OPERATION OF SECTION 50(1) OF THE INSURANCE ACT: Insurance Market Practice as to Premium Collection[1]

Introduction

1. The implications of Section 50(1) of the Insurance Act, 2003[2] have been the subject of much debate in recent times. This article seeks to critically examine the legal issues and market practices as regards the collection of insurance premiums in Nigeria. In addressing the foregoing, the following authorities have been considered in turn:

   1.1 Insurance Act 2003 (the Act);

   1.2 National Insurance Commission (NAICOM) Act (NAICOM Act);

   1.3 National Insurance Commission (NAICOM) Guidelines 2013 (NAICOM Guidelines); and

   1.4 Nigerian case law

Definition of a Premium

2. According to the *Black's Law Dictionary*, 'Premium' is 'the periodic payment required to keep an insurance policy in effect'.[3] Similarly, the word 'premium' has been used frequently to denote the annual payment for keeping an insurance policy.[4] It can also mean "a lump sum payment in composition of future annual premiums on an insurance policy".[5] Having considered the definition of the word 'premium', it is imperative to consider the position of Nigerian law on the payment of premium.

The Position of Nigerian Law on Payment of Premium: Section 50(1) of the Insurance Act

3. Section 50 (1) of the Insurance Act 2003 provides that "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."[6]

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[1] Adedamilotun Aderemi, Adebola Ogunsanya, Tomi Fadoju and Joseph Onele
[2] Insurance Act, Cap. I17, Volume 7, Laws of the Federation of Nigeria (LFN), 2004
[3] Bryan A. Garner, *Black's Law Dictionary*, Ninth Edition (2009), West Publishing Co., Thomas Reuters, United States of America, p. 1300.
[4] *Stroud's Judicial Dictionary of Words and Phrases*, Seventh Edition (2006), Volume 3 (P-Z), Thomson, Sweet & Maxwell, London, p. 2105; see also *Walter v. Everard* [1891] 2 Q.B. 369.
[5] *Stroud's Judicial Dictionary of Words and Phrases*, Ibid. p. 2105; see also **Re Oakes' Settlement** [1951] Ch. 156.
[6] Section 50(1) of the Insurance Act, Cap. I17, Volume 7, Laws of the Federation of Nigeria (LFN), 2004. It should be noted that section 50(2) of Insurance Act provides that payment to an insurance broker will be deemed to be payment to the insurer.

4. It is pertinent to note that Paragraph 4 of the NAICOM Guidelines 2013 provides that all insurance cover shall only be provided on a strict ‘no premium no cover basis.’ It further stipulates that “only cover for which payment has been received, directly by the Insurer or indirectly through a duly licensed broker, shall be recognisable as income in the books of the insurer”.[7]
5. The intention behind the introduction of the guidelines is to protect the solvency of the Insurance industry and curtail the exposure of insurers to liability in respect of premiums which have not been received.
6. Paragraph 4 of the NAICOM Guidelines 2013 also provides that “any insurer, who grants cover without having received premium in advance or premium receipt notification from the relevant insurance broker, shall be liable to a penalty in the sum of N500, 000 in respect of each cover so granted, and in addition, may be a ground for suspension of the license of the Insurer.”[8]
7. Based on the consideration of the provisions above, there is little room for doubt that the receipt of an insurance premium is a condition precedent to a valid contract of insurance. It is equally incontrovertible that unless premium is paid in advance, there can be no cover for an insurance risk. As can be gleaned from Section 50(1) of the Insurance Act, a valid insurance contract comes into existence only when a premium for the insurance is paid for in advance by the insured. However, the question of whether such advance payment must be in full is still the subject of debate.

Should Advance Payment be made in full?

8. it has been argued by some insurance practitioners that advance premiums may be paid in part if contemplated by the parties; that where parties contractually decide to pay advance premiums in part, such payments will not fall afoul of Section 50 (1) of the Insurance Act. However, one may be tempted to say that this argument is inconsistent with the provision of Paragraph 5 of the NAICOM Guidelines 2013, which provides that irrespective of the period of insurance, insurers are under an obligation to ensure that they have received directly or indirectly, through the Insurance Broker, the full premium in advance for the cover granted.
9. This argument that premium must be paid in full is further fortified by the Court of Appeal’s decision in the case of Industrial and General Insurance Company Limited v.

[7] Paragraph 4 of the NAICOM Guidelines 2013
[8] Paragraph 4 of the NAICOM Guidelines 2013

Adogu.[9] In that case, it was held that Section 50 of the Insurance Act does not contemplate installmental payment of premium in an insurance contract. The Court, per Abba-Aji, JCA held thus:

> "Learned counsel for the respondent also argued that section 50(1) of the Insurance Act does not prohibit payment of premium in part or by installment. With respect to the learned counsel, this argument is also misconceived. If the Section intends to make payment of premium in part or by installment, it would have stated so as what is not stated, is meant to be excluded. <u>Section 50 of the Act does not contemplate installmental payment of premium in an insurance contract</u>."[10] [Emphasis ours]

10. In addition, in Unitrust Insurance Co. Ltd v. Ambico Sendiran Nigeria Ltd[11], the Court of Appeal stated;

> "Where the law is silent on whether the premium shall be paid fully or by installment, the presumption is that it should be paid fully, and this, by virtue of Section 50(1) in advance."

Market Practice as to Premium Collection

11. Some market practitioners have argued that what the Act requires is that the quoted premium, whether annual or short period, must be paid in advance but not necessarily that such payment be made in full.
12. Accordingly, it is the usual practice for most insurers to include a "Time on Risk Premium Payment Clause" in their insurance contracts, which seeks to permit the payment of premium in advance of each cover (installment) period. Another effect of this clause is that each cover period automatically cancels the Policy contract unless the premium is received in advance of any succeeding cover period. Hence, premium is not required to be paid in full, but in advance for the period on risk.
13. This appears to be a clever way to receive 'part-payment' in advance of an insurance cover and yet stay within the limits of Section 50 of the Insurance Act. An illustration of this practice would be where parties enter into an insurance contract for 12 months in

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[9] [2010] 1 NWLR (Pt. 1175) 337 @ 357, paras. C-E
[10] *Industrial and General Insurance Company Limited v. Adogu* (supra).
[11] (2012) 10 CLRN; (2012) LPELR-15417 (CA).

respect of which premium is payable not only in advance but in full. Using the time on risk principle, the insurance cover period could be 4 months subject to renewal for a period not exceeding 12 months with payments to be made in advance and in full for each 4 month cover period.

14. The obiter of Abba-Aji J.C.A In IGI Co Ltd v Adogu[12] can be employed to support this market practice of insurers as it upholds the notion that parties are free to contract how they please and bind themselves to whatever terms they so desire. Accordingly, Abba-Aji J.C.A stated that "It is trite that the parties are bound by the terms of agreement they have freely entered into and the parties of the court cannot legally read into the agreement the terms on which the parties were not agreed and did not agree to". It therefore follows from this argument that parties can stipulate how premium is to be paid in an insurance contract.
15. Nevertheless, while it is agreed that parties are free to stipulate the terms of an insurance contract, it should be noted that such must be done within the confines of the law, especially as regards the issues of premium and cover, which are regulated by a statute.
16. In the light of the statement above, it can be argued that what the law envisages is not part payment but full payment in respect of each cover period no matter the length of the cover. However, it is important to carefully determine whether parties to an insurance contract can indeed, waive the provision of Section 50(1) of the Insurance Act by their agreement.

Can Section 50(1) of the Insurance Act 2003 be waived?

17. The proposition has been put forward that the presumption requiring premium to be paid in advance is one that cannot be displaced by a contract between the insurer and the insured; that not only must premium payments be made in advance, they must be paid in full. Applying the literal rule of interpretation to Section 50(1) of the Act, the point has equally been made that while the insurer and the insured are free to determine the extent and length of their cover and the premiums payable, such premium payable must be for a definite period of cover and must also be paid fully and in advance of that cover.
18. However, some have argued that that the beneficiaries of Section 50(1) of the Act can waive the statutory provision. This argument is further fortified by the celebrated case of

[12] Supra.

Ariori v. Elemo[13], where the Supreme Court, per Eso, JSC answered the question of the extent to which a person can waive the rights conferred upon him by law. In Ariori v. Elemo[14], Eso, JSC stated as follows:

> "*When a right is conferred solely for the benefit of an individual there should be no problem as to the extent to which he could waive such right*. The right is for his benefit. He is *sui juris*. He is under no legal disability. He should be able to forgo the right or in other words waive it either completely or partially, depending on his free choice. The extent to which he has forgone his right would be a matter of fact and each case will depend on its peculiar facts. A simple example could be seen in a right which has been conferred by contract. A person who is a beneficiary to a contract, whereby the benefit is principally for him, has full competence to waive that right. What obtains in the case of a contract should go for benefits conferred by statute. *A beneficiary under a statute should have full competence to waive those rights once the rights are solely for his benefit. The only exception I can think of is where the statute itself forbids waiver of its statutory provisions*." [Emphasis supplied]

19. Based on the foregoing, it has been argued that since a beneficiary under a statute has full competence to waive those rights except where the statute itself expressly forbids such, then, insurance companies, being the beneficiaries of the requirement to pay premiums in advance and in full, should have the liberty to determine the time at which and the extent to which premiums payable.
20. In furtherance of this proposition, it is arguable that the purpose of Section 50 of the Insurance Act and the NAICOM Guidelines is to preserve the solvency of the insurance sector by restricting undue exposure and liability to the insured; a benefit that is obviously exclusive to the insurer.
21. However, it is important to note that there are two types of statutory provisions, namely, mandatory and directory provisions. It is trite that where a statutory provision is mandatory, it cannot be waived, but where it is directory, it can be waived. In Raji V. Oladimeji,[15] it was also stated that the test for determining whether a statutory provision

[13] (1983) 1 SCNLR 1 at 13
[14] (1983) N.S.C.C. Page 1 at 8- 13
[15] (2014) LPELR-22976(CA)

is mandatory or directory depends on whether the provision is meant for the benefit of the state, the general public, the individual or a class of individuals.

22. . In the case of Corporate Ideal Insurance Limited V. Ajaokuta Steel Company[16], the Court held that Section 50(1) of the Act does not confer a right on insurers that may lend itself to a waiver. In the light of the foregoing, it suffices to say that the provisions of the Insurance Act that require the payment of premium as a condition precedent to a valid contract of insurance can only be mandatory but not directional as such provisions cannot be waived, either by the insurer or the insured.

Will Section 50 of the Insurance Act 2003 still apply if the insurer gives the insured a loan? Can an Insurer grant credit to an Insured Person?

23. The questions of whether it is possible for the Insurer to grant credit to the insured and whether Section 50(1) of the Insurance Act will still be applicable where the insurer gives the insured a loan have also been raised.
24. It can be argued that the provision of Section 50 (1) of the Insurance Act does not contemplate the grant of a loan by the insurer to the insured for the payment of premium. While the Insurance Act makes the receipt of an insurance premium a condition precedent to a valid insurance contract, it clearly makes no provision for the grant of loan facilities by an insurance company to cover risks within its portfolio; neither can it be reasonably interpreted to contemplate or validate such a practice.
25. It is pertinent to note that in practice, credit notes are issued by insurance brokers to the insurers, advising insurers to provide insurance for a risk on the understanding that the premium will be remitted within the 30 days stipulated by law. Hence, it is humbly submitted that the receipt of premium at a later date is contemplated and permissible under our laws but only between a broker and an insurer. This however does not achieve the same objective as the grant of a loan by the insurer to the insured.
26. It is worth noting that Preamble 2 of the NAICOM Guidelines 2013 (made pursuant to the Insurance Act and the powers of NAICOM[17] to establish standards for the conduct of insurance business in Nigeria) provides that there shall be no outstanding premium in

[16] Supra.
[17] Section 7 of the NAICOM Act LFN 2004.

the books of any insurer, as covers granted on credit are not recognised under the Nigerian Insurance Law.

27. .It is arguable that the purpose of Section 50 of the Insurance Act[18] and the NAICOM Guidelines is to preserve the solvency of the insurance sector by restricting undue exposure and liability to the insured. It becomes necessary to point out that this is also bad practice, more particularly for the reason that it exposes the insurer to liability on two heads: the first is the liability to pay proceeds on the occurrence of an event specified in the insurance contract before repayment and the second is exposure to the risk of default on the part of the borrower/insured. On the part of the Insured, he would be subjected to loan repayments aside from payments of the premium. The efficacy of such an arrangement is therefore in doubt as it appears to benefit neither party.

Conclusion

28. It is evident from the above analysis of decided cases and the market practice that Section 50(1) of the Insurance Act creates a confinement for insurers that both insurers and lawyers have attempted to evade. The requirement of a full payment of premium in advance is a rigid one that cannot be expanded or bent to accommodate such practices as installmental payments or loan facilities for an insured. Ultimately, the decision as to whether an insurance contract that employs devices such as the "Time on Risk Clause" to elasticise the provision of the law is valid rests with the courts who must be guided by both the Act and the intention of the contracting parties.