WHAT ABOUT MY EXCESS?

BACK TO MENU

The Ombudsman's Office receives a very substantial number of complaints from members of the public in regard to the recovery of "**excesses**" or "**first amounts payable**" in terms of insurance policies. The complaint comes most often in regard to an accident claim where the Insured is of the view that on the merits of the accident, the accident was entirely the fault of the other party, and he or she does not see under those circumstances why the excess under his policy should not be refunded by somebody.

Whilst this is a very natural view it demonstrates a misunderstanding of the nature of an "**excess**" and this misunderstanding is sometimes contributed to by the Insurer concerned.

The true nature of an excess is this - the Insured himself agrees to bear a certain proportion of the loss, or a certain amount of his loss in respect of every claim. There can be various types and various amounts of excesses depending on the circumstances of the claim, the nature of the loss, the age of the insured driver, etc., but in principle they all have the same attribute - i.e. that in respect of the amount of the excess or excesses, the Insured does not in fact carry any insurance at all. **He or she is in exactly the same position in regard to that excess as if he or she had not taken out any Insurance Policy.**

This means of course that if his loss was caused by somebody else's negligence, then he or she has a perfect right subject to the authority of the Insurer to sue that person, (usually the other driver or the owner of a car whose employee drove negligently), in order to recover his loss. What he or she is not entitled to do is to compel the Insurer to try to recover that loss, or to put his or her Insurer under any duty whatever to assist in recovering the outlay.

However, that is perhaps oversimplifying the position, because in fact in many cases the Insurer will want to recover its own outlay - that is the amount which it has had to pay its own Insured, and it is entitled by virtue of a doctrine called **subrogation** actually to institute proceedings in the name of its Insured against any negligent third party in order to endeavour to recover that outlay. Since duplication of action is not permitted, the Insurer will often agree with the Insured, that since it is going to sue the third party anyway in the Insured's name, it will add to the claim the amount of the Insured's excess and that if it can recover this amount the Insured in due course will be recompensed.

It is essential and in the best interests of both Insurer and the Insured, that if this happens the nature of the agreement must be fully understood by both parties. It is usually to the advantage of the Insured that he or she be permitted to "**ride on the Insurer's back**" in regard to the institution of legal proceedings against the third party, because he or she then does not take the risk of legal costs which are incurred. In return for that the Insurer will probably require and insist that the Insured understands that the Insurer will retain the right throughout to discontinue the proceedings, to settle them in any way it wants and that the Insured will only get the excess back if what the Insurer recovers covers not only its own capital outlay, but all costs which have been incurred, as well as the excess. In practice, it very seldom happens that the Insurer in fact recovers "**all**" its costs.

Where the excess is substantial the Insurer and Insured will sometimes agree that what is recovered from the third party will be shared proportionately, but this does not automatically follow in the absence of an agreement.

An Insured who seeks to recover the excess from the third party must therefore first ascertain whether the Insurer is in fact going to attempt to recover its outlay, and if the answer to that is 'yes', then he or she must negotiate with the Insurer on the basis of the excess being included, and exactly under what circumstances he or she can expect to get

back the excess from what is recovered by the Insurer.

If the Insurer indicates that it does not intend to attempt recovery, then this may be by virtue of what the Industry calls a "**Knock-for-Knock**" agreement between Insurers of the respective vehicles, although this is usually dealt with directly by the Insurers concerned), or it may be because the Insurer does not consider that the third party was negligent, or was totally negligent, or does not consider that the financial position of the third party warrants expenditure and risk of legal costs.

All these decisions are decisions which the Insurer is perfectly entitled to make and it is true that making a decision on that basis leaves the Insured "**in the cold**" as far as the recovery of excess is concerned.

However, to go back to the beginning, this does not then prevent the Insured, if satisfied that the accident was due to the other party's negligence, and he or she is prepared to take the risk, from suing the third party for the recovery of the amount of his or her excess, with the agreement of the Insurer.

The Insured's task in this connection is made very much easier in nearly all cases now, by the existence of the **Small Claims Court Act**.

The Small Claims Court is dealt with in another Memorandum, but basically it has jurisdiction to deal with all claims where **less than R7,000** is involved. The parties are not represented and therefore do not incur legal costs, and irrespective of the result the costs which can be incurred are limited to the costs of service of the Summons and process of the Court.

The procedure is also a lot more simple and swift than in the ordinary Court.

So, in summary, and generally speaking, your Insurer is not doing anything wrong or unethical in not acting so as to try to recover your excess for you, but if it does not itself take action, then there is absolutely nothing to stop **you** from trying to recover it yourself.