

ABSA Financial Planning Convention

1/9/2005

Misrepresentation and Misselling

J PREISS

DEPUTY OMBUDSMAN

LONG-TERM INSURANCE

MISREPRESENTATION

- ✚ Incorrect factual statement (or omission) misleading the client;
- ✚ Can occur prior to mandate when concerns statement about adviser's qualifications, expertise or experience;
- ✚ Can occur prior to sale of product
- ✚ Remedy – rescission and possibly damages. Not placed in position as if misrepresentation was true.

MISREPRESENTATION

CASE STUDY

- ✦ Complainant had R100 000 to invest after sale of his business.
- ✦ He told the insurer's agent that he needed to explore other business interests;
- ✦ Reassured that proposed policy could be used as collateral for a loan;
- ✦ 2 years later surrender value was R59942 and bank would only lend R30000;
- ✦ Agent himself had been mistaken about policy's collateral value. He recommended a refund of investment but insurer refused;
- ✦ Ruling on pre-contractual misrep: R100000 plus interest to be refunded.

MISSELLING

- ↳ Giving bad/inappropriate advice leading to action of client;
- ↳ Could be a misrepresentation at same time;
- ↳ Remedy – put client in position he would have been in if appropriate advice;
- ↳ Disputes of fact often occur in complaints;
 - Resolve on probabilities where onus can be decisive;
 - Occasional hearings.

DETERMINING APPROPRIATENESS OF ADVICE

- ↳ To be determined objectively at time of investment not with wisdom of hindsight.
- ↳ Take into account personal circumstances of client and purpose of policy;
- ↳ Other circumstances surrounding case;
- ↳ Determine whether client made an informed choice – were risks etc. explained?

MISSELLING : LIVING ANNUITY

CASE STUDY 2

- ↙ Client early retired age 60 in 1998;
- ↙ R445235 (only retirement money) used to purchase living annuity on advice of representative;
- ↙ Client drew 18% of fund value as annuity;
- ↙ Repeatedly requested assistance – only advice given was about changing portfolios;
- ↙ At time of complaint the fund value had dropped to R259000;
- ↙ No documentation explaining risk;
- ↙ No documentation showing that risks of product explained;
- ↙ No response from adviser to statement that 18% draw was not sustainable;
- ↙ Remedy: conventional annuity purchased equal to what could have been purchased at inception.

Subsequently LOA Code became applicable.

MISSELLING – OFF SHORE INVESTMENTS

CASE STUDY 3

- ↳ Client retrenched – pension package of R782924;
- ↳ In September 2000 after advice from broker, invested in preservation fund; in equity international portfolio; no guarantee;
- ↳ March 2003 value dropped to R485058;
- ↳ Client alleged that he was assured that investment was safe;
- ↳ He had been in guaranteed option in pension fund;
- ↳ This money was only source of retirement income;
- ↳ Intermediary had been lulled by insurers with material stating very high growth and low risk and telephonic assurances.

CASE STUDY 3 (Cont.)

Finding after hearing:

- ↪ Mandate had been to invest in a safe investment, without risk. Client understood this to mean capital was secure;
- ↪ Given assurances – although no capital guarantee given, that investment was risk free;
- ↪ Although broker acted in good faith he had not given appropriate advice/not acted in terms of mandate.

COMPLAINT TRENDS IN MISSELLING

- ↳ Living annuities;
- ↳ Offshore investments;
- ↳ Universal policies.

Future

- ↳ ? New generation risk products (switching)
- ↳ ? New generation guarantee products (switching)

COMPLAINT TRENDS IN MISSELLING (Cont.)

Common Denominator

- ↘ New type of risk for client – “fundamental shift”;
- ↘ Living annuities – investment risk periodic investment decision;
- ↘ Offshore investment – currency risk possible “mismatch”;
- ↘ Universal policy – investment risk, periodic review required.

SUGGESTIONS FLOWING FROM THIS EXPERIENCE

- ↘ Full understanding of product by intermediary; know when you are out of your depth; rely on experts.
- ↘ Assess whether a new kind of risk for client. If so appreciate consequence.
- ↘ Resist the upside, look on downside; ask “what if...”; beware of marketing material and hard sell.
- ↘ Apply Durr v Absa Bank Limited & Another.