have changed during the introduction of the TWIN Peaks regulatory system. Therefore, the *FAIS Act* is not aligned with the new regulators, for instance, it still refers to ‘Chairperson’ and the ‘Deputy Chairperson’ of the Financial Service Board, instead of ‘Commissioner’ and ‘Deputy Commissioners’ of the *FSCA*. The *COFI Bill* is designed and aligned to give effect to the Twin Peaks regulatory model system, and it is intended to strengthen the regulation strategies of the financial sector regulators to ensure that financial customers are treated fairly.¹⁸²

The *FAIS Act* focuses only on advice and intermediary services, meaning that it does not provide much detail with respect to financial products or services. On the other hand, the *COFI Bill* focuses on all the financial problems that appear in the financial industry by providing detailed conduct standards that the financial institutions must comply with.¹⁸³

The *COFI Bill* places an obligation on financial institutions to have arrangements in place to ensure that they comply with the requirements of treating customers fairly and further places an obligation on the financial institution to report non-compliance with the requirements to the authority. The *COFI Bill* broadens the mandate of the *FSCA* to both ensure that financial institutions comply with all the requirements of the conduct standards or to direct the financial institutions to perform an independent review of the arrangements in place that should ensure that all requirements are met.¹⁸⁴ The *FAIS Act* is silent in this regard.

In respect of the appointment of a representative or a key individual, the *COFI Bill* provides detailed requirements that the proposed appointed person must comply with before authorization, while the *FAIS Act* only provides that the representative or a key individual must comply with the requirements but relies on its subordinate legislation to provide those requirements. This means that when dealing with the *COFI Bill*, you do not have to go further to look for another piece of legislation that outlines all the required requirements.¹⁸⁵

¹⁸² Section 3(1) of the *COFI Bill*.

¹⁸³ Section 19 & 24 of the *COFI Bill*.

¹⁸⁴ Section 19 of the *COFI Bill*.

¹⁸⁵ Section 12 to 14 of the *COFI Bill*.

Both the *FAIS Act* and the *COFI Bill* provide for the debarment of an individual who contravenes the financial sector laws in a material way. However, the *FAIS Act* relies more on the guidance or procedures outlined by the financial institution on the processes to be followed when dealing with a debarment. The *COFI Bill* is a straightforward legislation as it provides the procedure that must be followed by the financial institution when dealing with debarment.

The *COFI Bill* provides that before an institution debars a person, adequate notice must be given to such person in writing stating its intention, the grounds and reasons for the debarment, and any terms attached to the debarment, including, in relation to uncompleted business, any measures stipulated for the protection of the interests of financial customers, provide the person with a copy of the licensee's written policy and procedure governing the debarment process, and give the person a reasonable opportunity to make a submission in response, consider any response provided then take a decision, and immediately notify the person in writing of the licensee's decision; the person's rights in terms of Chapter 15 of the *Financial Sector Regulation Act*, and any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal¹⁸⁶.

The *COFI Bill* provides that the debarment of the person who is no longer working for the financial institution must commence within six months from the date the person ceased to be a representative of the licensee.¹⁸⁷ The *FAIS Act* is silent in this regard. The *COFI Bill* provides that if a licensee is unable to locate a person to deliver a document or information under subsection (3), after taking all reasonable steps to do so, including dissemination through electronic means where possible, delivering the document or information to the person's last known e-mail or physical business or residential address will be sufficient.¹⁸⁸ The *FAIS Act* is silent in this regard. This is the *prima facie* evidence that the *Bill* is better than the *FAIS Act*.

¹⁸⁶ Section 15 (4) (a) to (c) of the *COFI Bill*.

¹⁸⁷ Section 15 (5) of the *COFI Bill*.

¹⁸⁸ Section 2(b) of the *COFI Bill*.

The *COFI Bill* addresses matters directly, while the *FAIS Act* refers the reader to subordinate legislation. *Section 17* of the *COFI Bill* provides that a licensed insurance institution must conduct its business in a manner that promotes fair treatment of financial customers, enhances, and supports the efficiency and integrity of financial markets, supports trust and confidence in the financial sector; and promotes transformation in a manner reasonably consistent with its transformation plan, developed in terms of section 23.¹⁸⁹ The *FAIS Act* is silent in this regard.

The Bill states that a licensed insurance institution is obliged to conduct its business with integrity, honesty, fairly, and with due skill, care and diligence, and should also identify and promote a corporate culture that takes ethics into account and aims to ensure that the fair treatment of insurance customers, and fair market practices, as the case may be, are central to the values and corporate culture of the insurance institution. It is required to organize and control its affairs responsibly and effectively, maintain adequate financial and other resources, avoid or, where avoidance is not possible, manage, mitigate and disclose conflicts of interest, deal with the Authority in an open and cooperative manner, and perform its activity or activities transparently.¹⁹⁰ These obligations, which are outlined above and with which the financial institutions must comply are not provided for in the *FAIS Act*, which is another indication that the *COFI Bill* is superior to the *FAIS Act*.

The *COFI Bill* deals with many factors, that must be taken into consideration by the insurance institutions, that are not mentioned in the *FAIS Act*. For instance, the *FAIS Act* is silent about culture and governance of the insurance institutions, insurance products and insurance services, advertising and disclosure and others.¹⁹¹

4.3. The *COFI Bill* amid at achieving appropriate market conduct outcomes in the financial sector by providing the following though it chapters:

a. Internal models of compliance:

The bill recognize that financial institutions are mostly familiar with the operation of their business, is better to allow them to come up with their own internal models of compliance,

¹⁸⁹Section 17 (1) (a) to (d) of the *COFI Bill*.

¹⁹⁰ Section 17 (2) (a) to (h) of the *COFI Bill*.

¹⁹¹ Section 16 of the *COFI Bill*.

that will be able to cater for the risk-assessed across the entity.¹⁹² The financial institution must put arrangements in place to comply with the requirements of the bill on an ongoing basis, and to identify any non-compliance with those requirements. The financial institutions must ensure that their internal models of compliance over sees that the business is conducted with integrity and the principle of treating customers fairly is at the forefront. If the FSCA reasonably believes that the arrangements in place does not comply with requirements have right to intervene by either investigation or making recommendations, the FSCA may direct a financial institution to perform an independent review of the arrangements by a person who is approved by the it at the cost of the financial institution.¹⁹³

The FSCA may direct the financial institution to strengthen or effect improvements to the arrangements in place to comply with requirements in this bill.¹⁹⁴ A financial institution that has identified, or is informed or made aware, that it has materially failed to comply with a requirement in terms of this bill, must without delay, notify the FSCA of the failure and the reasons for the failure. This section does not limit any other action that the FSCA may take in terms of this bill or the Financial Sector Regulation Act¹⁹⁵

b. Focusing on outcomes in the financial sector:

The COFI Bill aims at achieving a strong market conduct framework and this is supported by the move to an outcome-focused approach. As such, the current focus on assessing compliance with a rules-based approach must shift to focusing on whether financial institutions are conducting themselves in a manner that delivers desired outcomes for the financial consumers and the legislature.¹⁹⁶This approach will also hold the regulator accountable for ensuring its supervisory approach is effective by ensuring the outcomes from the financial sector are being met.¹⁹⁷

¹⁹² *Explanatory Policy Paper accompanying the Conduct of Financial Institutions.*

¹⁹³ *Section 8(1) (a) and (b).*

¹⁹⁴ *Section 8 (3).*

¹⁹⁵ *Section 8(3) and (4).*

¹⁹⁶ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill 2018 6.*

¹⁹⁷ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill 2018 6.*

c. Culture and Governance:

The bill provides for cultural and governance practices within financial institutions which support the correct conduct outcomes being achieved, including ensuring due regard to the interests of customers. The bill sets several general principles that financial institutions will be required to uphold when operating in South Africa. This will be the key component which will drive toward improved overall market conduct in the financial sector.¹⁹⁸

Further, it provide that financial institutions must have in place governing arrangements to ensure that they conduct business with integrity, due skill, care and diligence, to organize and control its affairs responsibly and effectively, to maintain adequate financial and other resources, to observe proper standards of market conduct and of conduct of business, to pay due regard to the interests of its financial customers and treat them fairly, to pay due regard to the information needs of its financial customers, and communicate information to them in a way which is clear, fair and not misleading, to manage conflicts of interest fairly, to take reasonable care to ensure the suitability of its advice and discretionary decisions for any financial customer who is entitled to rely upon its judgment to arrange adequate protection for financial customers' assets when it is responsible for them, and to deal with the *FSCA* in an open and cooperative way.¹⁹⁹

The *FSCA* is required to set requirements that must be adhered to in order to focus financial institutions on a sound governance culture centered around the fair treatment of customers which is aimed at improving customers confidence when dealing with financial institutions.²⁰⁰

The Bill states that a licensed insurance institution is obliged to conduct its business with integrity, honesty, fairly, and with due skill, care and diligence, and should also identify and promote a corporate culture that takes ethics into account and aims to ensure that

¹⁹⁸ Section 16 of the COFI bill, Explanatory Policy Paper accompanying the Conduct of Financial Institutions, 44.

¹⁹⁹ Section 17(1) of the COFI Bill.

²⁰⁰ Section 26 of the COFI Bill, Explanatory Policy Paper accompanying the Conduct of Financial Institutions, 45.

the fair treatment of insurance customers, and fair market practices, as the case may be, are central to the values and corporate culture of the insurance institution. It is required to organize and control its affairs responsibly and effectively, maintain adequate financial and other resources, avoid or, where avoidance is not possible, manage, mitigate and disclose conflicts of interest, deal with the Authority in an open and cooperative manner, and perform its activity or activities transparently.²⁰¹

d. Financial products:

the *COFI Bill* provides that financial products should be developed to meet a clearly identified and legitimate customer need. The bill sets requirements to ensure that financial products are designed to meet customer needs, are targeted appropriately, and perform as expected. Financial institutions are expected to have a written product oversight and governance policy in place.²⁰² Furthermore, *FSCA* will not be involved in the development of new product or pre-approval before the product can go to the market because that will delay.²⁰³ The *FSCA* will have intervention powers where it becomes apparent that products or services issued are not delivering appropriate outcomes.

The bill provides that when selling financial products, a financial institution or a representative must ensure that the products are appropriate for targeted or impacted financial customers, provided in a manner that is as objective as possible, and provided in a manner that supports the delivery of appropriate financial products and financial instruments to those financial customers.²⁰⁴

e. Financial services:

this is similar to financial products, the manner in which financial services are designed and provided to customers can impact on customer outcomes.²⁰⁵ The financial institution is expected provide financial services in a way that will consider the needs,

²⁰¹ Section 17 (2) (a) to (h) of the *COFI Bill*.

²⁰² *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*, 47.

²⁰³ Section 26 of the *COFI Bill*. *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*

²⁰⁴ Section 28 of the *COFI Bill*.

²⁰⁵ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*, 48.

circumstances, and expectations of targeted financial customers. It also required institutions and representatives to remain aware of the impacts of financial services on customers indirectly impacted through another financial institution. It requires that specific conduct standards to be set on financial services for matters such as investment administration, services provided to another financial institution, payment services, and benchmark determination. This is in recognition of the range of financial services that may be offered that are not always linked to a financial product, and so require distinct and specific conduct oversight of that activity itself.²⁰⁶

f. Promotion, marketing, and disclosure:

Financial institutions should promote, market, and disclose information about their products and services in a way that promotes informed and confident decision-making by customers.²⁰⁷ This bill requires financial institutions to have documented processes and procedures in place for signing off promotional and marketing materials by a person of appropriate seniority. Certain requirements for the presentation of promotional and marketing material are specified, and prohibited marketing practices are specified. And to ensure that lines of accountability remain clear, in that financial product or service providers remain ultimately responsible for their products and services, even if these are promoted or marketed by other entities.²⁰⁸

The FSCA is empowered to set standards on matters such as inducements and competitions, endorsements, direct and bait marketing and negative marketing. The FSCA will be able to set standards specifying details on things like Key Information Documents that institutions may be required to have in place, in plain and simple language.²⁰⁹

g. Advice:

²⁰⁶ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*, 48.

²⁰⁷ *Section 29 of the COFI Bill; Explanatory Policy Paper accompanying the Conduct of Financial Institutions*, 49.

²⁰⁸ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*, 49.

²⁰⁹ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*, 49.

The *COFI Bill* states that when financial products are sold and distributed in a poorly manner, particularly when talking to customers with bad attitudes, that is not considered to be acting in the best interest of financial customers, the bill sets the requirements that one must follow when choosing channels or developing models to distribute the products or providing services.²¹⁰

The requirements aim to ensure suitability of the distribution model for the products and services concerned, to enable customers to make an informed decision in respect of the products available, to enhance standards of professionalism in sale and distribution. Since distribution of products can happen on an advised and non-advised basis, the sets specific obligations on those providing financial advice to financial customers. The FSCA must set a range of conduct standards, including on matters such as product aggregation and comparison services, investment platform administration, referrals and lead generators, and remuneration arrangements.²¹¹

h. Post-sale barriers and obligations:

the bill aims to introduce consistent approaches and practices amongst financial institutions once a customer has purchased a product or entered a contract with a financial institution.²¹² The practices of financial institutions should not lead to unreasonable barriers to customers switching products or exiting when necessary. The financial institution must have a clear requirement/ procedure for claims handling processes where applicable.²¹³ Conduct requirements are provided for practices related to the renewal of contracts. The bill also entrenches requirements for the complaints management processes within financial institutions, including interactions between a financial institution and the relevant financial sector ombud, and requirements for how the information generated through complaints are used within an organization.²¹⁴

²¹⁰Section 30 & 31 of the *CIFI Bill*; *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*

²¹¹ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions*

²¹² *Explanatory Policy Paper accompanying the Conduct of Financial Institutions.*

²¹³ Section 32 of the *COFI Bill*.

²¹⁴ Section 33 (1)(a) to (d) of the *COFI Bill*.

4.4. Conclusion.

In conclusion, the legal framework governing the South African insurance Industry is very broad, as it is currently regulated with 13 pieces of legislation.²¹⁵ The application of more legislation may create confusion and cause difficulties for the regulators regarding their ability to discharge their regulatory and supervisory mandate. The *COFI Bill* intends to replace most of the existing insurance laws, as the Bill is designed to provide a holistic and flexible law that will set high-level minimum requirements for all insurance institutions and intermediaries. This means that insurance institutions and intermediaries will no longer have to worry about complying with the requirements of the multiple laws which are applicable presently.

Once the Bill is in force, it will provide relief to insurance intermediaries and insurers as they will only be required to comply with the new Act and its regulations. The *COFI Bill* provides clear guidance of what is required from the juristic and individual intermediaries unlike the current legislation, which requires that insurers or intermediaries must have conduct standards in place without providing clear information on what such standards should contain. In conclusion, the *COFI Bill* has an impact on the governance of a financial institution, as is evident in *section 8(1)(a)*²¹⁶ of the *COFI Bill* which provides that insurers, a key person, a representative, or independent intermediaries must have arrangements in place to comply with the requirements of the *COFI bill* on an ongoing basis, and to identify any non-compliance with those requirements and to report it to the regulating authority.

The above-mentioned section places an obligation on the insurance institutions and juristic intermediaries to establish processes and procedures to be followed by all insurance intermediaries within the insurance institution, to ensure that the requirements brought by the *COFI Bill* are complied with on a continuous basis. Furthermore, insurance institutions have a responsibility to identify all incidents of the non-compliance with the requirements and to notify the regulator.

²¹⁵ *Explanatory Policy Paper accompanying the Conduct of Financial Institutions.*

²¹⁶ *Section 8(1) (a) of the COFI Bill.*

The insurance institution or juristic intermediaries are restricted from performing or rendering any insurance services to insurance customers unless they have been issued with the license to render insurance services, in terms of *Clause 9 of the COFI Bill*.²¹⁷ In addition, The *COFI Bill* provides that an insurance institution may only obtain one license and may only perform functions authorised by, and in accordance with the applicable requirements.²¹⁸

The insurance institution or juristic intermediary will have to adapt to, and comply with, the provisions and the requirements of the *COFI Bill* when conducting debarments of persons. It appears that *section 15 of the COFI Bill* is meant to replace *section 14 of the FAIS Act*. *section 15 of the COFI Bill* provides significant and detailed information that was omitted from *Section 14 of the FAIS Act*. In terms of *Section 15 of the COFI Bill*, the powers of insurance institutions or juristic intermediaries, which permitted them to follow their own processes when dealing with debarments, has been abolished. This limitation means that financial institutions are now compelled to follow the steps set out in the *COFI Bill*.

²¹⁷ *Section 9 of the COFI Bill*.

²¹⁸ *Section 10 of the COFI Bill*.

CHAPTER 5

The duties of intermediaries rendering electronic or automated insurance services.

5.1. Introduction.

The general rule is that when some advice is given, the giver of the advice may be held liable for any loss emanating from his or her advice. However, in the case of the electronic or automated advice the question is who has a duty to ensure that insurance customers are treated fairly and who should be held liable for damages emanating from such electronic advice.

In terms of the *Board Notice 194 of 2017* “Automated advice- means the furnishing of advice through an electronic medium that uses algorithms and technology without the direct involvement of a natural person”.²¹⁹ It is evident from the definition that the advice is given to the insured through electronic means and without direct communication with the natural person. Therefore, it is important for the insured to know who should be held liable for damages or loss that may be suffered.

5.2. The requirements applicable to the insurers or juristic intermediaries providing automated advice.

The insurer or juristic intermediary must have adequate and appropriate key individuals who meet the competence requirements. The key person must have knowledge and understanding of the technology and algorithms used to provide automated advice, the methodological approaches, including assumptions embedded in the algorithms, the preferences or biases that might exist, and the risks and rules underpinning the algorithms. The key person must be able to identify the risks to clients arising from the automated advice and to monitor and review the automated advice generated by the algorithms, in order to ensure the quality and suitability of the advice and compliance with the *FAIS Act*.²²⁰

²¹⁹ Section 1 of the *BN 194 of 2017*.

²²⁰ Section 38 (a) of the *BN 194 of 2017*.

The insurer or juristic intermediary must implement and maintain adequate policies and procedures to monitor, review and test the algorithms and the advice generated by it, to monitor, review and test the filters implemented to ensure clients for whom the automated advice is not suitable are filtered out, and to set out the level of human review that will be undertaken on the advice generated.²²¹

The policies and procedures referred to above must have appropriate system design documentation that sets out the purpose, scope and design of the algorithms and filters, and have documented a test strategy that explains the scope of testing, including test plans, test cases, test results, defect resolution, and final test results, have appropriate processes for managing any changes to algorithms and filters that include having security arrangements in place to monitor and prevent unauthorized access to the algorithms, be able to control, monitor and reconstruct any changes to the algorithms or filters, review and update algorithms whenever there are factors that may affect their relevance, have in place controls and processes to suspend the provision of advice if an error within an algorithm or filters is detected, and be able to frequently monitor and supervise the performance of algorithms and filters through an adequate and timely review of the advice provided.²²²

The insurer or juristic intermediary must have adequate technology resources to maintain client records and data integrity, protect confidential and other information, and meet current and anticipated operational needs, including system capacity.²²³

5.3. Regulation of automated advice in South Africa.

The *FAIS Act* is the leading legislation that regulates the rendering of insurance advice and intermediary services. The *FAIS Act* states that insurers must be registered and comply with all fit and proper requirements, as discussed in Chapter two²²⁴. The key individual of the insurer that provides automated advice must meet the fit and proper requirements and must have knowledge and understanding of the technology system that

²²¹ Section 38 (b) of the BN 194 of 2017.

²²² Section 38 (c) of the BN 194 of 2017.

²²³ Section 38 (d) of the BN 194 of 2017.

²²⁴ Section 6A of the *FAIS Act*.

will be utilised to provide automated advice. In terms of the *FAIS Act* advice and intermediary services are two different things, but when it comes to automated advice the two will be considered as one because the system provides for both advice and intermediary services. The *FAIS Act* further states that the insurer and the key individual must comply with the additional requirements as stated in paragraph 5.2 above.²²⁵

Furthermore, the *GCC* contains specific provisions relating to the rendering of insurance advice. The main purpose of the *GCC* is to ensure that insurance customers are made aware of all material facts to make an informed decision as to whether their insurable interest will be best protected by the insurer or not.²²⁶ This means that advice that is provided by the automated advice system must be able to assist the insured to make an informed decision and to believe that his or her insurable interest will be well protected. If the insurer provides automated advice, it is still necessary to act with skill, care and diligence,²²⁷ and that the key person must ensure that this duty is complied with. However, the services of the key individual are still required even if the advice is given electronically, meaning automated advice does not take away the mediation of the human being on the rendering of insurance advice and intermediary services.

The *GCC* also provides precise measures that must be taken by the insurer when rendering advice. The *FAIS Act* sets the tone in *section 16* by stating that FSPs must act honestly and fairly, and with due skill, care, and diligence, in the interest of the insured and the integrity of the insurance industry.²²⁸ Furthermore, *section 16* of the *FAIS Act*²²⁹ requires insurers to make use of effective and appropriate technology for the proper performance of their activities. They are further required to treat the insureds fairly in a situation of conflicting interests. This means that the technology used must be such that it will promote the fair treatment of insurance customers. The use of language that will create uncertainty or confusion or be misleading must be avoided.

²²⁵ *Section 3 of the FAIS Act.*

²²⁶ *Section 2 of the FAIS Act.*

²²⁷ *Section 16 of the FAIS Act.*

²²⁸ *Section 2 of the GCC.*

²²⁹ *Section 16 of the FAIS Act.*

The *GCC* states that automated advice must be provided in plain language, be adequate and appropriate, and must consider the level of knowledge of the insurance customers.²³⁰ *Section 7(1)(a)* of the *GCC* expects an insurer, other than a direct marketer, to be able to provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client and to make full disclosure of any information that would reasonably be expected to enable the client to make an informed decision.²³¹

The *COFI Bill* is one of the potential laws that will have an impact on automated advice. The *COFI Bill* allows more flexibility than other laws and provides the regulator with better tools to enable and support new emerging insurance institutions in the market. One of these new emerging institutions are businesses that are driven by technology and digital innovation. This shows that the *COFI Bill* specifically recognise the role and impact of technology in the insurance industry.²³²

In order to understand the impact that the *COFI Bill* will have on automated advice in the insurance industry, it is necessary to consider those provisions of the Bill aimed at enhancing the use of technology. The Bill allows the *FSCA* to take a proportionate approach to regulation and supervision. Specifically, *section 8 of the COFI Bill*²³³ allows the *FSCA* to consider exempting certain participants in the financial sector from the application of the Act, in order to provide them scope for innovation and for the development of, and investment in innovative technologies, processes, and practices.²³⁴

5.4. The role played by automated advice in the insurance industry.

Worldwide, automated advice is being utilised in the insurance industry because of its efficacy. There is concern that automated advice may replace human intermediaries. However, both still have a role to play in the insurance industry, and it is safe to say that they can work side by side to cater to all insurance customer's needs. Automated advice

²³⁰ *Section 3 of the GCC.*

²³¹ *Section 7 (1) (a) of the GCC.*

²³² *National Treasury, 'Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill' (National Treasury, Explanatory Policy Paper), available at <http://> accessed on 24 February 2020.*

²³³ *Section 8 of the COFI Bill*

²³⁴ *Section 8 of the COFI Bill.*

is implemented because the insurance industry recognises the benefits of these online applications. This means that automated advice offers significant benefits to insurance customers in so many ways. The most significant benefits provided by these systems are lower costs, unbiased advice, efficiency, transparency, and easy access for new consumers. These benefits are considerable and are aimed at providing the insurance consumer with the best services and products.²³⁵

Since automated advice does not require insurance brokers or agents, it leads to lower costs as no broker's fees are payable. The insurance companies that are making use of automated advice claim that because their human mediation element is reduced as the technology can do the jobs of intermediaries, their premiums are lower than those charged by traditional insurers. The services offered by automated advice can also lead to better quality advice as the system and its outcomes are consistent and relevant. The system will utilise the same algorithm for every consumer, which means that all insurance consumers will receive the same impartial advice, even though the advice will vary depending on the data entered by the potential insured.²³⁶

The automated advice it will always ensure that all relevant material facts have been communicated, while a human being could forget some of the material facts, which may affect the insured's cover. In *Fliptrans CC v S & P Insurance Advisors (Pty) Ltd t/a McCrystal and Partners and E Solmes*²³⁷, the respondents, neglected to inform the insured that, in terms of the policy, his motorcycle had to be fitted with a tracking device. As a result, he did not have such a device fitted to his motorcycle and this failure was the reason for the insurer's repudiation of the claim. The insured contended that had his attention has been drawn to the clause in the policy, he would have fitted a tracker to the motorcycle. If the policyholder's motorcycle was stolen regardless of the tracking device, the claim against the insurer would have succeeded.

The insured approached the *Short-Term Insurance Ombudsman* for the recovery of R79 500 from the respondents. The respondents consequently alleged that the fitting of a

²³⁵ Huneberg, "SA Mercantile Law Journal" (2020), 2020, p 182, accessed 11 October 2022.

²³⁶ Huneberg, SA Mercantile Law Journal, 182.

²³⁷ *Fliptrans CC v S & P Insurance Advisors (Pty) Ltd t/a McCrystal and Partners and E Solmes*.

tracking device was a requirement of the insurance cover, and it was up to the complainant to ensure that this was done. The respondents further alleged that this requirement was reaffirmed in the 'confirmation of cover' that was subsequently forwarded to the complainant. The respondents argued that the complainant was free to cancel the policy at any time if he was not happy with the requirements as set out in the policy document.

The Ombud ruled in favor of the insured and further elaborate that the intermediary failed to inform the client that his motorcycle need a tracking device. This case is used to elaborate or to prove that if the advice was provided electronically by automated advice this material fact will not have been omitted.

The advice offered by automated advice is more transparent, as the system will not provide biased advice and there will be no favours for personal gains. Using automated advice will enable the insurance customers to enjoy quicker responses than from an intermediary who might take long to conclude the process. In addition, the automated advice system can be accessed anywhere, anytime by the insured. It will also reduce working hours and call center delays, and work to the advantage of customers as they can obtain access to advice 24 hours a day, seven days a week, which makes the customer service element offered by these systems much more efficient, as mentioned above. The insurance products will also be more accessible to people in remote areas.²³⁸

The insurance consumers are an important part of the equation and accordingly insurers are obliged to look for ways to create consumer satisfaction at every stage of conducting the insurance contract. Automated advice can address many of the issues that insurers currently face in securing new insurance consumers. However, there is no doubt that these systems are currently not as sophisticated as they may be in the future. However, intermediaries still play a vital role in the insurance life cycle, especially for the older generation who specifically want to interact with a person.²³⁹

5.5. Challenges arising from an automated advice system.

²³⁸Huneberg, *SA Mercantile Law Journal*, 182.

²³⁹Huneberg, *SA Mercantile Law Journal*, 182.

Thus far using automated advice appear to be advantageous, however, it is necessary to consider the advantage and disadvantages. One of the problems associated with the use of automated advice is that those platforms are generally limited to the data as recorded by the potential insured. This means that it can only use the information provided to it by the customer. The automated advisor can only give an answer based on the information provided and it cannot know if the answer has satisfied the client as it is unable to read the client's facial expression. The human intermediary will be able to see whether the client is answering or not. The intermediary interaction allows people to show and feel empathy, something that automated advice cannot do. This is a critical skill that only humans have and accordingly many consumers may still want the human interaction.²⁴⁰

Another problem is that some customers may not trust an automated advisor as they do not understand it completely. This means that many insureds, especially the older generation, may not understand and trust these systems. Certain customers are generally quite apprehensive about using this type of technology. This is something that may be overcome as the technology becomes more sophisticated and more readily used by customers, and trust in the system is gained. Another real challenge presented by automated advice is the lack of regulatory control over these types of system.²⁴¹ it is not clear whether new regulation would be required for automated advisors, but this is something that the regulators and innovators will need to work on jointly.²⁴²

5.6. Conclusion.

5.6.1. Automated advice constitutes intermediary services.

The fact that there is no human being involved in the automated advice system, creates a need to determine whether automated advice constitutes intermediary services. In terms of the additional requirements stipulated in *section 38 of the Board Notice 197 of 2017* it is stated that an insurance company which provides automated advice must have in place a key individual who has adequate and appropriate competence requirements

²⁴⁰ Huneberg, *SA Mercantile Law Journal*, 184.

²⁴¹ Huneberg, *SA Mercantile Law Journal*, 184.

²⁴² Huneberg, *SA Mercantile Law Journal*, 184.

and who understand the rendering of automated advice.²⁴³ The human element is not completely removed from the rendering of insurance services, and that stands as proof that automated advice is the same as intermediary services. The fact is that automated advice is used to speed up the process of securing insurance contracts, but human beings always have control over the information installed in the electronic systems.²⁴⁴

In terms of definitions under *section 1* of the *FAIS Act*, there is a distinction between the intermediary services and advice. The intermediary only focusses on the mediation of the insurance contract without giving advice. However, in the case of automated advice both the element of advice and intermediary are present.²⁴⁵ There will be instances where the insurance customers will not fully understand the advice electronically generated and in that regard an individual will be needed to give clarity. In closing, automated advice constitutes intermediary services and there is control over the advice given to the public. This means that they are indirectly rendering insurance services.

5.6.2. Who should be held liable.

In the introduction, it is made clear that the giver of the advice is the one responsible for any damages that may result from that advice. In the case of automated advice, it is the insurer and the key individual who must be held liable for any damages or loss arising from the automated advice, as the legal framework imposed an obligation on them to ensure that the product meet the needs of the client. It is not disputed that the advice generated will depend on the information that has been put into the electronic system. The *Board Notice 194* places an obligation on the insurer and key individual to implement and maintain adequate policies and procedures to monitor, review and test the algorithms and the advice generated by it.²⁴⁶

²⁴³ *Section 38 (a) of the BN 194 of 2017.*

²⁴⁴ *Huneberg SA Mercantile Law Journal, 182.*

²⁴⁵ *Huneberg, SA Mercantile Law Journal, 182.*

²⁴⁶ *Section 38 of the BN 194 of 2017.*

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