THE ROLE OF POLICYHOLDER PROTECTION IN RELATION TO MOTOR THIRD PARTY LIABILITY IN KENYA

WORLD BANK/IFC GLOBAL INSURANCE CONFERENCE, WASHINGTON D.C.

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1 – 2 June, 2011
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INTRODUCTION
Motor Third Party Liability (MTPL)

Under the Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405 Laws of Kenya, which regulates Third Party risks, it is mandatory for everyone operating a motor vehicle on a public road in Kenya to obtain minimum third party insurance cover for liabilities in respect of death or bodily injuries to third parties.

The spirit of the Act is heavily borrowed from the Road Traffic Act enacted in Britain in 1930.

Kenya, being a commonwealth country also prescribes to Common Law.
CHALLENGES IN MOTOR THIRD PARTY LIABILITY (MTPL)
Challenges Faced in MTPL

- Motor insurance premium rate determination and monitoring continue to be a challenge due to the following:
- Lack of integrated data and co-operation between the insurance industry and the traffic enforcement agencies has also led to increased fraud.
- Claims management procedures within the insurance companies which are lengthy and not consumer friendly.
- Disparity in policy offerings due to variation in policy contract wording.
- Under the Common Law, there were unlimited levels of compensation for third party injuries and therefore exposure on the insurers - unlimited exposure with a limited capital base led to the instability of the companies.
Challenges Faced in MTPL – PSV - I

A number of insurance companies offer insurance cover to Public Service Vehicles (hereinafter referred to as ‘PSV’S’), to ensure compliance by motor vehicle owners with the provisions of Cap 405.

The companies have however, faced enormous challenges in the underwriting of PSV insurance business a situation that has from time to time threatened to destabilize the entire insurance industry.

PSVs operates in all localities with little regulation and their mode of operation led to disorder and increase in accidents. This has made insurers reluctant to underwrite this business as a result of high loss ratios.
Challenges Faced in MTPL – PSV - II

In due time, insurers opted to form a voluntary pool to handle PSV business, an initiative that failed in 1984.

This led to a crisis in the country, as there was no insurance provider for compulsory motor third party insurance.

As a result of this lacuna, the Government introduced a second compulsory motor pool in 1985 which also failed and was abolished in 1989.

After the collapse of the pools, a few private insurance companies started to underwrite this class of business besides other conventional insurance. These companies faced various challenges in respect of PSV underwriting and have all since collapsed - Eight (8) companies between 1992 and 2009.

Currently only about five (5) companies are providing this insurance.
Challenges Faced in MTPL – PSV - III

The main contributory factor to the challenges in PSV underwriting is the unregulated nature of *matatu* operations which has led to indiscipline and as a result continual increase of road accidents.

Malpractice and fraud – this is perpetrated by a syndicate of fraudsters comprised of ambulance chasing lawyers, medical doctors, private investigators, insurance companies’ staff, shareholders, claimants, law enforcement agencies and the Judiciary.

Lack of a structured benefits scheme for various injuries leading to victims invariably seeking legal redress under common law, which is an opening for the fraud and ambulance chasing referred to above.

Cap 405 which imposes strict liability on the insurers issuing auto third party liability covers. The fact is that the owner of a PSV has no obligation to do anything to mitigate the risk. The insurer cannot avoid liability even in the case of breaches of warranties or policy conditions by the insured – a very odd scenario which precludes the vehicle owner from taking up responsibility as a stakeholder.
Responses to Challenges in MTPL

- Pursuing a change in policy in PSV underwriting.
- In the meantime, issuance of Motor Premium Guidelines to ensure that the rates are more commensurate to the risk.
- Proposed introduction of a structured compensation scheme in order to make the compensation process more transparent for the third party, the bar, the Judiciary and the insured as well as the insurer.
- Supporting the implementation of an Integrated Data Management System being set up through the insurance association.
- Country assessment of MTPL insurance market and risk management practices in order to prepare a road map to move from a fixed rate tariff regime to a risk based tariff regime.
- Arising from the challenges faced when insurance companies collapsed, the Policyholders Compensation Fund (PHCF) was set up in 2005.
POLICYHOLDERS PROTECTION SCHEME: 
THE KENYAN EXPERIENCE 
(POLICYHOLDERS COMPENSATION FUND)
The Fund was established for the primary purpose of providing compensation to the policyholders of an insurer that has been declared insolvent and was operationalized in January 2005.

Its’ secondary purpose is that of increasing the confidence of the general public in the insurance sector.

The decision to establish the Fund was informed by the collapse of several MTPL insurance companies prior to the year 2005.

The Fund is set up as a trust under the Insurance Act and is managed by a trust board with representation from the insurance industry and independent members. The Commissioner of Insurance also sits on the board.

The compensation scheme is funded through contributions charged as a levy on insurance premiums. The policyholders and the Insurance Companies each contribute 0.25% of the premium payable therefore making the total contribution paid into the Fund 0.5% of each premium.
Structure of the Policyholders Compensation Fund II

- Contributions are payable monthly and are due within one month after the end of the month in which they relate.
- The contributions are invested in Government Securities.
- The Fund shall only pay compensation when an insurer has been wound up and the Board, in consultation with the Minister, determines from time to time the amount payable as compensation for different types or classes of insurance policies.
- In the meantime, the compensation level is set at Kshs. 100,000/= (approximately USD$ 1,100)
- No payments have been made out of the Fund as yet but the fund is set to undertake an actuarial valuation.
Challenges Faced by the PHCF

- The current legal framework does not provide clear structures for when to trigger compensation and the amount payable, as there is no clarification as to whether compensation is on a ‘claim’ or ‘policy’ basis.

- There is no payment experience to date due to a lack of clear definition of when insolvency applies.

- The contribution structure has been criticized for involving policyholders to provide for their own protection and insurance companies to shell out for poor governance in their counterparts.

- The revenue base is not sufficient to provide adequate compensation or protection but currently offers a very basic safety net.

- The policyholders that can be compensated are limited in Law.

- The Fund operates without a knowledge of the real risk exposure.

- The areas of exposure for the fund are not targeted to the most vulnerable policyholders, which was the intended spirit of the Law.

- The Fund currently does not have powers in respect of the liquidation of insurance companies or winding down of closed funds/businesses which are additional responsibilities that may be beneficial to the insurance industry.

- Slow judicial processes for the winding up of insurance companies and the value of the compensation amount is also eroded over time.
CONCLUSION
Conclusion

The challenges attributable to the management of motor vehicle third party liability are not isolated to Kenya. This risk has been categorized as a special risk by many countries and has been managed outside conventional insurance.

Consequently, many jurisdictions in the world grapple with this problem and there are a variety of ways in which the same has been dealt with ranging from the use of fuel levies for compensation to unregulated risk management by the insurance industry.

In Kenya, the escalating claims cost for motor third party liability continues to result in higher premiums. This has a negative effect on the insured, as well as, the victims who would be left without recourse if a motor vehicle owner is uninsured or an insurance company goes under without attending to their claim.

For this reason the Government of Kenya through the Authority must continue to pursue the most prudent management of the Motor Insurance class of business as well as ensure stability in the insurance industry.
Conclusion

The regulation of insurance business, as with any other pillar of the financial sector, must provide balance between giving the providers of financial services the tools to thrive, thereby improving service delivery and spurring economic growth, and protecting the consumers of the financial products and services.
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Questions & Comments Welcome