TOWARDS AN ACTIVE ENFORCEMENT OF THE "NO PREMIUM, NO COVER" PROVISION OF THE INSURANCE ACT 2003 *

Abstract

The insurance sector in Nigeria has great potential for growth. This is having regards to the country's huge population advantage and other deliberate policies of the government which are designed to specifically grow the sector. Despite these obvious advantages, the insurance sector in Nigeria has remained relatively stagnant; the chief reason being huge and mounting unremitted insurance premiums. Although *section 50(1)* of the Insurance Act 2003 forbids selling insurance policies on credit, the section was observed more in breach than in obedience. It is therefore heartwarming to note that the insurance regulator, National Insurance Commission (NAICOM) has since 2013, begun active enforcement of the *section* 50(1) of the Insurance Act 2003. NAICOM has demonstrated its readiness to enforce the said provision of the Insurance Act 2003 by issuing and releasing to the insurance industry in Nigeria, specific guidelines on premium collection and remittance. Given effective supervision of the insurance institutions by the regulator and maximum stakeholders' cooperation, it is anticipated that enforcement of section 50(1) of the Insurance Act 2003 will assist the insurance industry in Nigeria to ultimately address the menace of unremitted insurance premiums which has plagued the sector for decades.

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Introduction

For over two decades, the insurance industry in Nigeria struggled under the burden of unremitted insurance premiums. This burden grew even worse in the last ten years. For instance, figures available at NAICOM as at 31st December, 2010 showed over ₦55billion as unremitted premiums. While the industry reported huge gross premium income; many insurers continued to make large amounts of provision for bad debts with little or no evidence of actual collection of the premiums previously provided for. Besides, NAICOM observed increasing disparities between what insurers claim were due from brokers and what brokers agree were actually due to insurers.[1] This state of affairs did not only aggravate the credit risk of insurers, but also introduced uncertainty in the market as to the capacity of insurers to meet their obligation to insurance policyholders and other stakeholders.[2]

While prompt settlement of claims presupposes that insurers receive full premium in advance, advance receipt of premiums allows insurers to keep and maintain necessary statutory reserves out of which claims settlement can be effected. Therefore, granting cover on credit diminishes the ability of the insurer to build and maintain the required statutory reserves, and such insurer, at best, becomes illiquid, and at worst, insolvent.

Although the provision currently encapsulated in section 50 of the Insurance Act 2003 has existed for over two decades[3], the government had been rather reluctant to enforce it in the past. A cursory explanation for the observed reluctance might be that the law did not provide any sanctions for

[1]See Preamble to Draft NAICOM's Guidelines on Premium Collection and Remittance, 2013

[2] Fola D., 'Challenges and Opportunities in the Insurance Sector', [2012], Journal *of Insurance Law and Practice*, (Vol.2, No.2), 3.

[3] The *No Premium, no cover* provision was introduced for the first time in 1991. See Insurance Decree No. 58 of 1991 (Now repealed), section 37.

non-compliance with the *No premium, no cover* provision. It is therefore gratifying that NAICOM has risen up at this time to the responsibility of enforcing the provisions of section 50 of the Insurance Act 2003.

This writer is of the view that successful enforcement of the *No premium, no cover* provision will require that the various stakeholders understood their obligations both under the Insurance Act 2003 and NAICOM's Guidelines on Insurance Premium Collection and Remittance. This article provides some guidance on the above. It begins by tracing the evolution of the *No premium, no cover* provision in our insurance laws and establishes the current position through case law analysis. It also highlights the obligations of the various stakeholders in the initiative.

For proper grasp of the subject- matter of discussion, it is considered apposite to begin this article by exploring the meaning and determinants of insurance premium.

Insurance Premium: Meaning and Determinants

Premium is the price required of the insured in return for which the insurer undertakes his obligation under a contract of insurance.[4] Premium is an essential ingredient of a binding insurance contract, and insurance contract will be void without payment of premium.[5]

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[4] MacGillivery & Parkington, *Insurance Law,* 6th ed. London, Sweet & Maxwell, 1975, 970

[5] See *Charles Chinwe v. United Nigeria Co. Ltd.* (1972) 2 ECSR, 808.

Parties to a contract determine what price they would pay. In other words, the adequacy of premium paid by the insured is not the concern of the law. What is important is that the insured paid the agreed amount of premium.[6]

The rate of premium payable in respect of every insurance transaction is a matter within the absolute discretion of the insurer.[7] In fixing the premium, the insurer takes into consideration the nature of the risk involved, management expenses, commission payable to intermediaries and a profit margin.

Having established the meaning and determinants of premium we shall proceed to explore the rules relating to payment of premium. In doing this, two major epochs are considered. The first is the period before 1991 and the other is the period after 1991.

Pre 1991

Under the general law, unless in the case of an express provision in the contract, it is not a condition for insurance contract that premium must be paid in advance. All is dependent on the agreement of the parties. It would be enough if the insured or his broker undertakes that premium will be paid sometime in the future. In Wooding *v. Monmouthshire and South Wales Mutual Indemnity Society Ltd*.[8], the court in England observed that a contract of insurance may involve merely a promise by the assured or his broker to pay the premium. This principle was recognized by courts in Nigeria and was followed up till 1991.[9]

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[6] Fumi A., *Insurance Law in Nigeria,* Lagos, Dalson Publications, 1992, 48
[7] Ibid.
[8] (1939) 4 All E.R. 570
[9] See Footnote 3

A practical application of the principle by the court in Nigeria can be found in *National Insurance Corporation of Nigeria v. Power & Industries Independent Engineering Co. Ltd.*[10] The court held that a contract of insurance may involve a promise to pay the premium and the right of insurer to indemnify is not conditional on payment of premium.

The principle upon which the above case was decided greatly encouraged granting cover on credit by insurers in the late 70s and early 80s. Soon, managing outstanding premium between insurers, intermediaries, and policyholders became cumbersome. Underwriters began to carry huge outstanding premiums in their balance sheet, and increasingly unable to meet their obligations to the policyholders. In an attempt to address this challenge, in 1982, with the approval of the Director of Insurance,[11] insurers introduced a clause known as *Premium Payment Warranty* which was incorporated in all policies of insurance. A typical premium warranty clause stipulated that premium paid through a broker or an ordinary agent must be paid to the insurance company within a period not exceeding 60day and 30days respectively. Non-compliance with the warranty rendered the cover granted by the policy null and void and retrospectively from the date of commencement of cover.

As Adeyemi observed,[12] the premium warranty clause was never entirely in the interest of the insurer since it did not give the insurer the right to claim premium on a *quantum meruit* basis covering the short period of insurance. Indeed, under the warranty, insurers did not reserve the right to recover from the insured or his broker, an amount equivalent to the management expenses incurred on the ill-fated transaction.

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[10] (1986) 1 NWLR (Pt. 14) 1
[11] The Department of Insurance was then in the Federal Ministry of Finance
[12] Fumi Adeyemi, *op.cit.*, 48

Post 1991

Towards addressing the above challenge on a lasting basis, in 1991, following the Indian and Pakistani examples,[13] Nigeria introduced a statutory modification of the common law rule relating to payment of insurance premium via the provision of section 37 of the Insurance Decree of 1991[14] which provided thus:

> *The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance*

From thence, it became a condition for all insurance contracts in Nigeria that payment of premium must be made in advance. The *No premium, no cover* provision featured as section 50 of the Insurance Decree of 1997[15] and, now section 50 of the extant Insurance Act 2003.

Section 50 (2) of the Insurance Act 2003 provides that *an insurance premium collected by an insurance broker shall be deemed to be premium paid to the insurer involved in the transaction.* This provision enacted as law, as it relates to insurance brokers, the premium warranty earlier introduced into the market by the insurers.

Below, we present analysis of some judicial decisions based on section 50 of the Insurance Act 2003 and related provisions in the previous Insurance legislations. The aim is to throw light on the current applicable principles on the subject-matter of discussion.

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[13] India and Pakistan had at different times prior to 1991 introduced similar provisions in their Insurance laws.
[14] See footnote 3
[15] See Insurance Decree No 2 of 1997 (Now repealed), *section* 50

Judicial Interpretation and Current Principles

The *No premium, no cover* provision has frequently been the subject of judicial interpretation. Happily, the law has become fairly settled on the following points.

Premium must be paid in advance

The primary issue which has been laid to rest from court decisions is the time for payment of insurance premium. For a binding cover, premium must be paid in advance. In *Ajaokuta Steel vs. Corporate Insurance Limited*,[16] it was held that there is no contract at all unless premium has been paid in advance.

It goes without saying therefore that any contract entered into without payment of premium in advance is illegal, null and void and the insurer is not bound to settle claims occurring when the contract is not recognised in law or null and void.

Installmental payment of premium prohibited

Section 50(1) does not contemplate installmental payment of premium in an insurance contract. In *Leadway Assurance Co. Ltd v Kechinyere Adaogu*,[17] the insured made part-payment of the premium at the beginning. Loss occurred a few months later but while the balance of the premium remained outstanding. The insured completed payment thereafter and put up a claim which the insurer repudiated for non compliance with section 50(1) of the Insurance Act 2003. Although the insured succeeded at the lower court, but on appeal, the Court of Appeal held that the contract was

[16] Judgment of the Court of Appeal (Abuja Division), Appeal No. CA/A/M/2002, Judgment delivered 29th April, 2004.
[17] Judgment of the Court of Appeal (Abuja Division), Appeal No. CA/A/96/07.

null and void for failure to comply with section 50(1) of the Insurance Act 2003. The court held also that there is no contract until the full premium has been paid by the insured, and since the loss occurred before the full premium was paid by the insured, the loss was not covered.

Section 50 of the Insurance Act 2003 applies to all insurance businesses

In the past, it was assumed albeit erroneously, that given the peculiar nature of Marine Insurance business, the *No premium no cover* provision did not apply to marine insurance policies.[18] The basis for this assumption, however, was demolished in *Leadway Assurance Co. Limited v. Jombo United Company.*[19] The facts of this case are briefly stated below. Plaintiff sued the defendant company at the Federal High Court Port Harcourt, and claimed against the defendant the sum of ₦32, 482,240. 00, as damages for breach of contract. The defendant contested the suit on the ground that there was no valid contract between the parties. The loss occurred before payment of premium and the defendant was entitled under section 50 of the Insurance Decree of 1997to repudiate the loss. Judgment was given in favour of the plaintiff. Delivering his judgment the court held that the subject matter of this suit being Marine Insurance, section 50 of the Insurance Decree 1997 did not apply to it. According to him it is section 23 of the Marine Insurance Act Cap 216 of 1961 that applied. Section 23 of the Marine Insurance Act provides:

> *A contract of Marine insurance shall be deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy is then issued or not; and for the purpose of showing when the proposal was accepted reference may be made to the slip or covering note or other customary memorandum of the contract*

[18] *National Insurance Corporation of Nigeria v. Power & Industries Independent Engineering Co. Ltd. Supra*
[19] LER (2004) CA/PH/127/2002

On appeal to the Court of Appeal, it was held that section 50 of the Insurance Decree 1997 applied and that a Marine Insurance contract cannot be concluded before payment of premium.

Parties cannot by agreement circumvent section 50(1) of the Insurance Act 2003

Under the general law of contract, neither party can sue upon a contract if: (1) both knew that it necessarily involved the commission of an act, which to their knowledge, is legally objectionable; that it is illegal or otherwise against public policy; or (2) Both knew that the contract is intended to be performed in a manner which to their knowledge is legally objectionable in that sense; or (3) the purpose of the contract is legally objectionable and that purpose is shared by both parties; or (4) Both parties will be performing the contract in a manner which they know to be legally objectionable.[20]

In *Ajaokuta Steel Co. Ltd & 2 Others v. Corporate Insurance Ltd*,[21] the Court of Appeal held per Oguntande JCA, that any contract by parties to circumvent the provision of section 50 of the Insurance Act 2003 is ex facie illegal and unenforceable by the court. Also Oduyemi JCA, relying on Halsbury's Laws of England 4th edition, volume 9, Article 422, held in the same judgment, that a contract which is entered into with the object of committing an illegal act is not enforceable at all.

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[20] Chitty J., and Beale H.G., *Chitty on Contracts – General Principles*, 27th ed. London, Sweet & Maxwell, 77, See also *Alao v. ACB* (1998) 2 NWLR (Pt 542) 339

[21] (2004) FWLR (Pt 235) 189

Having noted the current applicable principles relating to payment of insurance premium we may now proceed to consider some relevant provisions of the NAICOM's Guidelines on Premium Collection and Payment.

Guidelines on Insurance Premium Collection and Remittance

The high points of the NAICOM's Guidelines on Premium Collection and Remittance (the guidelines) may be summarized as follows.

1) All insurance covers are to be provided on a strict *No premium, no cover* basis.
2) Cover may sometime be granted on time-on-risk basis, but underwriters must ensure receipt of premium before granting cover.
3) Only cover for which payment has been received, directly by the underwriter or indirectly through a duly licensed insurance broker, shall be recognizable as income in the books of the insurer.
4) Any insurer, who grants cover without having received premium or premium receipt notification from the relevant insurance broker, shall be liable to a fine in the sum of ₦50, 000 in respect of each cover so granted.

The question that readily comes to mind with respect to the last bullet point above is the capacity of the Commission to punish for non-compliance with section 50(1) of the Insurance Act 2003, when the provision itself does not contain any sanction for non-compliance. A ready answer to

this poser may be found in various provisions of the *Insurance Act 2003* and the *National Insurance Commission Act 1997*. In particular, *Section 86* of the *Insurance Act 2003* provides that the administration of the Act shall be NAICOM's responsibility. To this end, section 101 confers on NAICOM, power to make rules and regulations generally for the purposes of giving effect to the provisions of the Act. Likewise, the *National Insurance Commission Act 1997* gives NAICOM power to issue guidelines for insurance institutions. It is even significant to note that a person or institution which fails to comply with any guideline issued by NAICOM is guilty of an offence and liable to a fine of not less than ₦250, 000.[22]

On this note we proceed to consider the obligations of the various stakeholders towards the success of this endeavour.

Obligations of Stakeholders

a) Insurers

NAICOM requires information on premium acknowledgement and remittance by brokers. Except such information is forwarded to NAICOM on regular basis or as needed basis, it might be difficult to achieve enforcement of the *No premium, no cover* provision. Accordingly, the guidelines require that:

[22] *Section* 49 (5)

1) All insurers not later than 30 days from the end of every quarter to notify NAICOM of all premiums acknowledged as having been received by brokers but not remitted to them on quarterly basis.[23]
2) Any insurer who fails to render this return shall be liable to a fine in the sum of ₦5, 000 for each day of default.[24]
3) Where premiums are paid to a Lead insurer in the case of co-insurance, the lead insurer shall act as if it were a broker as prescribed in clause 5 of the Guideline.[25]
4) A Lead Insurer who fails to notify all co-insurers of any premium received on their behalf shall be liable to a fine of not less than ₦250, 000 in each case of failure to notify.[26]
5) A lead insurer who fails to remit to other co-insurers, premiums received on their behalf within 30 days of receipt shall be liable to a penalty of 10 times the amount of premium not remitted.[27]
6) All insurers upon the receipt of credit notes from broker, to issue cover and forward the policy documents along with the related debit notes to the insurance broker[28]
7) All remittances by insurers of reinsurance premiums to reinsurers shall be in accordance with the terms of the reinsurance contract.[29]

[23] *Guidelines on Premium Collection and Remittance*, Par.8
[24] *Ibid.*
[25] *Ibid*. Par.6
[26] *Ibid.*
[27] *Ibid*. Par.7
[28]I*bid*. Par.5
[29] *Ibid*. Par. 10

8) Evidence of such remittances to reinsurers by the insurer shall be a condition for determining admissibility of reinsurance debtors in the insurer's financial statement.[30]
9) All premiums for all local facultative premiums should be paid within 14 days of receipt of premium from brokers or insured.[31]

Insurance Brokers

In relation to Insurance brokers, the guidelines amplify *Section 50(2)* of the *Insurance Act 2003* which provides that insurance premium collected by an insurance broker in respect of an insurance business transacted through the insurance broker shall be deemed premium paid to the insurer involved in the transaction.

The section thereby constitutes the broker a statutory trustee in relation to the premium. Unless insurers are notified by brokers of the receipt of premiums on their behalf, insurers are exposed to being presumed to be on cover in respect of risk which they may not have had the opportunity to document.

For the intent of *Section 50(1)* to be served, the broker must remit the premium to the insurer in good time. Accordingly, the guidelines require:

1) All insurance brokers within 48 hours of receiving insurance premium on behalf of any insurer, shall notify the insurer in writing in each case.[32]

[30] Ibid.
[31] *Ibid.*, Par. 11
[32] *Ibid.*, Par. 5

2) All such notification shall be accompanied by the broker's credit notes acknowledging indebtedness to the insurer (or insurers in the case of co-insurance)[33]
3) An insurance broker who fails to notify the insurer of any premium received on his behalf shall be liable to a fine of not less than ₦250, 000 in each case of failure to notify.[34]
4) Insurance brokers shall, not later than 30 days from the end of every quarter, render to NAICOM returns of premiums received and unremitted to the insurers on quarterly basis. Any insurance broker who fails to render this return shall be liable to a fine in the sum of ₦5, 000 for each day of default.[35]

The Policyholders

Avoiding unnecessary pitfalls in securing cover for their interests requires that policyholders, whether individuals, companies, or government should note the current position of the law and practice. The current position is summarized as follows:

1) Full premium must be paid in advance.
2) Any agreement to pay installmental premium is illegal, null and void.
3) Any insurance policy (marine certificate, cover note, GIT certificate, motor insurance certificate, and Group Life Insurance certificate) issued by an insurance company without receiving full premium in advance is illegal, null and void.

[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*

4) Short period cover (Time-on-Risk cover) can be arranged but full premium must be agreed and paid in advance.
5) Part-premium paid by the insured to the insurer can be recovered in the event that loss is repudiated for incomplete payment
6) Payment of premium can be made through a broker.
7) Receipt of premium by *licensed* insurance broker is deemed to be receipt of same by the insurance company.
8) Backdating of cover is illegal, null and void.
9) Credit facility to pay off insurance premium in advance may be necessary if the insured is facing cash flow challenges.
10) Government ministries, agencies and parastatals may consider revising their insurance year to make sufficient room for budgetary process.

General Requirements for Insurers and Brokers

The general provisions in the guidelines relate to transition arrangement and reporting penalties in the financial statement. Insurers and brokers are required to carry out a reconciliation of their accounts and ensure that all unremitted premiums are paid over to insurers and reinsurers as the case may be.[36]

[36] *Ibid.*, Par. 9

Also in line with the requirement of the IFRS regime, all penalties imposed on an insurance operator pursuant to the guidelines must be disclosed in annual financial statements and reported to shareholders.[37]

Conclusion

The government's resolve to begin strict enforcement of the *No premium, no cover* provision of the Insurance Act 2003 is a step in the right direction. The initiative will go down as another development driver provided by the Federal Government through NAICOM for insurance development in Nigeria.

However, the success of this initiative will depend to a large extent on how it is implemented. As the critical driver of this initiative, NAICOM must go beyond mere releasing of guidelines and take practical steps to identify and appropriately sanction erring insurance institutions. This requires that NAICOM must have a robust compliance platform.

Strict enforcement of the *No premium, no cover* provision of the *Insurance Act 2003* can help insurance work for Nigeria if only the stakeholders will lend their support.

[37] *Ibid.*, Par. 13