The Duty of Utmost Good Faith

Edited by Assunta Di Lorenzo
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About the International Bar Association Insurance Committee

Insurance is present in every facet of commercial, industrial and private life. Lawyers practicing in many different fields encounter insurance and its problems and can greatly benefit from the knowledge which membership of this committee provides.

The Insurance Committee aims to provide its nearly 600 members, and the IBA Legal Practice Division as a whole, with information about developments in insurance and reinsurance law, regulation and markets throughout the world as well as with specialist knowledge to assist in the efficient solution of practical insurance problems. New insurance products are also brought to the attention of members.

In addition to this publication, the Committee produces a newsletter for its members which provides updates and commentary on developments and issues in the field.

The Committee also presents sessions at the IBA Annual Conference every year. In 2014, the Conference will be held in Tokyo. Please see http://www.ibanet.org for more information on this and other upcoming events.

If you would like to join the Insurance Committee, or if you would like further information on the Committee’s activities, please visit the insurance pages in the committee section of http://www.ibanet.org.

We also invite you to contact the IBA membership department on

Tel: +44 (0)20 7842 0090, Fax: +44 (0)20 7842 0091

or by email at member@int-bar.org.
Note from the IBA Insurance Committee

Following the excellent responses we have received to our substantive project in 2013 which dealt with the legal nature of insurance contracts (our members from 29 jurisdictions responded to the 2013 survey), we decided to explore another topical issue of global relevance.

This year, we have conducted a survey regarding the “Duty of Utmost Good Faith”, a fundamental doctrine of insurance law in many jurisdictions. Our members from 34 different jurisdictions have provided detailed information and insights into the application of the principle of utmost good faith (uberrimae fidei) in their jurisdiction. This survey offers a study of the similarities and differences in the practical applications of the principle of utmost good faith under different legal systems.

Insurance and reinsurance are global enterprises which engage different legal and regulatory regimes. This, at times, results in cross border disputes, often involving both common law and civil law jurisdictions. We hope that this comparative analysis will be valuable to lawyers and other (re)insurance professionals alike.

We would like to thank those who generously contributed their time and expertise to successfully complete this project.

A pdf copy of this report will be made available on the IBA’s website.

Best regards,

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Editorial

The Duty of Utmost Good Faith

The principle of utmost good faith, expressed by the Latin maxim ‘uberrima fidei’, meaning fullest confidence, originated from English insurance law and is regarded as a fundamental principle of insurance law in many jurisdictions around the world, whether civil or common law. However, the doctrine does not have the same meaning nor does it operate in the same way in each legal system in which it has been adopted. Also, in some jurisdictions, the principle of utmost good faith is not recognized. For example, the insurance law of some civil law countries refers instead to the civil law concept of “good faith”.

The doctrine of utmost good faith requires that those involved in negotiations for an insurance contract must disclose all relevant information to all the other parties in the negotiation. Originally, the common law duty of utmost good faith applied only at the pre-contractual stage. Nowadays, in many jurisdictions that have adopted the principle of utmost good faith, it is a continuing duty that exists while the relationship between the insurer and the insured subsists and the application of the doctrine has been extended to the exercise of contractual rights and the processing of claims. In some of these jurisdictions, the duty of disclosure forms part of the principle of utmost good faith and thus, is indistinguishable, whereas in other jurisdictions it is a separate duty imposed on the insured by statute.

With the above in mind, the Insurance Committee of the IBA thought it would be of interest to our members, insurance professionals and advisors to compare across jurisdictions the nature of the parties’ obligations under the principle of utmost good faith, both at the pre-contractual stage and the claim stage, and the consequences where there has been a breach. For example, a dispute involving material non-disclosed information or misrepresentation at the pre-contractual stage with respect to an insurance policy that is settled by an insurer in one jurisdiction could result in the same policy being set aside ab initio by the insurer in another jurisdiction.

The responses to our survey on the duty of utmost of good faith contained in this report were submitted by IBA Insurance Committee members from 34 different jurisdictions, both common and civil law, allowing for a review around the globe.

You will find in this report a general overview of the content of the duty of utmost good faith for the insured and/or the insurer, as applicable, both at the pre-contractual stage and at the claim stage, including whether there is a separate duty of disclosure on either party, whether different principles regarding utmost good faith are applied to reinsurance, and the consequences of a breach of such duties by either party to an insurance or reinsurance contract.

It is our hope that these surveys will inform practitioners about the meaning of the duty of utmost good faith, a fundamental principle of insurance law applicable in many jurisdictions, and the consequences of a breach of such duty for the parties involved in an insurance contract.

A Note of Appreciation

I would like to thank my colleagues at McMillan LLP, Carol Lyons and Frank Palmay, who devoted a significant amount of their time to this project over several months and helped greatly realizing it.

Assunta Di Lorenzo

McMillan LLP
August 2014
DISCLAIMER

This report is not intended to provide legal advice but to provide general information on legal matters. Transmission is not intended to create and receipt does not establish an attorney-client relationship. This report is not intended to replace legal advice and no responsibility for claims, losses or damages arising out of any use of this work or any statement in it can be accepted by the contributors or editors. Readers should seek specific legal advice before taking any action with respect to the matters mentioned in this report.

The content of this publication has been created by the individual contributors. The views expressed are theirs. If you would like further information on any aspect of this report, please contact the relevant contributor with whom you usually deal.
Argentina

MANZANO, LÓPEZ SAAVEDRA & RAMÍREZ CALVO
Martin Manzano and Ignacio Shaw
I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

In Argentine law, good faith is mandatory to all contracts by operation of the Civil Code.

The Civil Code requires contracts to be executed, construed and complied with in accordance to what the parties truly understood or were able to understand, acting with due care.¹

Willful misconduct is defined by the Civil Code as any action or omission performed with fraud, deceit or an intentional assertion of what is false or distortion of the truth (Section 931, Civil Code). The burden of proof of willful misconduct lies on the party alleging it.

There is an ongoing debate on whether or not the duty to act in good faith is greater in insurance than in other contracts. Many scholars and courts contend that the parties to an insurance contract are bound to act with the utmost good faith required in other types of contracts. In the Touring case², the court held that the standard to be applied should be that the parties to an insurance contract should perform their obligations as if they were their counterparties.

The Golden Rule, as many like to call it, is considered to be the most important general principle of law.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

As mentioned above is a civil law principle set forth by our Civil Code and applicable to any type of contracts.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Coming now into the field of the Law of Insurance, the main laws enacted by Congress are the Insurance Act³ that deals mainly with the insurance contract and the Insurance Companies Law⁴ that provides the regulatory framework of the insurance activity.

The terms “good faith” and “bad faith” are barely used in the Insurance Act⁵ (Sections 5, 7 and 8) and the terms “fraud” or “malice” (equivalent to dolo and malicia in Spanish) appears only in 10 sections out of 164.⁶

The Insurance Companies Law only uses the term “good faith” in section 55 in respect of insurance brokers, agents, intermediaries, experts and adjusters (altogether referred to as “auxiliaries”), to require them to act in good faith. Insurers are not mentioned in this section.

Despite this lack of terminology, the truth is that the duty of good faith is fundamental in the law of insurance law and binding on both the insured and the insurer and it transpires from most of the solutions and regulations provided by the Insurance Act and the Insurance Companies Law.

There is a duty of disclosure for the insured. Section 5 of the Insurance Act says: Any false declaration or any concealment of circumstances which are known by the assured, even made with good faith, which in the opinion of an expert would have avoided the contract or modified its conditions, had the insurer be aware of the real state of the risk, makes the contract void.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes.

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¹ Civil Code, Section 1198.
³ Law 17.418.
⁴ Law 20.091.
⁵ The term “good faith” is used in Sections 5 and 7; “bad faith” is only used in section 8. Sections 5, 7 and 8 refer to misrepresentation or concealment by the insured.
⁶ The terms “fraud” or “deceit” are mentioned in Sections 6, 8 (both sections dealing with concealment by the insured), 48 (insured’s fraudulent breach of the duty to provide, at the request of the insurer, the necessary information to verify and adjust the loss; insured’s exaggeration of the loss; insured’s use of false evidence), 70 (fraudulent production of the loss by the insured), 72 (fraudulent breach of insured’s duty to of salvage), 77 (fraudulent breach of insured’s duty of refraining from changing the status of the property affected by the loss), 105 (in animal insurance, insured’s fraudulent mistreatment to the animal), 114 (in liability insurance, fraudulent production of the loss), 130 (concealment in life insurance) and 152 (fraudulent production of the loss in personal injuries insurance).
5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

It applies both, during the insurance contract formation and during the execution of the contract.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Yes.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

As mentioned above, Section 5 of the Insurance Act states: Any false declaration or any concealment of circumstances which are known by the assured, even made with good faith, which in the opinion of an expert would have avoided the contract or modified its conditions, had the insurer be aware of the real state of the risk, makes the contract void.

Thus, during the formation of the contract the insured has to provide the insurer with a true and correct declaration of the risk. Even if the insured innocently misrepresented the risk the insurer may avoid the insurance contract.

The insurer cannot rescind the insurance contract at its sole discretion. It is necessary to produce expert evidence in order to prove the circumstances mentioned in Section 5.

Describe the insured's pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

It may be said that at this stage of the contract, the duty relies more heavily on the insurer.

The following are examples where misrepresentation was held to exist and therefore a breach of the duty of utmost good faith:

(i) when a used car was declared to be brand-new; (ii) when the insured failed to declare a brain tumor concealed from him as a white lie; (iii) the value of insured goods is a significant circumstance that determines the nullity of the contract; (iv) failure to declare two theft losses occurring prior to the purchase of the insurance.

Nevertheless, the insurer cannot void the insurance contract at its sole discretion. It is necessary to produce expert evidence that must determine if had the insurer be aware of the non-disclosure or the misrepresentation it would have avoided the contract or if it would have been executed under different conditions.

The burden of proof lies on the insurer that alleges the non-disclosure and misrepresentation.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

Yes, it may be considered equivalent.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

N/A

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

According to Section 5 of the Insurance Act the effect of a material non-disclosure or a material misrepresentation by an Insured, which in the opinion of experts could have determined the Insurer not to take the risk or to modify the terms of the contract if the Insurer had been aware of the real state of the risk, is that the contract is null and void, even if the material non-disclosure or material misrepresentation were made in good faith.

The Insurer must avoid the contract within three months of having known the material non-disclosure or material misrepresentation.

If the insured acted with good faith, according to Section 6 of the Insurance Act, the insurer has two options: (i) return the collected premium with a deduction of the pertinent expenses; or (ii) with the insured's consent readjust the premium in accordance with the real risk.7

In life insurance the readjustment of the premium may be imposed to the insurer when (i) the nullity of the contract is prejudicial to the assured; (ii) if in accordance with an expert opinion the contract could be readjusted; and (iii) if the contract has been executed in accordance with the insurer commercial practice.

If the insured acted with bad faith the insurer may keep the premium for the term passed and for the term in which the non-disclosure was invoked.8

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7 Insurance Act, Sections 5 and 6. In the case of life insurance, readjustment of the premium may be imposed on the insurer when avoidance of the contract were prejudicial to the insured, if pursuant to experts' advice the contract were readjustable and it had been executed according to the commercial standards of the particular insurer involved.

8 In life insurance, the insurer may not invoke the misrepresentation after three years as from the execution of the contract, except when the insured acted with scienter (Insurance Act, Section 130).
11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

See above.

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

Throughout the formation stage, the insurer must:

(i) sufficiently inquire about all material aspects of the risk for which coverage is sought.

Failure to do so, may reduce its chances to allege that had the information been appropriately disclosed, coverage would have not been provided or that it would have been provided under other conditions.

(ii) The policy, in turn, must be clearly drafted and easy to read so that the insured be adequately informed as to the coverage provided by the insurer. Any ambiguities will be construed against the insurer.

If the text of the policy differed from the proposal form, the difference will be deemed approved by the insured if the latter does not claim for any such difference within a month of having received the policy; provided that the insurer must have warned the insured about this possibility by text included in the policy.

This is a clear example of how the law provided good faith solutions to specific situations.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

See 12 above.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

According to Section 4 of the Insurance Act, the insurance contract is consensual (i.e. it is entered into by the parties’ consent, and it enters in force from that moment, even before the policy is issued). The proposal does not bind neither the insured nor the insurer, and it may be subject to prior knowledge of the general conditions.

As mentioned above if there are any differences between the proposal form and the terms of the policy, such differences shall be considered accepted by the insured if no claim is made within a month of having received the policy (Section 12, Insurance Act).

Therefore, the insured must present the proposal form fulfilled acting with good faith. In practice, insurance brokers are usually involved and they have the duty to advise the insured.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

As already mentioned, if the text of the policy differed from the proposal form, the difference will be deemed approved by the insured if the latter does not claim for any such difference within a month of having received the policy; provided that the insurer must have warned the insured about this possibility by text included in the policy. If the insurer fails to warn the insured the later has the right to declare the policy null and void (Section 12 of the Insurance Act).

**III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)**

**A - For the Insured and Third Party Beneficiary of Cover**

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Yes. They must provide to the insurer – if requested with all the information and documentation necessary for adjusting the loss.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

The insured has the duty and the obligation of avoid the alteration of the risk and if the risk is altered must report it to the insurer.

Section 37 of the Insurance Act states that “any aggravation of the risk that if would have existed at the time of execution of the contract, in the judgment of experts would have prevented the contract or would have modified its conditions, is a special cause for the insurer to rescind the contract”.

It may be seen that the aggravation of the risk is subject to the same regime of the non-disclosure and misrepresentation. The insurer cannot rescind the insurance contract at its sole discretion. It is necessary to produce expert evidence in order to determine that if the risk would have existed the insurer would have not executed the contract or would have execute it under different conditions.

Section 38 of the Insurance Act states that the insured must notify the insurer the aggravations that are due to its own acts, before they occur, and the aggravations due to third parties, immediately after knowing them.

Under this section the insured is obliged to communicate the insurer any aggravation caused by him before they take place and those due to a third party act, immediately after knowing them.

Effects of the aggravation: the Insurance Act makes a distinction taking into account whether the
aggravation was caused by the insured or by a third party.

1) Aggravation caused by the insured (Section 39):

Coverage is suspended for 7 days and within those 7 days the insurer must notify its decision of rescinding the contract.

The burden of proving the aggravation of the risk lies on the insurer.

Nevertheless, the law gives the insurer the option of not rescinding the contract and to readjust the premium in accordance with the real risk (Section 35).

If a loss occurred (Section 40 second paragraph) and the insured fraudulently failed to report the risk increase, the insurer shall not be obliged to cover the loss. Similarly, the insurer shall be released from the obligation to indemnify the insured if the latter fraudulently (or recklessly) produced the loss.12

2) Aggravation caused by a third party (Section 40):

In this case coverage is not suspended and the insurer has one month to rescind the contract.

Considering that the rescission of the contract is for the future, if a loss occurs during the one month period, the insurer will be liable for the loss.

3) Effects of the rescission of the contract (Section 41)

a) If the aggravation of the risk was communicated in due course, the insurer has the right to keep the premium for the period during which the contract was in force.

b) If the aggravation of the risk was not communicated in due course, the insurer has the right to collect the premium for the whole contract.

c) The right to rescind the contract may be lost. For example if the insurer after knowing of the aggravation collects a premium instead of rescinding, it will be considered that he has waived the right to rescind.

4) Good Faith after a Loss:

The insured should not provoke the loss neither voluntarily nor acting with gross negligence (Sections 70 and 114) and, in case of a loss (Section 46) the insured must promptly report it (normally, within three days from the occurrence) and in order to facilitate the insurer investigation of the loss must provide the insurer, at its request, with all the necessary information to investigate and adjust the claim.13

If the insured fraudulently breached its duty to provide the necessary information to investigate and adjust the claim or fraudulently exaggerated the loss or provided false evidence of it, the insurer shall not be obliged to cover the loss (Section 48).

According to Section 77 of the Insurance Act the insurer must refrain from changing the status of the property affected by the loss. If the insured fraudulently breaches this obligation, the insurer is liberated.

The insured is also obliged to make all the necessary efforts (sue and labour) for avoiding a loss or to minimize the loss (Section 72). Failure to comply with this disposition may allow the insurer to reduce the amount of the indemnification taking into account the effect that the breach had in the amount of the damage.

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

In principle it may be considered a breach of the duty of utmost good faith, but it will depend on the circumstances of the case. Indeed, the main question is if the Insurer would have executed the contract (in the same or with different conditions) even if he was aware of the concealment.

B - For the Insurer

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

The insurer must exercise due diligence while investigating the loss and must avoid unnecessary delays in investigating the loss. In this sense the insurer have to request the proper and necessary information to the insured and must avoid requesting irrelevant information and/or documentation.

According to Section 56 of the Insurance Act, the insurer must accept or deny coverage within 30 days of having received the relevant information from the insured. Failure to do so implies that coverage has been accepted.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

Yes.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

Insurer’s post-contractual duty of utmost good faith mainly appears after the occurrence of a loss. Our Courts have repeatedly said that after the loss

11 Insurance Act, Section 40 (a).
12 Insurance Act, Section 70 (also Sections 114 and 152).
13 Insurance Act, Sections 46, 102 and 115.
14 Insurance Act, Section 77, first paragraph.
15 Insurance Act, Section 77, second paragraph.
16 Insurance Act, Section 56.
The Duty of Utmost Good Faith

20. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

Insurers must mainly comply with the provisions of the Insurance Act.

21. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Courts do not have special powers. They have to analyze the merits of the case, construe the evidence produced and issue a ruling on the matter under discussion.

22. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

As already mentioned, in Argentine law, good faith is mandatory to all contracts by operation of the Civil Code. Therefore, if the insurer fails to act with bad faith in breach of the principle set forth by Section 1198 of the Civil Code.

23. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

In some cases, yes. For example, Section 23 of the Insurance Companies Law (that provides the regulatory framework of the insurance activity) establishes that insurers can only operate in those lines of business in relation to which they have been expressly authorized by the regulator. If an insurer issues a policy on a line of business for which it is not expressly authorized by the regulator it may be considered that it is acting with bad faith and subject to the sanctions provided by the law (warning, fine or license suspension).

24. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

Argentina has no specific statute on reinsurance. The only existing legal provisions specific to reinsurance are four sections of the Insurance Act. These mainly deal with: (i) the absence of cut-through rights of the insured with respect of the reinsurer; (ii) the insured’s preference over other creditors as regards the insurance monies owed by reinsurers to a cedant in case of liquidation of the cedant; (iii) the set-off credits and debts as between reinsurer and cedant in the event that either party becomes insolvent.

The few reinsurance cases that have been decided by Argentine courts establish that reinsurance is a type of insurance. In the absence of express agreement in the reinsurance contract between the parties and given the absence of legal provisions specific to reinsurance, courts may apply to reinsurance cases, by analogy, the rules established by the Insurance Act for insurance matters.

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19 CNCom., Sala B, 01/03/93, “Transportadora de Productos S.A. c/Antorcha”, Revista Jurídica del Seguro, la Empresa y la Responsabilidad”, nros 23/24).
Australia

CLAYTON UTZ
David Gerber and Craig Hine

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The term “uberrimae fidei” or “of the utmost good faith” is a principle which applies in the law of insurance in Australia.

Most contracts of insurance entered into in Australia are governed by the Insurance Contracts Act 1984 (Cth) (Insurance Contracts Act). Under the Insurance Contracts Act the duty of utmost good faith is implied into every contract which is subject to the Act. The meaning of utmost good faith is not defined in the Insurance Contracts Act. It is best understood from the various cases in which the statutory duty has been applied.

Some contracts of insurance fall outside the Insurance Contracts Act. For instance contracts of reinsurance and contracts of marine insurance. Contracts not subject to the Insurance Contracts Act are governed by the common law duty of utmost good faith. In this regard the Australian common law is not dissimilar to the English common law. Higher level English judicial authorities are persuasive but not binding on Australian Courts. As with the statutory duty the meaning of the common law duty of utmost good faith is best understood from the various cases in which the duty has been applied.

The application of the English common law principle of utmost good faith was described in the United Kingdom in the 19th century in the following terms:

“There are some contracts in which our courts of law and equity require what is called ‘uberrima fides’ to be shown by the person obtaining them ... Of these, ordinary contracts of marine, fire and life insurance are examples, and in each of them the person desiring to be insured must, in setting forth the risk to be insured against, not conceal any material fact affecting the risk known to him. On the other hand, ordinary contracts of guarantee are not amongst those requiring ‘uberrima fides’ ... Whether the contract be one requiring ‘uberrima fides’ or not must depend upon its substantial character and how it came to be effected.”

In Australia, the statutory duty goes well beyond this historically narrow construction - which was to relate it primarily to the duty of disclosure and impose the duty on the insured to address the imbalance between insurer and insured in respect of knowledge of the risk to be covered.

According to one commentator², attempts to define what constitutes the duty of ‘utmost good faith’ have used a variety of terms: “Fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness, decency, and reasonableness.”³ He goes on to describe the duty as follows:

“What utmost good faith essentially requires is that each party demonstrate an awareness of and positive commitment to the other party’s reasonable expectations under the contract and, more particularly, refrain from exploiting any advantage, any position of power, influence or discretion, whether conferred by the terms of the contract itself or by the nature of the relationship, in order to avoid the anticipated costs of performing its contractual obligations, to the detriment of the other party. Discretions expressly conferred by the contract especially must be exercised strictly within the limits and for the purposes contemplated by the contract, and not by reference to extraneous factors. The requirement however stops short of disinterested altruism, and the parties owe each other no more than the level of performance which is reasonably to be expected in light of the contemplated scope and purpose of the policy, determined by reference to all relevant considerations but in particular, the basis upon which it is promoted and sold. Viewed in this light and at the risk of introducing another set of “weasel words” into the debate, utmost good faith can be seen as simply a form of commercial morality.”⁴

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

Utmost good faith in Australia is a statutory principle for contracts of insurance subject to the Insurance Contracts Act and a common law principle for

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¹ Seaton v Heath, Seaton v Burnand (1899) 1 QB 782 at p 792 (per Romer LJ).
contracts of insurance not subject to the Insurance Contracts Act.

The Insurance Contracts Act implies into all contracts of insurance which are the subject of the Insurance Contracts Act a provision regarding utmost good faith. It does so under section 13(1) as follows:

“A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.”

The Insurance Contracts Act does not define the duty.

The Marine Insurance Act 1909 (Cth) (Marine Insurance Act) says the following about the duty at section 23:

“Insurance is uberrimae fidei

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.”

Similarly, the Marine Insurance Act does not define what constitutes utmost good faith. Rather, the common law informs the meaning of the duty of utmost good faith under the Marine Insurance Act.

3. **Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?**

In Australia the answer to this question differs depending on whether it is the statutory duty or the common law duty.

Under statute, the Insurance Contracts Act provides a duty of utmost good faith between the parties to the contract (and third party beneficiaries) and a separate duty of disclosure for the insured. The duty of disclosure is set out in section 21 of the Insurance Contracts Act as follows:

“The insured’s duty of disclosure

(1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:

(a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or

(b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.

(2) The duty of disclosure does not require the disclosure of a matter:

(a) that diminishes the risk;

(b) that is of common knowledge;

(c) that the insurer knows or in the ordinary course of the insurer’s business as an insurer ought to know;

(d) as to which compliance with the duty of disclosure is waived by the insurer.

(3) Where a person:

(a) failed to answer; or

(b) gave an obviously incomplete or irrelevant answer to;

a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.”

The Insurance Contracts Act also deals more generally with disclosures and misrepresentations in Part IV of the Insurance Contracts Act, including prescribing certain remedies for non-disclosure: section 28.

The Marine Insurance Act also articulates statutory obligations of disclosure: section 24.

At common law the doctrine of utmost good faith is the source of the duty of disclosure at the time of entry into a contract.5 The insured must act in accordance with the duty of utmost good faith during the term of the contract, but that this does not extend the duty of disclosure beyond the time of entry into the contract: NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd (1985) 4 NSWLR 107.

4. **Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?**

The principle applies to all types of insurance contracts.

However, it has express recognition as an implied term of the contract under the Insurance Contracts Act That legislation does not apply to all contracts of insurance. All other contracts of insurance attract the common law duty of utmost good faith.

The Insurance Contracts Act does not extend to:

- reinsurance;
- health insurance;
- insurance entered into by a friendly society;
- marine insurance;
- workers compensation insurance;
- compulsory third party liability insurance;

5 *Kelly & Ball Principles of Insurance Law*, LexisNexis Butterworths, at [5.0250].
• certain contracts entered into in the course of State insurance.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

In Australia, under the Insurance Contracts Act, the duty of utmost good faith applies both pre-contractually and post-contractually.

Under the common law post-contractual duty of utmost good faith has been applied in very few cases and its width is uncertain.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

Each party to a contract of insurance is required to act towards the other party with the utmost good faith.

Under the Insurance Contracts Act, the duty of utmost good faith applies to each party "in respect of any matter arising under or in relation to a contract of insurance." This broad language makes it clear that the duty applies to both the insured and the insurer at the pre-contractual stage. However, the pre-contractual duty of utmost good faith implied by the Insurance Contracts Act “does not have the effect of imposing on an insured, in relation to the disclosure of a matter to the insurer, a duty other than the duty of disclosure.” The Insurance Contracts Act creates the duty of disclosure in section 21.

At common law, the duty is imposed on both the insured and the insurer. The trend at common law has been for the duty of utmost good faith to be considered in the context of the inception of a contract of insurance. That may reflect the fact that the principle of utmost good faith historically manifested in disputes about breach of the duty of disclosure.

A - For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In relation to contracts governed by the Insurance Contracts Act, given that the Insurance Contracts Act sets out a separate duty of disclosure on the insured and provides that the implied duty of utmost good faith does not extend that duty, insurers tend to rely on the duty of disclosure, or both duties, rather than the duty of utmost good faith alone.

In *CIC Insurance Limited v Barwon Region Water Authority* (1999) 10 ANZ Insurance Cases 61-425, an insurer argued that the failure to declare the existence of three structures in accordance with "declared values" and "adjustment of premiums" clauses meant that reliance by the insured on the insuring clause in respect of those structures constituted a breach by the insured of its pre-contractual statutory duty of utmost good faith. It was held that there was no such breach by the insured on the basis that the failure to declare the structures was a mere oversight and there was "no want of honesty." Oniston JA went on to state that if he was wrong in his view that there was a requirement for dishonesty, there was nothing put forward to counter the following finding by the primary judge:

"Even if a failure to act with utmost good faith need not always be attended by dishonesty, I do not consider that there is in this case any failure by [the insured] to act fairly and reasonably or any act by [the insured] contrary to community standards of decency and fair dealing."

On that basis, it was concluded that there had not been a breach of the duty of utmost good faith.

The pre-contractual common law duty of utmost good faith creates a requirement on the insured for full disclosure to the insurer and for the insured to have regard to the legitimate interests of the insurer.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

Under the Insurance Contracts Act, the statutory duty of utmost good faith, in its pre-contractual operation, is not in terms limited to the duty of disclosure. However, in relation to disclosure, section 12 of the Insurance Contracts Act has the effect that the duty of utmost good faith does not impose any duty upon the insured other than the duty of disclosure under section 21.

At common law, the pre-contractual duty of utmost good faith is directed primarily to the duty of disclosure. However, the duty goes beyond disclosure alone. It is imposed on each party to the contract and informs all aspects of its operation.

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6 Insurance Contracts Act s 13(1).
7 Insurance Contracts Act s 12.
12 See for example *Boulton v Houlder Bros* [1904] 1 KB 784; *Britton v The Royal Insurance Co (1866) 4 F & F 905; Moraitis v Harvey Trinder (Qld) Pty Ltd [1969] Qd R 226;
9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

Under statute, section 12 of the Insurance Contracts Act states (in relation to Part II of the Insurance Contracts Act, which deals with the duty of utmost good faith):

> “The effect of this Part is not limited or restricted in any way by any other law, including the subsequent provisions of this Act, but this Part does not have the effect of imposing on an insured, in relation to the disclosure of a matter to the insurer, a duty other than the duty of disclosure.”

Accordingly, it has been said that the “interaction between the duty of utmost good faith and the duty of disclosure is an exception to the general principle of paramountcy”. 13 In practice, this means insurers tend to rely upon the duty of disclosure in section 21 of the Insurance Contracts Act or both duties rather than the duty of utmost good faith in isolation in circumstances of a failure to disclose. 14

The statutory duty of disclosure applies in the period “before the relevant contract of insurance is entered into” and hence relates only to pre-contractual disclosure. 15 Where a policy includes a continuous disclosure requirement which applies after the formation of the contract, a breach of that requirement could amount to a breach of the statutory duty of utmost good faith: Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd (2014) 18 ANZ Insurance Cases 62-000.

At common law, the two duties do not operate separately pre-contractually.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The Insurance Contracts Act deals expressly with the remedies for a breach of the duty of disclosure. Under section 28 of the Insurance Contracts Act, an insurer cannot avoid a contract of general insurance for innocent misrepresentation or innocent non-disclosure: section 28. However, the insurer may reduce its liability in respect of the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made: section 28(3).

The insurer remains entitled to avoid the contract if the failure to comply with the duty of disclosure or the misrepresentation was made fraudulently: section 28(2).

The remedies in respect of life insurance are similar: section 29. However, where there is a relevant non-disclosure or misrepresentation that is innocent (and does not relate to age), the insurer may only avoid certain contracts of life insurance (mortality based and with a residual value) within three years after the contract was entered into: section 29(3). Other contracts of life insurance are subject to different considerations.

At common law, the remedy for a pre-contractual breach of duty of utmost good faith is rescission of the contract and refund of the premium: Banque Financière De La Cite SA v Westgate Insurance Co Limited (1991) 2 AC 249.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

Subject to the operation of sections 28 and 29 of the Insurance Contracts Act, the duties do not take precedence one over the other. Section 12 of the Insurance Contracts Act makes it clear that the duty of disclosure imposed by section 21 is not rendered more onerous by the operation of Part 2 of the Act (and, in particular, section 13: ‘The duty of the utmost good faith’).

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

See 13 below.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

Cases in which the insurer’s pre-contractual statutory duty of utmost good faith has been applied suggest that an insurer may breach the duty by leading the prospective insured to believe that they have cover that is not put in place. 16

In Cameron McIntosh Pty Ltd v C E Heath Underwriting & Insurance (Aust) Pty Ltd (unreported, Vic Sup Ct, Ormiston J, 25 September 1991), Ormiston J noted that it is necessary that the insured should be a party, either directly or through an agent, to the negotiations for a contract of insurance at least because each party is required to comply with the duty of disclosure or the insurer remains entitled to avoid the contract.

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14 Ibid.

15 See question 3 above.


The Insurance Contracts Act contains certain protections for consumers which, while not expressly stated to be or enhance the insurer’s pre-contractual duty of utmost good faith, impose obligations on the insurer which in effect are consistent with that duty. For example, the insurer must clearly inform the insured in writing of:

- the general nature and effect of the duty of disclosure (section 21A)
- any unusual provisions in the policy (section 37)
- whether a ‘prescribed contract’ provides insurance cover in respect of flood (section 37C).

At common law, the pre-contractual duty of utmost good faith requires an insurer to draft policies which are easily understood and not ambiguous so that they require interpretation and construction by a court, and to bring unusual terms to the insured’s attention.

As an element of the duty of utmost good faith, an insurer is arguably under a duty to draft any conditions precedent to liability under the contract in clear and plain terms, separately from other provisions of the policy, and to draw attention to such conditions precedent in the proposal form: Re Bradley and Essex and Suffolk Accident Indemnity Society [1911–13] All ER 444 at 453.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

The Insurance Contracts Act creates a statutory requirement for insurers to notify the prospective insured of the nature and extent of their duty of disclosure. This is separate from the statutory duty of utmost good faith. Subsection 22(1) states:

“The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure and, if section 21A applies to the contract, also clearly inform the insured in writing of the general nature and effect of section 21A.”

If an insurer does not comply with subsection 22(1), it may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent: section 22(3).

Accordingly, for contracts of insurance which are subject to the Insurance Contracts Act, an insurer must notify the prospective insured of the nature and extent of their duty of disclosure. Furthermore, it must do so if the insurer is to be entitled to the remedies for a failure by the insured to comply with the duty (unless the failure is fraudulent).

The common law duty of utmost good faith does not, without more, require an insurer to notify a prospective insured of its duty of disclosure.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

Section 13(1) of the Insurance Contracts Act makes the duty of utmost good faith an implied term of any contract to which the Insurance Contracts Act applies. An available remedy for breach by the insurer of this duty, therefore, is damages for breach of contract.

Section 14(1) of the Insurance Contracts Act provides that a party to a contract of insurance may not rely on a provision of the contract, if to do so would be to fail to act with the utmost good faith. Section 14(3) provides that in the case of an insurer, the court shall have regard to any notification of the provision that was given to the insured. The common law pre-contractual duty of utmost good faith on the insurer requires, primarily, clarity of drafting and steps to notify the insured of certain types of provision. However, detriment to the insured generally would flow when an insurer subsequently placed reliance upon a provision not clearly drafted or notified. Therefore, assuming that the statutory duty places similar requirements upon the insurer, the remedy for pre-contractual breach by the insurer of its duty of utmost good faith may effectively, in many circumstances, be an order to the effect that the insurer may not rely on a particular provision by the contract.

At common law, the remedy for a pre-contractual breach of the duty of utmost good faith by the insurer is, as in the case of a breach by an insured, rescission of the contract and refund of the premium: Banque Financière De La Cité SA v Westgate Insurance Co Limited (1991) 2 AC 249.

However, in practice, there would be very few, if any, circumstances in which an insured would seek to rescind a contract of insurance in reliance upon a pre-contractual breach of the duty of utmost good faith. That is particularly so in circumstances where the insured has sought to make a claim under the insurance contract.

**III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)**

A - For the Insured and Third Party Beneficiary of Cover

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

Dishonest conduct will constitute a breach of the duty implied under section 13(1) of the Insurance Contracts Act. Hence, the deliberate insertion of a false answer in a claim form is also a breach of utmost good faith: Gugliotti v Commercial Union Assurance Co of Australia Limited (1992) 7 ANZ Insurance Cases 61-104.

However, in CGU Insurance Ltd v AMP Financial Planning Pty Ltd [2007] HCA 36 the Australian High Court held that it is not essential to prove dishonesty in order to establish a breach of the statutory duty of...
utmost good faith (albeit in the context of consideration of the insurer’s duty). The statutory duty may require a party to a contract that is subject to the Insurance Contracts Act to act consistently with commercial standards of decency and fairness, with due regard to the interests of the other party.

At common law, the post-contractual duty of utmost good faith has been applied in very few cases and its width is uncertain.

In Bolton v Houlder Bros & Co (1904) 1 KB 784 at p 791, Matthew LJ observed that "it is an essential condition of a policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in steps taken to carry out the contract".

The post-contractual duty of utmost good faith at common law in England was addressed by Hirst J in Black King Shipping Corp and Wayangi (Panama SA) v Massie (the “Litson Pride”) [1985] 1 Lloyd’s Rep 437 where it was said (at 518 and 519):

"I am prepared to hold that the duty not to make fraudulent claims and not to make claims in breach of the duty of utmost good faith is an implied term of the policy …

Consequently, I hold that the underwriters are entitled to maintain the defence of fraudulent claims and claims other than in utmost good faith against the mortgagees, since they arise out of the contract."

While it is uncontroversial that a claim made fraudulently would involve a breach of the post-contractual duty of utmost good faith, it is doubtful whether such breach of the duty would itself sound in damages for breach of contract in England or in Australia.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

In respect of insurance contracts subject to the Insurance Contracts Act, third party beneficiaries of cover have a duty of utmost good faith by reason of changes to the Insurance Contracts Act recently introduced by the Insurance Contracts Amendment Act 2013 (Cth).

Pursuant to section 13(3), any reference in section 13 of the Insurance Contracts Act to a party to a contract of insurance includes a reference to a third party beneficiary under the contract. The implied term under section 13(1) of the Insurance Contracts Act therefore extends to third party beneficiaries and requires them to act towards the insurer, in respect of any matter arising under or in relation to the contract of insurance, with the utmost good faith. However, section 13 applies in relation to a third party beneficiary under a contract of insurance only after the contract is entered into: section 13(4).

At common law, a third party beneficiary of cover may be bound by a duty of utmost good faith. In an obiter opinion, Mahoney JA of the New South Wales Supreme Court of Appeal said:

"In my opinion, a third person involved in a transaction of insurance may be bound by the principle of uberrimae fide (utmost good faith) and, to the extent he is, may be under a duty to disclose facts affecting the insurance; however, the extent of the duty imposed on the third person will depend on the circumstances of his involvement." 22

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The deliberate insertion of a false answer in a claim form is a breach of the duty of utmost good faith implied under section 13(1) of the Insurance Contracts Act: Gugliotti v Commercial Union Assurance Co of Australia Limited (1992) 7 ANZ Insurance Cases ¶61-104.

In FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd (1999) 10 ANZ Ins Cas 61-445, an insured under a third party liability policy elected not to give notice of known circumstances, which subsequently led to the making of a claim against it. The insurer refused indemnity by reason of the failure to notify but was unsuccessful in the proceedings at first instance and on appeal. Although breach of utmost good faith was not argued, Chesterman J expressed his opinion that perhaps in some cases “the insurer may rely upon the implied obligation of good faith contained in s 13 to resist paying where the insured seeks to resile from a decision not to give notice of an occurrence.”

In the common law case of New South Wales Medical Defence Union Limited v Transport Industries Insurance Co Limited (1985) 4 NSW LR 107, the insurer asserted that the insured had failed to comply with its obligation to act in good faith by failing to disclose the fact of claims having been made upon the insured by its members during the policy period. Rogers J rejected the insurer’s argument, noting that after the contract was formed there was no obligation to disclose a matter simply because it would be relevant to the insurer’s decision making. The case did not decide that there was no post-contractual duty of utmost good faith. However, it distinguished the Litson Pride case (see Question 15) and found that there had to be a “live obligation” on the part of a

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20 Bolton v Houlder Bros & Co (1904) 1 KB 784 at p 791 (per Matthew LJ).
party to the contract of insurance to which the duty of utmost good faith could attach.  

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

As stated above, section 12 of the Insurance Contracts Act ensures that the duty of utmost good faith does not extend an insured’s duty of disclosure beyond the requirements set out in section 21. Accordingly, the intentional concealment by an insured of criminal activities when completing a proposal for a life policy might only be a breach of the duty of utmost good faith if those criminal activities must be disclosed in order to comply with the duty of disclosure.

If a prospective insured was specifically asked to disclose criminal activities and intentionally concealed them, the insured will have breached its statutory duty of disclosure. Whether or not the prospective insured is obliged to disclose criminal activities in respect of a particular contract of insurance would likely depend on the nature of that policy. The test is whether a reasonable person would know it to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms.

At common law, whether the prospective life insured’s criminal activities must be disclosed turns on the materiality of the activities to the proposed contract.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

Under the duty implied into the contract by section 13(1) of the Insurance Contracts Act, when dealing with a claim an insurer is required to act with due regard to the legitimate interests of the insured and consistently with commercial standards of decency and fairness: *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36. For example, this requires an insurer to make a timely response to a claim for indemnity and to avoid taking advantage of the insured’s difficulties.

Gleeson CJ and Crennan J state the following about the content of the statutory duty of utmost good faith in their joint opinion in the *CGU v AMP* case:

“We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular, we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insurer’s

obligation of utmost good faith is a requirement of full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer’s statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.”

In his dissenting judgment, Kirby J stated:

“The principle is that the parties to insurance contracts in Australia, unlike most other contracts known to the law, owe each other, in equal reciprocity, an affirmative duty of the utmost good faith. This is so now by s 13 of the Act. In the context of that section, emphasis must be placed on the word “utmost”. The exhibition of good faith alone is not sufficient. It must be good faith in its utmost quality.”

An insurer’s duty under the Insurance Contracts Act extends to making prompts admission of liability to meet a sound claim for indemnity and, where appropriate, to make payment promptly *Moss v Sun Alliance Australia Ltd* (1990) 6 ANZ Insurance Cases 60-967. However, where a matter is complex and investigation into the circumstances is difficult, it may be reasonable for an insurer to delay making a decision on indemnity for a longer period than usual: *Baulderstone Hornibrook Engineering v Gordian Runoff* (2006) 14 ANZ Insurance Cases 61-701.

It will also not constitute a breach of the statutory duty of utmost good faith where an insurer acts on apparent circumstances the contradiction of which lies in the power of the insured: *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* (2011) 16 ANZ Insurance Cases 61-885.

As to the common law principle, there is little guidance in the cases in relation to its content when applied to the insurer dealing with a claim. It appears, however, that the principle requires an insurer to exercise discretionary powers, such as a power to withhold consent to settlement in proceedings involving a third party, with due regard to the interests of the insured as well as to its own interests and without regard to considerations extraneous to the policy. The principle will have diminished relevance.


24 Insurance Contracts Act s 21.
where the policy expressly confers upon the insurer the right to act in a way which can only be inimical to the insured’s interests.29

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

An insurer owes a statutory post-contractual duty of utmost good faith towards third party beneficiaries of cover since the recent changes to the Insurance Contracts Act introduced by the Insurance Contracts Amendment Act 2013 (Cth).30

There is no authority recognising the existence of such a duty at common law. Given that the common law duty is between the parties to a contract of insurance it is unlikely that it can be extended to non-parties.

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The best known High Court case on an insurer’s post-contractual duty of utmost good faith under the Insurance Contracts Act is CGU Insurance Ltd v AMP Financial Planning Pty Ltd [2007] HCA 36.31 In this case, the insured was faced with third party claims by investors who had suffered loss having been advised by financial advisers operating under the insurer’s licence. The insured notified its professional indemnity insurer. The financial system regulator in Australia (ASIC) became involved, advising the insured that it expected investors’ demands to be handled in an efficient, fair and timely manner, irrespective of any insurance concerns. The insurer reserved its rights and told the insured it should act as a “prudent uninsured”. The insured then settled the third party claims after notifying the insurer that it would do so. After a delay of two years, the insurer declined indemnity based on among other things a denial that the insured was liable to the third parties.32

The Full Court of the Federal Court held by majority that, in the circumstances of the case, the insurer’s failure to make a timely decision on indemnity was a breach of its duty of utmost good faith. This decision was overturned by majority on appeal to the High Court. Two of the four majority judges (Callinan and Heydon JJ) referred to notions of reciprocity and held that were it not for the existence of the duty of utmost good faith, the insurer’s conduct may have been in breach of the duty. However, they declined to make such a finding. The balance of the majority judges (Gleeson CJ and Crennan J) did not accept that the insurer’s conduct was in breach of its duty of utmost good faith but made the statement extracted at Question 18, above.

See also Kirby J’s dicta on the content of the duty, set out in his dissenting judgment, extracted at Question 18, above. It is important to note the role of the (rather prescriptive) policy wording in the case.

The best known cases on the common law post-contractual duty upon the insurer are Distillers Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd [1974] HCA 3 and Re Zurich Australian Insurance Ltd [1998] QSC 209.33

The facts in Distillers were summarised by Chesterman J in Re Zurich at [43]-[44]:

“[T]he respondent issued a policy of public risk insurance to the appellant against whom claims were made for compensation. Condition 2 of the policy provided that the appellant should not make any admission, offer, promise or payment in connection with any claim without the consent in writing of the respondent. The same condition entitled the respondent, if it so desired, to take over and conduct the defence or settlement of any claim in the name of the appellant.

The appellant wished to settle some claims brought against it. The respondent did not admit liability to indemnify the appellant pursuant to the policy but nor did it intimate that it would not do so. It refused to take over or conduct the appellant’s defences of the claims. The appellant was concerned that if it settled the claims it would be in breach of condition 2 and the respondent might, as a consequence, decline indemnity. It unsuccessfully sought a declaration [in the Supreme Court of New South Wales] that the condition had no application where the insurer refused to conduct the defence of the claims against the insured.”

A majority of the High Court upheld the appeal. The reasoning of the majority did not turn upon application of the principle of utmost good faith. However, Stephen J said that the combination of an upper limit of indemnity and a right in the insurer to withhold consent to settlement created the conditions for a conflict of interest between insured and insurer. In those circumstances, the consent of the insurer “is not one which the insurer may arbitrarily withhold. Its power of restraining settlement by the insured must be exercised in good faith having regard to the interests of the insured as well as to its own interests and in the exercise of its power to withhold consent the insurer must not have regard to considerations extraneous to the policy of indemnity … [T]he insurer must exercise its powers under the policy with due regard for the interests of the insured.”34

Re Zurich concerned a claim in negligence against an insured hospital by a former patient. Under a policy of public liability insurance issued by the insurer, the insured was covered for liability up to a policy limit of $200,000, plus the costs of defending or settling proceedings including costs that may be awarded against the insured. Proceedings

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29 Re Zurich Australian Insurance Ltd [1998] QSC 209 at [85].
30 See question 15.1 above.
31 See question 18 above.
33 See question 18 above.
34 At 26-27 and 29.
commenced by the former patient had been on foot for many years when the insurer exercised its right to pay to the insured the full limit of its liability under the policy and (i) withdrew from its conduct of the defence of the proceedings, and (ii) declined to provide indemnity for any further defence costs that might be incurred.

The insurer also disclaimed any liability to cover costs awarded against the insured in excess of costs already incurred by the plaintiff to the litigation. As a matter of construction of the policy, the Supreme Court of Queensland (Chesterman J) held that the insurer in fact was liable for the full amount of any subsequent costs order against the insured.

However, the insured also alleged that to decline to provide indemnity for its own legal costs incurred after the insurer’s withdrawal would be a breach of the principle of utmost good faith. Chesterman J did not agree. This was primarily on the basis that the contractual right exercised by the insurer could only ever be exercised in a manner that was inimical to the interests of the insurer. For this reason, the post-contractual principle of utmost good faith, requiring due regard to the interests of the insurer in the exercise of contractual discretions, had limited scope to condition the exercise of the particular power in question.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

The General Insurance Code of Practice (Code) is a voluntary code under which general insurers agree to uphold minimum standards. It was first introduced in 1994 and has recently been reviewed and updated - the latest version took effect on 1 July 2014.

The relationship between the Code and the duty of utmost good faith is complex. The Code has a number of fairness standards. The duty of utmost good faith at common law and under statute is said to include notions of fairness: COU Insurance Ltd v AMP Financial Planning Pty Ltd [2007] HCA 36; Re Zurich Australian Insurance Ltd [1998] QSC 209.

There is necessarily some overlap between requirements under the Code and the duty of utmost good faith. The same conduct may fall short of the standards required under each, but not always. It has been suggested that in appropriate circumstances, a court may have regard to whether an insurer had acted in breach of a Code standard in assessing whether the insurer’s conduct was in utmost good faith under the Insurance Contracts Act or that the Code may inform the content of the statutory duty of utmost good faith.35

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

Section 14 of the Insurance Contracts Act prevents a party - whether the insured or the insurer - from relying on a provision in the contract of insurance if that reliance would be to fail to act with the duty of utmost good faith. Section 14(1) does not limit the operation of section 13: section 14(2).

There are a number of cases in which the duty of utmost good faith has been considered in the context of an insurer relying on a provision in breach of the duty.

In Baradom Contracting Pty Ltd v GIO General Ltd (unreported, NSW Sup Ct, Allen J, 13 June 1996), an insurer was prevented from relying on an exclusion in a broad form liability policy in circumstances where the policy was negotiated on the basis that there would be no such exclusion, the underwriter did not intend the policy to contain the exclusion, the terms of the policy were not communicated to the insured until after an event giving rise to a claim and the premium was grossly excessive for a policy containing the exclusion.

In Australian Associated Motor Insurers Ltd v Ellis (1990) 54 SASR 61 an insurer was not entitled to rely on the breach of a condition which required the insured to notify the insurer of modifications to an insured car subsequent to policy inception. It was held that sections 13 and 14 of the Insurance Contracts Act required the insurer to give adequate warning to the insureds of the general nature and effect of the condition, otherwise the insurer could not rely on the condition. However, it is noted that this judgment has since been criticised in Re Zurich Australian Insurance Ltd (1999) 10 ANZ Ins Cas 61-429.

In Banks v NRMA Insurance Ltd (unreported, NSW Sup Ct, Brownie J, 1 September 1988) an insured was not prevented from relying on a provision in an insurance contract which specified a particular measure of indemnity. The provision provided for a measure of indemnity based on the cost of rebuilding the building to the same specifications. The building contained features which were unlikely to be replaced in the event that the building was completely rebuilt and had recently been purchased for a sum which was disproportionately low when compared with the cost of rebuilding. It was held that section 14 of the Insurance Contracts Act could not be used to prevent reliance on an express provision of the contract of insurance in these circumstances.

This remedy is not available at common law.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

By statute in Australia avoidance of a contract is a creature of the duty of disclosure which is distinct from the duty of utmost good faith. While the insurer may avoid the contract of insurance from inception on the ground of a fraudulent failure to comply with the duty of disclosure or fraudulent misrepresentation, under the Insurance Contracts Act a court may disregard the avoidance in certain circumstances. Under section 31 of the Insurance Contracts Act, the Court may disregard the avoidance if it would be harsh and unfair not to do so. It can then allow the insured to recover the whole, or such part as the Court thinks just and equitable in the circumstances, of the amount that would have been payable if the contract had not been avoided: section 31(1).

The legislation provides some parameters within which the Court may exercise the power conferred by section 31(1) and requires the Court to have regard to the need to deter fraudulent conduct in relation to insurance and weigh the extent of the culpability of the insured against the magnitude of the loss that would be suffered by the insured if the avoidance were not disregarded.

Equivalent protections are not available to an insured under the common law.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

In relation to the statutory duty of utmost good faith a failure by a party to a contract of insurance (which includes a third party beneficiary) - whether the insured or the insurer - to comply with the provision implied in the contract by section 13(1) of the Insurance Contracts Act is a breach of the requirements of the Act: section 13(2).

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

A breach of the statutory duty of utmost good faith can result in regulatory sanctions but a breach of the common law duty cannot. This is because the power to impose regulatory sanctions arises under the Insurance Contracts Act.

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36 Section 31(3)(a).
37 Section 31(3)(b).
38 Namely, the provision requiring each party to act towards the other party, with respect of any matter arising under or in relation to it, with the utmost good faith.
39 Insurance Contracts Act s 55A.
Belgium

LYDIAN

Hugo Keulers and Anne Catteau

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

There is no express provision on (utmost) good faith in Belgian insurance laws. However, the general principle of good faith applicable on all contracts also applies on insurance policies.

2. Is the principle of (utmost) good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The duty of good faith is one of the basic principles of Belgian contract law. It is expressly provided for in articles 1134, § 3 and 1135 of the Belgian Civil Code, which is basically the same as the French Civil Code. Hence, it is a civil law principle in Belgium.

No difference is made between “good faith” and “utmost good faith”. For the remainder of the questionnaire we therefore base our answers on the principle of “good faith”.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

There is no express reference to the principle of good faith in Belgian insurance laws.

The Belgian Insurance Act provides for a duty of disclosure for the insured, both when the policy is being issued and throughout the duration of the policy. An example of this is in case of aggravation of risk during the lifespan of the insurance policy (Article 26 of the 25 June 1992 Non-Marine Insurance Law).

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

The principle of good faith applies to all types of insurance contracts as it is a general principle of contract law.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

It is a continuous duty.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Yes.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The content will for a large part be covered by the duty to disclose (see Question 8). In general, insured will need to have a genuine interest to take out insurance coverage for an unforeseeable loss (i.e. an absence of an intention to prejudice the insurer).

Case law usually relates to violation of the specific provisions of the duty of disclosure.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

The duty of disclosure undoubtedly incorporates for a major part the principle of good faith within an insurance context. The two concepts are however not identical. The duty of disclosure is expressly provided for in the Insurance Act and states specifically what must be disclosed and what not. There is numerous case law which applies those provisions. The principle of good faith is much broader and applies on all contractual duties. It is recognized that each right can be abused and must therefore be performed in good faith. Because of the general nature of the principle, it is also harder to invoke it.

However, note that a violation of the duty of disclosure not necessarily implies a violation of the duty of good faith. Unintentional, but negligent lack of disclosure will also be sanctioned.
9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

When concluding an insurance policy, the insured must disclose to the insurer all known circumstances which he reasonably considers to be of influence on the risk assessment of the insurer.

The principle of good faith could at this stage for example be applied as preventing the insured of intentionally providing false or incomplete information to influence the risk assessment, or to prevent the insured of taking out insurance knowing that the risk will certainly occur (absence of risk element).

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

In general a violation of the duty of good faith would result in that party being unable to exercise the right which is not exercised in good faith.

There are however specific remedies in the Insurance Act for violation of the duty of disclosure or taking out of insurance coverage with fraudulent intentions, going from the possibility to terminate the policy, the possibility to lower the coverage in case of a loss to having the policy declared null and void.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

Both have a legal basis and operate therefore on the same level. Since the duty of disclosure to a large degree incorporates the duty of good faith and is also less general, it may in practice have precedence (lex specialis derogat legi generali). In practice also for insurance disputes, insurers will usually rely on the duty of disclosure as this is a better developed and more mature concept for insurance contracts than the duty of good faith.

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

This could be seen as the insurer’s duty to fully inform the insured on the insurance terms and the duty to cooperate with the insured to obtain the necessary information to fully understand the risk.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

If an insurer is negligent by not providing a questionnaire to the insured or not informing itself of the risk, it cannot later invoke a lack of disclosure which is the direct consequence of its own negligence. Another example would be the disclosure of incomplete or imprecise medical information by the insured, whereby the insurer does not take action to request additional information. Also in such case the insurer would be prevented by the principle good faith from invoking the incomplete disclosure if it follows from its own negligence.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

It will be up to the insurer to request the information it needs in order to assess the risk. If an insurer would not request basic information it needs, it would probably not be acting in good faith if it would later invoke such lack of information against the insured. See also Question 13. As to the statutory duty of disclosure for the insured in general, there is no specific information obligation on the insurer imposed by the Insurance Act or by the Civil Code. This follows from the application of the legal principle that everybody is deemed to know the law.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

Besides the specific remedies available to the insured for violations of the insurer’s information duty, the general remedy would be that the insurer would be prevented to exercise its rights because of such violation.

**III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)**

A - For the Insured and Third Party Beneficiary of Cover

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

The insured will have the duty to cooperate with the insurer for the evaluation of the damage and the investigation of the loss. It will need to provide the information that insurer needs in such process. It will also have to mitigate its damage. Certain of these duties are also expressly provided for in the Insurance Act and can be seen as an incorporation of the duty of good faith.

16.1 **Do third party beneficiaries of cover have a duty of utmost good faith?**

Yes, just like any other party. This is specifically the case because for liability insurance third party beneficiaries generally have a direct claims right against the insurer pursuant to the Belgian Insurance Act.
Act. Such direct claims right must be exercised in good faith.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

An insured who does not provide the insurer with all information concerning a loss in order to avoid the insurer discovering the application of a policy exclusion, could be violating its duty of good faith.

An insured who does not mitigate its damage because it is covered anyway, will not be acting in good faith (and will also violate the specific duty on mitigation of damage). An insured who deliberately files a claim for damages which is actually higher than the damages he really suffered, is acting fraudulently.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

This may be the case. It will likely depend on whether the insured had the intention to mislead the insurer and also what the type of criminal activities are and thus whether these have an impact on the risk (membership of a criminal organisation vs. internet hacking or mail fraud).

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

The insurer will have to investigate and handle the claims in a reasonable and professional manner. If an insurer would invoke unfounded arguments for the mere sake of paying later rather than sooner, this may constitute bad faith. In practice, it will probably be difficult to prove that an insurer did not act in good faith.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

Yes. There should be no difference with the insurer’s duties towards the insured.

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

An insurer needs to inform its insured correctly when applying a suspension of coverage.

A liability insurer needs to defend its insured against claims of third parties. When an insurer does not inform the insured that it will not do so because of policy exclusions, it needs to inform the insured in a clear and timely manner otherwise it may be violating its duty of good faith.

In the case of a car insurance which includes coverage against theft, an insurer is not acting in good faith if it continues to collect premiums without verifying whether the insured has installed the required alarm system and then refuses to pay out a loss because of the lack of such alarm system.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

Assuralia, the Belgian sector federation of insurance companies, has issued several Codes of Practice rules applicable on different situations (e.g. general, commercialization, loss adjusting, policy specific rules).

These rules are not binding as such and are to be considered as guidelines. However, they could potentially be used to prove that an insurer did not act in good faith if the insurer’s behavior is seriously aberrant from these rules.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

In principle yes, since it is accepted by Belgian’s Supreme Court that all rights can be abused. However, this is only very rarely applied by the lower courts.

See Question 13.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

The courts could decide that the insurer has wrongly refused to cover a loss because this would be a violation of good faith. This implies that the insured requests the court to do so and that the insurer would succeed in its burden of proof, which we consider very difficult in such case.

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

Yes.

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

In principle yes as insurance companies are highly regulated. In practice, we consider the chance of such sanction to be highly unlikely as a consequence of individual cases. Sanctions are usually a result of not
following insurance legislation. Therefore the duty of good faith would already need to be incorporated into a specific legal provision which was breached before it would in practice lead to a sanction against the insurer. Also, it must have been established that acting in bad faith is a consistent and structural default within an insurer before the Regulator or the Ombudsman would take action.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

Also on reinsurance and retrocession contracts the general principle of good faith (articles 1134, § 3 and 1135 of the Belgian Civil Code) applies.

The role of the principle of good faith will however likely be more relevant in the relationship between insurer and reinsurer and especially between reinsurer and retrocessionaire because these relationships are for a major part built on trust. The insurer has to take the interests of the reinsurer into consideration when the loss is reinsured and typical clauses like Follow the Fortunes and Follow the Settlements are applicable.

In addition, reinsurance is almost not regulated in Belgium which means that parties will need to fall back on the basic principles of contract law, including the principle of good faith.

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The Brazilian Civil Code (the “BCC” or the “2002 BCC”) adopts the principle of good faith as a general principle in the field of contracts. Article 113 of the BCC establishes that “legal transactions must be construed in accordance with good faith and the uses of the place of its formation” whereas Article 422 sets forth that:

“The contracting parties must abide by the principles of good faith and fair dealing in the execution and in the performance of the contract.”

Although the provisions do not refer to utmost good faith, but rather to good faith, without further qualification, it is well established in Brazil that the principle of good faith when applied to contracts is understood contemporaneously in a very broad spectrum. The meaning of good faith applied in Brazil, especially in the area of insurance, largely meets that of utmost good faith in other jurisdictions. It is generally understood that the principle of good faith, as provided for in the BCC, creates a wide range of duties to the contracting parties, such as the duty to inform the other party of relevant facts concerning the contract in question, and the duty to conduct oneself in a consistent fashion throughout the relationship, and also taking into account the interests of the other party.

Articles 113 and 422 apply to contracts in general, which includes insurance contracts. Despite that, the BCC turns to good faith again when it regulates insurance contracts in particular. Article 765 of the BCC sets down:

“Art. 765. In the execution and in the performance of a contract, the insured and the insurer are bound to keep the strictest good faith and truthfulness, with respect to both the object of the contract and the circumstances and declarations concerning its object.”

When framing the provision, the legislature was careful enough reinforce to the importance of the principle of good faith when it specifically regulated the contract of insurance. Note that when it comes to insurance, the BCC calls for the application of the principle of good faith in the strictest sense possible, leaving no doubt that, when it comes to such type of contract, the duty of good faith must be construed very broadly, creating for the parties a wide range of cooperation duties, such as the duty to disclose material facts (including risks), how the contract and its provisions operate, etc.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The principle of utmost good faith has long been a statutory principle as far as insurance contracts are concerned. Prior to the enactment of the BCC, which entered into force in 2003, the former Civil Code, which dates back to 1916 (the “1916 BCC”), also required the parties to an insurance contract to act according to the strictest good faith. The wording of Article 1,443 of the 1916 BCC was nearly the same of the current Article 765 of the BCC:

<table>
<thead>
<tr>
<th>1916 Civil Code</th>
<th>2002 Civil Code</th>
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<tr>
<td>Art. 1.443. The insured and the insurer are bound to keep the strictest good faith and truthfulness, and so act with respect to the object of the contract and to the circumstances and declarations in connection therewith.</td>
<td>Art. 765. In the execution and in the performance of a contract, the insured and the insurer are bound to keep the strictest good faith and truthfulness, with respect to both the object of the contract and the circumstances and declarations concerning its object.</td>
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Despite the longstanding recognition of the duty of good faith in the area of insurance law on a statutory basis, the content of the principle of good faith has changed quite dramatically over time. Up until the 80s and 90s, good faith was usually construed more narrowly, typically referring only to the subjective state of mind of the party to the contract. In simplest terms, it essentially required the party not to act dishonestly. Good faith was the opposite of bad faith. In the insurance arena, it involved not concealing known material facts from the other party if so asked. This narrow concept came to be called subjective good faith.

Especially from the 90s onwards\(^1\), the doctrine of good faith gained much more importance in the contractual context in Brazil. Along with the subjective character, the principle of good faith was said to have also an objective dimension, one that required a much more ethical standard of behavior from the contracting parties than the narrow subjective good faith. The

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\(^1\) Some scholars argue that the 1916 BCC already contemplated the principle of objective good faith. Although this is not denied by other scholars, it is quite clear that the content of the principle expanded severely over time.
objective good faith imposes on the parties a multitude of affirmative duties, such as the duty to be transparent with the counterparty, and to pursue mutual benefits from the contractual intercourse, rather than behaving one-sidedly, without regard to the interests of the other party.

3. **Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?**

In Brazil, the duty of disclosure is not separate from the principle of utmost good faith, but rather the former is a consequence of the latter. In other words, the duty of disclosure in Brazilian insurance law is a duty that derives from the principle of good faith. Despite that, the legislature has rendered a specific treatment to the duty of disclosure, particularly as regards the formation of insurance contracts. This is provided for in Article 766 of the BCC:

> "Art. 766. If the insured himself or his representative makes inaccurate statements or omits circumstances that could influence acceptance of the application or the premium rate, he shall lose the right to the guarantee, in addition to being obligated to pay the overdue premium."

By the same token, the head of Article 37 of the SUSEP Circular No. 256/2004 so determines:

> "Art. 37. The contractual conditions must include that if the insured, its legal representative, or its broker makes misstatements or omits circumstances that may affect the acceptance of the offer or the rate of the premium, the right to compensation will be impaired, in addition to being the insured obligated to pay the overdue premium."

Article 769 reinforces the insured’s duty of disclosure in the context of the performance of the insurance contract. It sets forth that

> "Art. 769. The insured is bound to inform the insurer, as soon as he becomes aware of all incidents which may substantially aggravate the risk covered, under the penalty of loss of right to the guarantee, if its proven that he silenced in bad faith.

§ 1. The insurer, provided that he acts in the fifteen days following the receipt of the notice of aggravation of the risk without fault attributable to the insured, may inform the insured in writing of his decision to terminate the contract.

§ 2. The termination is enforceable thirty days after the corresponding notice, being the insurer required to return the balance of premium."

The harshness of the Article 769 rule is sometimes mitigated by the Brazilian courts. For instance, in automobile insurance, let us say that the owner of a car covered under an automobile policy sells the vehicle to a third party, but fails to inform the insurer about the sale. Supposing that a loss occurs, this will not exempt the insurer from paying under the policy necessarily. At least not under the rationale that has prevailed in Brazil. This is because the courts have developed the understanding that coverage may be denied only if the insurer proves that the risk was materially aggravated as a result of the sale of the car. Therefore, the courts have inadvertently shifted the burden of proof here from the insured to the insurer.

By way of example, innocent non-disclosure clauses, which might be acceptable in some jurisdictions, would hardly be enforceable in Brazil. They would conflict with the final part of Article 769, which creates a very high bar for the insurer to deny coverage on the basis of breach of duty to disclose during the policy period.

4. **Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?**

Yes, the principle of utmost good faith applies to all types of insurance contracts.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

Even though the law in Brazil expressly refers to the principle of good faith applying to the making and to the performance of the contract, it is well established that the principle extends to the pre-contractual and post-contractual stages as well.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

Yes, Article 765 of the BCC is plain and clear that the principle of good faith must operate both ways, i.e., to the insured and to the insurer and applies at the pre-contractual stage. Because the principle of utmost good faith is largely perceived as creating the duty to disclose specific information at the time of making and renewing the contract, at the pre-contractual stage it is perhaps fair to say that it affects more the insured than the insurer.

Yet, the principle of utmost good faith also plays an important role in the sale of insurance. Oftentimes insurance brokers are held to be longa manus – i.e., intermediaries – of insurance carriers. As such, they are also charged with good faith duties of clarifying to the applicant or policyholder contractual conditions that are not plain or obvious.

By the same token, also in the name of good faith, insurers to use a plain, objective, conspicuous and informal language in all contractual clauses (Articles 7 and 9 of the SUSEP Circular No. 256/2004):

> "Art. 9 The Conditions of Contract shall be expressed in plain and objective language, so that does not generate multiple interpretations and respect the vernacular, as well as
The Brazilian Consumer Code (Federal Law No. 8,078/90, usually referred to as “CDC”), as well mandates that all offers made to consumers shall bear adequate, accurate, and plain language, and describe its features objectively and conspicuously (Articles 6, III, and 31 of the CDC).

As a result, insurance companies are not so rarely held liable for the language of the policy, either because the language is way too difficult for insureds to understand or because the policy language is ambiguous, contradictory or otherwise gives room to multiple interpretations.

In another recent precedent the STJ stroke down a clause in a property insurance that limited coverage to “qualified theft” only, leaving simple thefts uncovered. The court held that the knowledge of the specific meaning of “qualified theft,” which is a term of art defined under the Brazilian Penal Code, cannot be assumed from the insured, who was a consumer and thus was presumably vulnerable.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The principle of utmost good faith is largely related to the duty of disclosure owed by the insured towards the insurer not only in the formation of the contract, but also in its performance. When applying for insurance coverage, the insured must describe the relevant facts related to the scope of the insurance.

For example, in the application for health or life insurance, the insured must neither conceal nor lie about any known serious personal illness or health condition when answering the health questionnaire. If the insurer proves that the insured knew about such health condition or illness beforehand, the latter will be found to have breached the principle of good faith.

Note that despite usually referring to the objective concept of the principle of good faith, the courts in Brazil usually require the insurer to prove that the insured has acted in bad faith – in theory, a characteristic of the subjective concept of good faith – in order to allow the insurer to avoid the contract. The bar imposed on insurers is, thus, very high.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

Even though the duty of utmost good faith is generally much broader than (and not confined to) the duty of disclosure in Brazil, in the pre-contractual stage the duty of disclosure is the main manifestation of the principle of utmost good faith.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

In theory, the principle of utmost good faith is not confined to the duty to disclose. It also manifests itself, for instance, in Article 771, in fine, of the BCC, which creates for the insured the duty to take affirmative steps seeking to mitigate the harmful consequences of a loss to the insurer once the loss materializes:

“Art. 771. On pain of losing the right to indemnification, the insured shall inform the insurer of the loss, as soon as he learns of it, and shall take immediate measures to diminish the consequences of the loss to the insurer.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

In theory, under Article 766 of the BCC, the insurer will have the right to either terminate the contract or keep it and charge any extra premium to insure the heightened risk covered. If the insured is found to have breached the duty of disclosure intentionally (i.e., to have acted in bad faith), the insured shall lose the right to the guarantee accorded by the insurance contract, but will still be bound pay any overdue premium.

In practice, as indicated in the preceding answer, many courts in Brazil place on the insurer the high burden of showing that the insured consciously concealed a material fact and sometimes that such fact had causal connection with the loss in order to uphold termination of the insurance contract.

A classic example involves the implication of suicide in life insurance. Article 798 of the BCC is crystal clear that the beneficiary in a life insurance policy has no right whatsoever to the insured amount if the insured commits suicide within the two (2) first years of contract. The criterion adopted by the law was a purely objective one. However, the courts in Brazil have modified the law by introducing a subjective element to the test. The courts currently understand that the insurer can only avoid paying under the contract if it manages to show that the insured purchased the policy with the preconceived intention to defraud the insurer by committing suicide. In real world, it is nearly impossible for the insurer to be discharged from such burden, making insurers vulnerable to pay the insured amount to the beneficiaries in virtually all suicide cases.

2 Cf. REsp 1,293,006/SP, 3rd Panel, DJe 06/29/2012.
11. If the duty of utmost good faith operates separately from the duty of disclosure, does one have precedence over the other?

As indicated earlier, the duty of disclosure is a subset of the principle of utmost good faith. Therefore, they do not conflict.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

The principle of utmost good faith operates very broadly for the insurer. For instance, the principle has been invoked in several life insurance disputes where the underlying policy had been renewed continuously for decades. Many precedents hold that in such instances, by renewing the policy consecutively for many years, the insurer would have created on the insured in good faith an expectation that it would keep being renewed on similar bases indefinitely despite his/her ageing. As a result, the insured would be entitled to renewal whereas the insurer would be prevented from not renewing the policy. Therefore, in such situations, insurers' have been precluded from rejecting renewal and from raising the premium substantially on grounds of ageing because such acts are held to be abusive and in breach of the principle of good faith.

In a similar fact pattern, there are precedents holding that after renewing the policy for many years in a row, the insurer cannot validly avoid the policy on grounds of preexisting illness. Such a behavior has been deemed as incompatible with the principle of good faith.

Good faith has been frequently invoked in cases where the insured paid the premium to the broker, but the latter failed to pass the money on to the insurer. Absent showing of negligence and bad faith on the part of the insured, court precedents have held that the insurance contract must be considered valid and binding upon the insurer in such cases.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

See above.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

Even though the duty of disclosure is expressly contemplated in Article 766 of the BCC, in those cases where the insurance relationship is held to qualify as a consumer contract, the courts in Brazil sometimes charge insurers with the duty of educating insureds on the nature and extent of their duty of disclosure. This happens more often in sophisticated and complex types of insurance products, annuities, in which the extent of the duty of disclosure may be less intuitive.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

Typically the insurer will be bound to perform under the insurance contract, which in most instances will translate into indemnifying the insured or paying the insured amount to the beneficiary. It is not uncommon for moral damages to be available for the insured or the beneficiaries if the insurer is found to have delayed too much to pay proceeds under the policy.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

The insured must cooperate with the insurer in the claims handling process by providing accurate and timely information and documentation related to the loss.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

As interested parties, the duty of utmost good faith arguably is also owed to third party beneficiaries. This is even clearer and unmistakable if the underlying insurance contract qualifies as a consumer contract.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Examples of the duty of utmost good faith in the post-contractual stage include the interaction between the insurer and the insured in the loss adjustment process, in the renewal of the policy and in the right of subrogation of the insurer.

As pointed out earlier, the insured is bound to cooperate with the insurer in the loss adjustment process by providing information and documentation regarding the loss in an accurate and timely fashion. Also, in the context of policy renewal, the insured must disclose to insurer any supervening event which may have increased the insured peril or influence the insurer in determining the premium to be charged and whether or not to accept the application.

In liability insurance, manifestations of the duty of utmost good faith include the insured’s duty to inform

3 Consumer contracts are such contracts that fall within the concepts of the CDC. The CDC is a comprehensive body of law which provides for public policy rules according a heightened level of protection to the so-called consumers of products and services, including insurance and financial services. The vast majority of insurance contracts are deemed to be consumer contracts. Oversimplifying a little the concept for the purposes of this questionnaire, suffice it to say that only insureds which happen to be large and sophisticated companies arguably fall outside the scope of protection of the CDC.
to the insurer, as promptly as possible, the consequences of his/her acts which may result in liability under the policy, that is, which may implicate the insurer. The insured is also precluded from acknowledging liability in a case brought against him/her and from settling with plaintiff (i.e., the injured third party) without the prior and express consent of the insurer. Such rules, which also derive from the principle of utmost good faith applicable to the insured, are not absolute though and must be assessed on a case-by-case basis.

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

If the criminal activities are current and may impact the risk assessment inherent to the analysis made by the insurer, then its concealment will amount to a breach of the duty of utmost good faith.

Past criminal activities which have no direct and present connection with the scope of the insurance contract most probably will have no bearing and, thus, would not qualify as a breach of the duty of utmost good faith.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

The insurer must be careful and keep the policyholder informed about the main facts surrounding the claims handling process, including the adjusting process. In the so-called damage insurances – as opposed to the so-called personal insurance –, the insurance authorities mandate the insurer to pay proceeds under the policy within thirty (30) from the loss communication by the insured. Such term may be stayed whenever the insured delays in providing the insurer with information or documentation related to the loss requested by the latter.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

Yes.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

See answer to the preceding items.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

The National Federation of Insurance Companies (Federação Nacional das Empresas de Seguros e de Capitalização – FENASEG) issued in 2011 a Code of Ethics for the industry. The Code of Ethics is binding upon the adhering parties. Nevertheless, the Code of Ethics is a short document and only refers to the principle of good faith generically.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

There are precedents holding void for abusive clauses stipulating waiting periods in life insurance policies, i.e. provisions establishing that the policy will not become enforceable upon the formation of the contract, but rather at a later point in time.

Another example involves termination of the insurance contract for cause based on default on the part of the policyholder. Even if the policy allows the insurer to terminate the policy in such instance upon default by the policyholder without notice to the latter, there are several precedents holding that the insurer must give prior notice of the default to the policyholder in order for the termination to be effective.

Also, see the answer to item 6 where we discuss briefly the case on “qualified theft” vs. “simple theft.”

All such cases are grounded on the principle of good faith.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Yes. Courts in Brazil frequently scrutinize the validity of exclusions under the policy vis-à-vis the principle of good faith. Typically, the courts determine whether the exclusions are compatible with the insured’s reasonable expectation concerning the scope of the policy.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Yes. In the administrative field, the insurer is subject to the oversight by the Superintendence of Private Insurance (Superintendência de Seguros Privados – SUSEP) and, for those contracts that qualify as consumer ones, also by the consumer protection authorities, usually known as “PROCONs”. It is incumbent upon such entities to investigate misconduct by the insurer amounting to breach of the principle of good faith.

For instance, under the CNSP Resolution No 243, of 2011, as amended, insurers held by the insurance authority to have breached or delayed unjustifiably the performance of a given insurance contract are liable to a fine in a range between BRL10,000 and BRL300,000 (Article 29). A similar offense that implicates the principle of good faith is the one provided for by Article 33 of said regulation. It states that the insurer which
modifies general, special or particular conditions of the policy or any other contractual document related thereto without the prior consent of the policyholder, when such consent is required under the law, can be subject to a fine which may vary between BRL20,000 and BRL800,000.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

Even though reinsurance contracts are made by sophisticated parties per definition, as opposed to a broad category of insurance contracts that involves insurers and vulnerable consumers, under Brazilian law the principle of utmost good faith is equally applicable to reinsurance contracts. This is because the courts in Brazil have established that reinsurance contracts fall within the more general classification of insurance contracts, which, therefore, attracts the applicability of Article 765 of the BCC, along with Articles 113 and 422 of the same statute, which apply to contracts in general. The duty to inform that derives from the principle of good faith affects the parties to a reinsurance contract much the same way to that applicable to insureds and insurers in every insurance contract; it applies to both parties, albeit affecting the ceding company slightly more than the reinsurer with respect to the risks transferred to the latter. The ceding company must communicate any loss to the reinsurer as soon as reasonably practicable. The ceding company must also keep the reinsurer informed about any material developments in the loss adjusting process and allow the reinsurer to take a leading role if the reinsurance contract provides for a claims control clause.

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Preliminary Comments

Canada is a federation with two distinct jurisdictions of political authority: the country-wide federal government; the ten provincial governments and three territories. The division of powers between the federal and provincial governments was initially outlined in the British North America Act, 1867 (now known as the Constitution Act, 1867). There is no express provision in the Constitution Act, 1867 for jurisdiction over insurance. The matter was somewhat settled through the courts over the years which have interpreted the provinces’ constitutional power to regulate “property and civil rights” to include the marketplace regulation of insurance. Accordingly, except for marine insurance, the regulation of contracts of insurance is largely a provincial matter.

All provinces and territories of Canada have used their “property and civil rights” power to shape insurance contract law and to license any insurers undertaking insurance in the province or territory and insurance intermediaries. Each province and territory has legislation dealing with most aspects of insurance contracts made within its boundaries. Apart from auto insurance, which varies widely across the various provinces and territories, the legislation regarding insurance is broadly similar in most provinces and territories. However, recent provincial insurance acts contain important exceptions and differences. The provincial and territorial statutes deal both with the form and the content of contracts and address several classes of insurance, each of which has different rules. The provincial and territorial statutes include rules regarding disclosure and misrepresentation in negotiations, entry into force, content of policies, notice and proof of loss, valuation of loss, third party rights and termination of contracts, amongst others.

The province of Québec distinguishes itself from the rest of Canada in that its private law is governed not by the common law provinces, but by the Civil Code of Québec containing a comprehensive set of legal principles covering all aspects of civil law. Provincial statutes such as the Act respecting Insurance (Québec) and the Act respecting the Distribution of Financial Products and services (Québec) amongst others, and the regulations adopted thereunder, complete this legal framework. The general principles of Quebec insurance law are contained in Chapter XV of the Civil Code of Québec. For the most part, the rules governing insurance in Québec are similar to those elsewhere in Canada. Some of the articles under property insurance are devoted exclusively to fire insurance.

Each province and territory also has its own insurance department which regulates market conduct and the licensing and supervision of insurance intermediaries such as agents, brokers and adjusters in their province. In Québec, for example, the Autorité des marches financiers (the “AMF”), is the regulator of Québec incorporated insurance companies and of extra-provincial insurance companies licensed to conduct insurance business in the province of Québec.

Our responses to this questionnaire focus on both the common law provinces and the civil law province of Québec.

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

common law provinces

Yes. The principle of utmost good faith under Canadian common law provinces traces back to the English contract law case, Carter v. Boehm (1766) 3 Burr 1905, which established the duty of utmost good faith (or uberrimae fidei) in insurance contracts. In that case, Lord Mansfield held that the insured applying for insurance coverage owed a duty of utmost good faith to the insurer to disclose all facts material to the risk. This initial articulation of the duty was based upon the inequality of information between the proposed insured and the insurer. The insured must disclose all relevant information in order to enable the insurer to accurately assess the risk. The courts have since imposed the duty on the insurer as well.

Based on more recent pronouncements by Canadian courts, it is a well-established principle under Canadian common law provinces that an insurance

1 Our thanks to A. Max Jarvie, Mirna Kaddis and Jennifer Allman, students at law, for contributing to the preparation of our responses to this questionnaire.

2 Some would argue that provinces have at least a concurrent jurisdiction with the federal government (which has power over navigation and shipping) in the field of marine insurance. In 1993, the federal government adopted the Marine Insurance Act, a statute whose provisions are similar to its provincial counterparts.
contract is one of utmost good faith. In addition to the express terms of the policy and any statutorily mandated conditions, there is an implied obligation in every insurance contract that the insurer will deal with claims from its insured in good faith. The obligation to act in good faith is separate from the insurer's obligation to compensate its insured for a loss covered by the policy and, as such, its breach gives rise separate and additional damages.

The Supreme Court of Canada in Fidler v Sun Life Assurance Company of Canada adopted the definition articulated in 702535 Ontario Inc v Lloyd's London Non-Marine Underwriters:

The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

civil law (Quebec)

Yes. In general, the Civil Code of Quebec provides for the basic principle of good faith in articles 6, 7, and 1375, stating that civil rights, as well as obligations, need to be exercised in good faith. Quebec's insurance law operates with an augmented form of this concept, described as the principle of utmost good faith. In the case of marine insurance, article 2545 of the Civil code of Quebec expressly states that these contracts are "based upon the utmost good faith." Moreover, the courts have determined that in Quebec law, insurance contracts generally are founded on this principle.

Similar to the common law provinces, this concept applies to both insured and insurer. With respect to the insured, the duty of utmost good faith requires that the insured make representations that a "normally provident insured would make, if they were made without material concealment and if the facts are substantially as represented" and that "represent all the facts known to him which are likely to materially influence an insurer in the settling of the premium." With respect to the insurer, the duty is connected with its position of power relative to the insured: the insurer cannot abuse its dominant position. The insurer's duty of utmost good faith finds expression in the requirements of competence, diligence and an obligation to inform the insured.

The duty of utmost good faith is also linked in Quebec law with the concept of mutuality, an essential principle that governs all insurance contracts. Mutuality is the concept by which in insurance contracts, the risks of the insured and his/her insurer are combined in a proportionate manner.

### 2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

**common law provinces**

The principle of utmost good faith is a creature of common law provinces; however, some incidents of common law good faith have been articulated by statute in the context of insurance contracts. For example, section 183 of the Ontario Insurance Act sets out the insurer's duty to disclose in relation to life insurance as follows:

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4 Whitew v Pilot Insurance Co, 2002 SCC 18 at 650 [Whiten].

5 Ibid.

6 2006 SCC 30 at para 63, citing 702535 at para 29.


8 See Civil Code of Quebec, LRQ c C-1991, art. 2545.


12 See McKinnon c. Industrielle Alliance, assurances collectives, 2010 CanLII 5622 (QC CQ).


183. (1) Duty to disclose – An applicant for insurance and a person whose life is to be insured shall each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within the person’s knowledge that is material to the insurance and is not so disclosed by the other.15

This statutory provision applies to the pre-contractual stage of the insurance contract.

Similarly, section 18 of the Ontario Marine Insurance Act provides that:

18. A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith is not observed by either party the contract may be avoided by the other.16

This statutory provision imposes a good faith duty in the context of marine law on both the insured and the insurer and implies that the duty exists at both the pre-contractual and post-contractual phase of the contract.

Further, the Ontario Insurance Act mandates a standard form of automobile policy which requires certain statutory conditions to be printed as part of each automobile policy in Ontario. The first such statutory condition provides as follows:

1. Material Change in Risk – (1) The insured named in this contract shall promptly notify the insurer or its local agent in writing of any change in the risk material to the contract and within the insured’s knowledge.17

This statutory condition applies to the insured in the post-contractual phase of the insurance contract.

civil law (Quebec)

In Quebec, the principle of utmost good faith is both a statutory and a civil law principle. It is made express in article 2545 of the Civil Code of Quebec, which states that the contract of marine insurance is founded on the utmost good faith.18

With respect to insurance contracts generally, courts have established that articles 2408, 2409, 2466, 2471 and 2472 of the Civil Code of Quebec, all of which concern the obligations of the insured in his/her representations to the insurer, are expressions of the principle of utmost good faith.19

Finally, the Quebec Court of Appeal has established that in civil law there exists a pre-contractual obligation to inform on the part of an insurer (through the agent acting as the insurer’s mandatary).20

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Common law provinces and civil law (Quebec)

Yes, both the common law provinces and civil law (Quebec) provide for the principle of utmost good faith and a separate duty of disclosure for the insured.21 For the common law provinces, please refer to the answer to Question 8 below. Although the principle of utmost good faith in insurance contracts is indistinguishable from the duty of disclosure, the duty of disclosure has specifically been codified in various statutes of the common law provinces for particular types of insurance contracts.

Similarly, in civil law, it is important to note that although it is possible to distinguish and describe each of these principles separately, they are conceptually related in Quebec law. The Quebec Court of Appeal has determined, for example, that the duty of utmost good faith governs the pre-contractual declarations made by an insured;22 in addition, Quebec courts have also found the principle of utmost good faith to be in operation when an insured notifies his/her insurer on material change in risk23 or in his/her declarations regarding losses.24

17 Q.A.P. 1 – Ontario Automobile Policy, Sec. 8 – Statutory Conditions.
21 For Quebec, see Civil Code of Quebec, LRQ c C-1991, art. 2407, 2466, 2470-2473, 2545.
23 See Lemay Paquette c. Unique cie d'assurances générales, 2004 CanLII 14063.
4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Common law provinces and civil law (Quebec)

Yes, both for the common law provinces and civil law (Quebec) jurisdictions, the principle of utmost good faith applies to all types of insurance contracts. Case law does not hinge the application of the principle upon the subject matter or type of insurance. Quebec courts have stated that the principle of utmost good faith governs all contracts of insurance between insurers and insureds. Furthermore, some of the provisions relating to the utmost good faith, such as the declaration of risk, are in the “General Provisions” division of the chapter on insurance of the Civil Code of Quebec, thus implying that all insurance contracts are subject to the principle.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

Common law provinces

As described in answer to Question 1 above, the insured’s common law duty of utmost good faith applies at the time of applying for coverage.

The insurer’s duty of good faith is present during every stage of the claims process according to the common law. It requires the insurer to act in a timely and considered manner and not to use its position of economic power against the insured. Case law is very limited involving claims by insurers against insureds for breach of their duty of good faith other than at the pre-contractual stage. The allegation is normally raised by the insurer as a defence. However, theoretically, the duty could be applied, for example, where the insured is in breach of its obligations under the insurance contract. Note that statutory condition 1 of the Ontario standard form automobile policy (referred to in the answer to Question 2 above) specifically provides for the insured’s duty of disclosure following the formation of the contract.

Civil law (Quebec)

Similarly, in Quebec, the duty applies continuously, throughout the pre- and post-contractual stages. The duty of utmost good faith first applies at the pre-contractual stage. This includes negotiations and of course the prospective insured’s declaration of risk at the formation of the contract. During the contract, the duty of utmost good faith remains applicable since the insured has the obligation to notify his/her insurer of any change that increases the risk stipulated in the policy. Finally, the duty of good faith also applies at the claim stage. For example, when declaring the circumstances of a claim, the insured must act in the utmost good faith. Hence, the duty of utmost good faith is a continuous one that applies pre-contractually, contractually and post-contractually.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Common law provinces and civil law (Quebec)

Yes, utmost good faith applies to both the insured and the insurer both in common law provinces and in civil law, in a reciprocal manner. For the common law provinces, the Ontario Court of Appeal in Ferme Gérard Laplante & Fils Ltée v Grenville Patron Mutual Fire Insurance Co stated that “[i]n an insurance contract, the law has long recognized, in addition to the express terms of the contract agreed to by the parties, a mutual obligation between insurer and insured to act in utmost good faith.” The common law provinces clearly states that the insured’s duty to disclose all information material to the risk exists at the pre-contractual stage. Similarly, case law has found that failure by the insurer to obtain material information from the insured at the time of entering into the insurance contract is bad faith if the insurer later denies coverage on the basis that it was missing the information.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?


29 See Civil Code of Quebec, LRQ c C-1991, art. 2408.


Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

common law provinces

The insured has a duty to disclose all information that is relevant to the risk, whether or not the insurer has inquired about them.33 The insured cannot benefit from concealed knowledge; however, the insured need not mention what the insurer already knows, ought to know, or is reasonably presumed to know.34 That being said, the insurer cannot deny coverage on the basis of missing information when the insurer knew the information was missing.

In Andrusiw, the insured suffered a stroke that resulted in the loss of the use of his left hand and he was required to wear a foot brace and use a cane. The insurer made monthly payments to the insured based on the diagnosis that he would be unable to return to work. The insured brought an action for total disability benefits and the insurer counterclaimed to be reimbursed for the monthly payments. The court held in favour of the insurer, stating that with the foot brace the insured was able to use his foot in a way that enabled him to perform the duties of his job. As such, his disabilities did not fall within the definition of ‘total disability’.35

In Al-Asadi, the insured claimed that his motorcycle had been stolen and brought an action against his insurance company for the replacement value of the motorcycle. However, there was no evidence the motorcycle had actually been stolen, and investigations show it could not have been started without the insured’s microchipped key. The insured therefore breached his duty of good faith to the insurer by engaging in fraud.36

civil law (Quebec)

The applicable principles are very similar in the civil law tradition. At the pre-contractual stage, the insured’s duty manifests itself during the initial declaration of risk, just as in the common law provinces jurisdictions.37 The policyholder has the obligation to declare to the insurer all the relevant elements for the insurer to be able to evaluate the risk.38 Therefore, in principle, the insurer should be able to rely on the insured’s good faith and diligence to assess the risk, without having to investigate further.39 The insured has the obligation not only to answer the questions asked by the representative of the insurer, but also to divulge, on his/her own initiative, any relevant fact that could affect the risk. This is explained by the fact that it is difficult for the insurer to find out confidential information about the insured, such as his/her health status, by himself.40

For instance, in Deguise c. Montminy41, the Court decided that the duty of good faith implied that the insureds had to divulge the content of a report saying that the presence of pyrrhotite in their rocks could cause damages.

In Mansour c. Companie mutuelle d’assurances Wawanesa,42 in the case of a car insurance contract, the policyholder needed to divulge the reasons why the previous insurance was cancelled, in that case because of a default of payment.

Finally, in Larche c. Assurances Générales des caisses Desjardins,43 the Court expressed that the policyholder in a car insurance contract needs to disclose any previous criminal record in a car insurance contract, failing which the contract may be invalid.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

common law provinces

The duty of disclosure is present in the common law provinces and statute for certain types of policies. For example, in Ontario the Insurance Act provides that an applicant for life insurance must disclose every fact material to the risk.44 Similarly, the Insurance Act provides that where an applicant for automobile insurance gives, among other things, false particulars of the described automobile, a claim by the insured is invalid.

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34 (1766), 3 Burr 1605 (KB) footnote 53, at para 5.
35 *Andrusiw v Aetna Life Insurance Co of Canada* (2001), 289 AR 1 (Alta QB) [Andrusiw].
36 *Al-Asadi v Alberta Motor Assn Insurance Co* (2003), ABQB 289 [Al-Asadi].
38 See Tardif c. 9111-7317 Québec inc., 2004 CanLII 19064 (QC CQ).
40 *Id.*
41 See 2014 CanLII 2672 (QC CS).
42 See 2008 CanLII 2451 (QC CQ).
43 See 2002 CanLII 38440 (QC CQ).
invalid. In other jurisdictions, specific areas of insurance have a statutory duty to disclose (e.g. in British Columbia there is such a duty for accident and sickness insurance[46]). The common law provinces duty of disclosure requires applicants to disclose material facts, but does this does not include future changes to risk.[47] The common law provinces duty of disclosure and the duty of utmost good faith are indistinguishable.

*civil law (Quebec)*

In civil law, the duty of utmost good faith for the insured is not equivalent to the duty of disclosure in the sense that it is possible to describe and identify them separately. Nevertheless, they are both dependant of the other, since the duty of disclosure is governed by the duty of utmost good faith; it is thus not easy to find one without the other.[48]

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

*common law provinces*

The duty to disclose is part of the duty of utmost good faith, although see Question 8 for instances where the duty to disclose is also contained in the statute.

*civil law (Quebec)*

The two concepts are interdependent, just as in the common law provinces jurisdictions, where declarations made by the insured need to be made with the utmost good faith. This implies not only an obligation to answer the questions asked by the insurer, but also to take the initiative to divulge any information that would be relevant for the initial evaluation of the risk. This obligation also exists in the context of a renewal of contract.[49] Hence, the insured needs to declare, for instance, the use to be made by the insured good, a previous disaster, a driver’s license suspension, a drunk driving conviction, or any serious health issues.[50] Even though all these declarations need to be made in good faith, it is the responsibility of the insurer to prove the false statement by the insured.[51]

Also, there are limits to this disclosure obligation. Like in the common law provinces jurisdictions, the insured does not have to represent the facts that the insurer knows or is presumed to know.[52] Also, the presence of a questionnaire can also limit the obligation to divulge, but in a limited manner.[53]

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

*common law provinces*

For a serious breach of disclosure in the application (material misrepresentation), the insurer has the right to rescind the contract.

In the case of insurers, see the answer to Question 7. The insurer, for example, may be precluded from arguing misrepresentation.

*civil law (Quebec)*

The remedies in Quebec are a little more stringent. When the insured breaches his/her duty of utmost good faith, the contract can be nullified. Article 2410 of the *Civil code of Quebec* states that “any misrepresentation or concealment of material facts by either the client or the insured nullifies the contract at the instance of the insurer, even with respect to losses not connected with the risks so misrepresented or concealed”. In that sense, the remedies are not different for a breach of the duty of utmost good faith or for a breach of the duty of disclosure.

The insurer will only be able to obtain a sanction if he proves that the answer given by the insured was inaccurate or reluctant.[55] In that case, it will be possible for the insurer to ask for the nullity of the contract.[56] Since it is a relative nullity, it is possible for the insurance contract to provide for other sanctions, such as an increase in the insurance premiums.[57]

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[48] See also question 3.
In damage insurance, a possible sanction is the reduction of the indemnity.58 This sanction applies unless the bad faith of the insured or policyholder is established and unless it is established that the insurer would not have covered the risk if he had known the truth.59

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

*common law provinces*

Given that the two are indistinguishable, neither takes precedence over the other. That being said, courts tend to focus more on the duty of disclosure.

*civil law (Quebec)*

It can happen that an insured, making a representation in good faith (for instance, by thinking that information omitted from the representation is not relevant to the insurer) will still be subject to sanctions.60 In that sense, it would appear, similarly to common law jurisdictions, that the duty of disclosure has precedence over the duty of utmost good faith.

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

*common law provinces*

Generally, Canadian case law dealing with the obligation of good faith as an implied obligation in an insurance contract relies on broad statements of the duty's existence. They do not generally distinguish between the different stages of the contractual relationship. It is often limited to contractual performance and not to pre-contractual negotiations. Scholars have noted that Canadian jurisprudence generally rejects the application of good faith in pre-contractual negotiations.61

However, refer to Question 13 for a summary of cases where the duty of good faith has been applied to an insurer in the context of pre-contract formation.

*civil law (Quebec)*

In Quebec, the utmost good faith of the insurer demonstrates itself, amongst other things, in the duty to inform.62 The insurer, along with its agents or mandataries, is obliged to inform and advise a prospective insured regarding the types of policy and coverage available to them during the pre-contractual phase.63

The insurer is also bound to abide by the terms of an insurance contract negotiated with an insured, even where a written policy associated with the contract and furnishing evidence of its existence exculpates the insurer from indemnifying the insured for certain claims.

13. **Describe the insurer's pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

*common law provinces*

In *Carter v Boehm*,64 Lord Mansfield suggested that it was a breach of good faith for the insurer to insure a ship on its voyage when the insurer privately knew it had already arrived at its destination.

In *Sagl v Cosburn, Griffiths & Brandham Insurance Brokers Ltd*, the Ontario Court of Appeal held that if the insurer failed to obtain material information at the time of insuring, where they should have known they were missing such information, then they cannot deny coverage on the basis that the information was missing.65

*civil law (Quebec)*

In *Fletcher v. Manitoba Public Insurance Co*,66 the Supreme Court of Canada stated that private insurance agents and brokers should be held to a stringent duty to provide both information and advice to their customers. Notwithstanding its origins in the common law, the Quebec Court of Appeal incorporated this finding into their decision in *Baril c. Industrielle compagnie d'assurance sur la vie*, saying that in civil law there exists a precontractual obligation to inform on the part of an insurer (through the agent acting as the insurer’s mandatary).67 In that case, an insurance agent failed to inform a prospective insured...

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58 *Civil Code of Quebec, LRQ c C-1991, art. 2411.*


62 See *Thibault (Succession de) v Industrielle Alliance (L)*, *Assurances et services financiers inc.*, 2006 CanLII 1235 (CQ CQ).

63 See *Baril c. Industrielle compagnie d'assurance sur la vie*, 1991 CanLII 3566 (QC CA).

64 (1766) 3 Burr 1905.

65 *Sagl v Cosburn, Griffiths & Brandham Insurance Brokers Ltd* (2007) 54 CCLI (4th) 236 (Ont SCJ); supp reasons 77 CCLI (4th) 161 (Ont CA).


67 See *Baril c. Industrielle compagnie d'assurance sur la vie*, 1991 CanLII 3566 (QC CA).
that a life insurance policy offered to her and to which she had agreed but not yet paid the first premium upon could not have immediate effect. The Court of Appeal found this to be a failure on the part of the agent to fulfill the insurer’s duty to inform.

The insurer’s general duty to inform at both the pre- and post contractual stage was later endorsed in Thibeault, in the Court of Quebec, as arising from the duty of utmost good faith informing insurance contracts. 68

With respect to the duty to abide by negotiated terms, in Hadley Shipping, the Quebec Superior Court determined that an insurer who, knowing that an insured wanted insurance against wind damage, concluded an oral insurance contract with that insured that included insurance against wind damage, could not rely on a clause in the written policy exculpating the insurer, saying that insurance contracts are based on utmost good faith. 69

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

common law provinces and civil law (Quebec)

To our knowledge, this issue has not been addressed in common law or in civil law jurisdictions. Furthermore, in civil law, there are no statutory requirements relating to this characterization of the insurer’s duty of utmost good faith. To the extent that Quebec case law addresses the insurer’s specific duties that flow from the principle of utmost good faith, a duty to notify a prospective insured of the nature and extent of their duty of disclosure is never mentioned.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

common law provinces

Remedies that must be provided by the insurer following a breach can take several different forms. Courts can award damages for breach under traditional contractual damage principles. If the insurer has behaved particularly badly and the court wants to deter and denounce future conduct, they may award punitive damages. Aggravated damages, which compensate the insured, can be awarded. Judgments can also require the insurer to pay interest and costs.

civil law (Quebec)

Like in the common law jurisdictions, the remedies can take the form of damages or even punitive damages in some cases. In Baril, the Court of Appeal determined that the appropriate damage award for a breach of the duty was to provide the insured with the benefit of the contract that they would have received if the coverage had been immediately applicable.

Similarly, the Quebec Superior Court in Hadley Shipping decided to award damages commensurate with the benefit that would have flowed from the agreed contract had the contested exculpatory clause in the policy been absent.

In addition, the Court of Quebec has found that in consequence of the insurer’s duty to act with utmost good faith, an insurer may also be found liable in negligence for damages arising from the insurer’s errors or omissions. 70

Finally, punitive damages may be awarded. The respected doctrinal author Jean-Louis Baudouin has stated that an insurer may also be liable, in extreme cases, for punitive damages under Quebec’s Charter of Human Rights and Freedoms, 71 such as in the case of an unjustified and totally unsustainable refusal to indemnify an insured where such action affects an insured’s human rights under the Charter. 72

We conclude that like in common law jurisdictions, the general approach for pre-contractual breaches of the duty of utmost good faith is to award damages equivalent to the benefits an insured could reasonably have been expected to enjoy under the contract, but that breaches can attract liability in negligence and in some cases punitive damages may also be awarded.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

common law provinces

The role of the insured is to: apply for insurance and notify the insurer of material changes, pay all premiums, and in first party claims provide notice, proof of loss and co-operate with the insurer. Specific policies may give the insured additional roles, but in these cases there is no need for an ‘obligation of good

68 See Thibeault (Succession de) c. Industrielle Alliance (L’), Assurances et services financiers inc., 2006 QCCQ 1235.


71 See Charter of Human Rights and Freedoms, CQLR c C-12.

faith’ because there is already a contractual requirement.

civil law (Quebec)

In Quebec, the duty of utmost good faith for the insured at the claim stage is of a piece with the insured’s pre-contractual duty to disclose and is provided for in the Civil Code of Quebec at articles 2471 and 2472. The content of the duty is to inform the insurer, at their request, as soon as possible of all the circumstances surrounding a declared loss, including its probable cause, the nature and extent of the damage, the location of the insured property, the rights of third persons, and any concurrent insurance.

It bears mentioning in addition that the ongoing duty to disclose anything that may entail a material change in risk is also part of the insured’s post-contractual duty of utmost good faith.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

common law provinces

Yes, third party beneficiaries do have a duty to the insurer. They must co-operate in the defence of any claim against the insured.

civil law (Quebec)

In Quebec, third parties beneficiaries also have a duty to the insurer, which is provided for in the Civil code of Quebec. The third paragraph of article 2471 permits any other interested party, should the insured fail to fulfill his/her obligation to inform under paragraph 1 of article 2471 (as described above), to shoulder the insured’s obligation themselves. A third party beneficiary who, as an interested party, undertakes to fulfill the insured’s obligation to inform is bound by that same obligation and hence by the duty of utmost good faith.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

common law provinces

It has been less common for the insurer to initiate a claim against the insured for bad faith. Instead, it is more common that the insurer allege bad faith as a defense to a claim brought by the insured. In one case, the insured misled the insurer about the defence of a claim against the insured. Another case involved an insured refusing to co-operate with the insurer in a first party claim.

civil law (Quebec)

In Minville c. Assurances générales des Caisses Desjardins, an insured failed to communicate to their insurer that an insured residence had been vacated, instead describing it as a temporary vacancy, and the insurer refused to indemnify the insured when the vacated property burned down. The Quebec Superior Court found that the insured’s failure to give a real account of the character of the vacancy was a breach of the duty of utmost good faith.

In Cyr c. Groupe La Laurentienne, the Court of Appeal found that an insured’s concealment of the fact that they were approached by someone who declared themselves ready to set fire to the insured building in order to rectify their financial difficulties constituted a breach of the duty to proactively disclose.

In Miserany c. Royal Sun Alliance, the Court of Quebec found that an insured, claiming theft of a microwave, had breached the duty of utmost good faith in respect of his/her obligations under articles 2471 and 2472 of the Civil Code of Quebec, when it was determined that he had lied concerning the state of the microwave.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

common law provinces

No. In Oldfield, the widow of the insured was not barred from claiming under her husband’s life insurance policy even though he died during the commission of a criminal act (he swallowed a condom filled with cocaine, which he intended to sell, in order to hide it from the police). Two principles of insurance are discussed in the case. First, that the insured cannot benefit from their own intentional action (e.g.

74 See Miserany c. Royal Sun Alliance, 2007 QCCQ 12212 (CanLII).
75 See Civil code of Quebec, LRQ c C-1991, art. 2471.
76 See Civil code of Quebec, LRQ c C-1991, art. 2466.
77 See Lemay Paquette c. Unique cie d’assurances générales, 2004 CanLII 14063.
78 Fredrickson v Insurance Corp of British Columbia, [1985] 5 WWR 342 (BCSC); affd 28 DLR (4th) 414 (BCCA); affd 49 DLR (4th) 160 (SCC).
82 See Miserany c. Royal Sun Alliance, 2007 QCCQ 12212 (CanLII).
setting their house on fire). Second, that the insured must not benefit from their own deliberate criminal conduct. However, here the insured did not swallow the cocaine with the intention of ending his life so his wife could have the insurance proceeds; his death was accidental. The insurance claim by the wife would not form part of the insured’s estate, and as such her claim was that of an ordinary beneficiary and was not tainted by the criminal activity. 83

civil law (Québec)

Yes. The duty of utmost good faith requires that the insured proactively declare all relevant information to his/her insurer. In life-insurance policies, some criminal activities, such as driving while impaired, must be revealed to the insurer as part of both his/her duty of disclosure and his/her duty of the utmost good faith. 84 Also, the intentional concealment of a previous criminal record is considered to be information that is relevant for the insurer to evaluate the risk, thus breaching the duty of utmost good faith. 85

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

common law provinces

The duty of good faith requires an insurer to act both promptly and fairly when investigating, assessing and attempting to resolve claims made by the insured. 86 The insurer must act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment. 87

The duty of good faith also requires an insurer to deal with its insured’s claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured’s economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith. 88

When dealing with bad faith claims, the insurer must pass two tests. They must 1) fairly and fully consider the interests of the insured and 2) act as a prudent insurer without policy limits would. When considering the interests of the insured, Canadian cases state that the insurer must at least give as much consideration to the insured’s interest as it does its own. 89 However, often the courts will require the insurer to give more consideration to the interests of the insured than it does its own. 90

_Bullock v Trafalgar Insurance Co of Canada_ 91 set out requirements for an insurer responding to a claim. An insurer:

- Must be prompt in handling and assessing the loss
- Must give as much consideration to the welfare of the insured as it does its own interests
- Cannot do anything to injure the rights of the insured to receive benefits under the policy
- Must undertake an adequate investigation and evaluation of the claim
- Provide the insured with correct information, a fair interpretation of the policy and prompt payment if the claim has merit
- Not treat the insured as an adversary whose interest may be disregarded.

These requirements have also been laid out as: an obligation to fairly and competently investigate, assess the claim, defend the claim, negotiate the claim, inform the insured, be prompt, and acquire and communicate information.


85 Landry _c._ Union-Vie, 2004 CanLII 18015 (QC SC); McDuff _c._ Industrielle Alliance, assurances et services financiers inc., 2009 CanLII 530 (QC SC); Proulx _c._ Axa Assurance Inc., 2004 CanLII 28327 (CQ CQ).

86 702535 at para 27.

87 Ibid at para 28; Bullock _v_ Trafalgar Insurance Co of Canada (1996), 9 OTC 245 (Ont Gen Div).

88 Palmer _v_ Royal Insurance Co of Canada (1995), 27 CCLI (2d) 249 (Ont Gen Div).

89 Shea _v_ Manitoba Public Insurance Corp, [1991] ILR 1:2721 at 1237 (BCSC); Comunale _v_ Traders General Ins Co, 328 P2d 198 (Cal Sup Ct 1958); Brown _v_ Guarantee Ins Co, 319 P2d 198 (Cal Ct App 1957) at 74.

90 Appel (Guardian ad Litem of) _v_ Dominion of Canada General Insurance Co (1995), 32 CCLI (2d) 92 (BCSC); afd [1998] 1 WWR 592 (BCCA).

91 (1996) 64 ACWS (3d) 670 (Ont Ct Gen Div) at paras 100-102.
In civil law, the insurer's duty of utmost good faith at the claim stage includes an obligation to obtain any information from the insured in a reasonable amount of time that he deems necessary for proper assessment of the claim. The insurer also has the obligation of acting in good faith, transparent and diligent when paying the indemnity to his/her insured.

Hence, if the insurer is not satisfied with the details given by the insured with respect to the loss suffered, he needs to seek additional information. The Civil Code of Quebec stipulates that the insurer has a 60 day period following receipt of the notice of loss or the relevant information to pay the indemnity. Furthermore, the insurer is "liable for injury resulting from delay in the performance of the obligation from the moment he begins to be in default".

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

**Common law provinces**

When a third party is entitled to claim benefits under the insurance policy of another person, the insurer can assert they have no contract with the third party and therefore no duty of good faith. In one British Columbia case, however, it was held that an insurer may owe good faith obligations to an uninsured when the person is treated as if they were insured. In Hosseini, the insurance company treated Mr. Hosseini, who was uninsured, as if he was insured by writing in its statement of claim that Mr. Hosseini was driving "contrary to the terms and conditions of the owner's policy."  

**Civil law (Quebec)**

Yes. In Quebec, the obligations owed to an insured with respect to the duty to obtain any information necessary for the assessment of a claim will also be owed to a third party beneficiary who, as an interested party, has taken up the burden of disclosing information under article 2471 of the Civil Code of Quebec as provided for in that article.

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93 See Civil code of Quebec, LRQ c C-1991, art. 2473.

94 See Civil code of Quebec, LRQ c C-1991, art. 1600.

95 Insurance Corp of British Columbia v Hosseini (2006), 262 DLR (4th) 233 (BCCA) [Hosseini].

96 Ibid at para 60.

21. **Describe the insurer's post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

**Common law provinces**

Courts have examined the investigation carried out by the insurer before it denied coverage. In McDonald, the court found that the insurance company had relied too heavily on evidence that supported the denial of coverage on the basis of intoxication. The insurer must pursue evidence that would support the claim of the insured. In Ferguson, the insured provided the insurer with a witness who had corroborating evidence. The court held that the insurer needed to make an effort to interview the witness and should not discount the claim without doing so. The larger the potential claim, the more intensive the investigation should be. The insurer must also be careful, especially in arson cases, to investigate evidence that proves the claim as much vigor as they investigate evidence that disproves it. In Spence, the insurance company disregarded evidence that Mr. Spence had moved his vehicle after colliding with a deer and claimed the damage was not the result of a collision.

The most well-known case about the investigation stage is Whiten. In Whiten, the insured's home burned down and the home-owners fled in their night-clothes, leaving all of their belongings inside, including their pet cats. The insurer claimed that it was a case of arson and provided only $5000 and a few months worth of rent. The fire department had concluded there was no evidence of arson, as did an independent insurance adjuster hired by Pilot Insurance. Pilot Insurance ignored these reports and continued to pursue the theory that it was arson. The court gave the insured's a high punitive damages award, as the insurer had been harsh and unreasonable.

While a breach of a duty of good faith in the claims process is typically remedied by compensatory damages, it is not uncommon for punitive damages to be available. Punitive damages are designed to address the purposes of retribution, deterrence and denunciation: Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 2002 SCC 18 (S.C.C.), at para. 43. In Whiten, the Court clearly established the relevant
factors to consider in determining whether or not an award of punitive damages is warranted.

civil law (Quebec)

In Max-I-Mum Services Financiers c. Promutuel du Lac au Fjord\(^\text{101}\), the plaintiff was seeking indemnity for the loss of revenue to its insurer, while the latter argued that the plaintiff did not suffer from any loss in revenue. The Court decided that the insurer had an obligation of good faith that required it to ask the insured for additional information if necessary, which in that case was not done. As a consequence of the insurer’s long delayed response and silence in the interim, the Court concluded that the insurer waived its right to ask for an additional delay and to its right to ask for additional information.

Also, in Pelletier c. Groupe commerce\(^\text{102}\), the plaintiff was asking for the indemnity after the robbery of his/her snowmobile. The insurer, arguing that the insured had made false declarations, did not want to pay. The insurer in this case did inform the insured of its decision not to pay until two years after the robbery. Since the insurer did not ask for additional information or ask for a longer delay, the Court concluded that the insurer did not act in the utmost good faith and ordered the payment of an indemnity to the plaintiff.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

civil law (Quebec)

Quebec insurers do not have a Code of Practice that applies directly to them. To the extent that insurer practices are codified, the rules are contained in the Civil Code of Quebec and Chapter V of the

Regulation under the Act respecting Insurance (Québec)(the “Regulation »).

The relationship between the provisions of the Civil Code of Quebec and the principle of utmost good faith have been discussed elsewhere in this survey. As for the Regulation, it contains only broad general guidelines against exaggerating the extent of protection offered and requiring specification of any exclusions and the conditions under which medical examinations are needed,\(^\text{103}\) making no reference to utmost good faith.

By contrast, insurance representatives (including agents and brokers) and claims adjusters\(^\text{104}\) are governed by codes of practice that either express or could be said to import a duty of utmost good faith. The Code of Ethics of Damage Insurance Representatives and the Code of Ethics of Claims Adjusters, for example, both make reference to obligations of good faith.\(^\text{105}\) Damage insurance representatives only have express obligations of good faith towards the insurers for whom they are representatives, but insofar as that obligation requires representatives not to place the insurer in a compromised position with respect to the insurer’s own obligations, it can be said that this obligation of good faith imports the duty of utmost good faith that the insurers are directly obliged to fulfill. Moreover, the Code of Ethics of Damage Insurance Representatives also provides that representatives must give their clients advice “in a meaningful and comprehensive manner and provide necessary and useful information.”\(^\text{106}\) This directive that echoes the general duty to inform incumbent upon insurers described above, which duty arises from the principle of utmost good faith governing all insurance contracts.\(^\text{107}\) Claims adjusters also have good faith obligations towards their insurers, but their code also expressly indicates obligations of good faith towards all parties involved in a claim including the claimant.


\(^{102}\) See Pelletier c. Groupe commerce, 2001 CanLII 12458 (QC CQ).

\(^{103}\) See Regulation under the Act Respecting Insurance, CQLR c. A-32, r. 1, ss. 34-37.

\(^{104}\) As defined by An Act Respecting the Distribution of Financial Products and Services, CQLR c. D-9.2, ss. 1-2. See also Code of Ethics of the Chambre de la sécurité financière, CQLR c. D-9.2, r. 3.


\(^{107}\) See question 13.
23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

**common law provinces**

To our knowledge, it would be unlikely for a court to disregard a term in the contract of insurance, even if it does breach the duty of good faith.

**civil law (Quebec)**

In contrast to the common law jurisdictions, Quebec law is more stringent and it is possible for a Court to disregard a term of the contract for a breach of the duty of utmost good faith. For instance, in *Hadley Shipping Co. c. Eagle Insurance*[^108], a company took insurance for its cargo. After enduring harsh weather conditions, including very strong wind, the cargo was severely damaged. The insurer refused to pay, alleging that they were exculpated from indemnifying the insured for their claim, because the policy contained an exclusion for coverage for damage arising from wind. The Court established that it was clear from the evidence that the intention of the insured was to be covered in cases of bad weather conditions including wind, and that the insurer knew this. Hence, even though there was a clear term stipulating the exclusion of wind damages, the Court decided that the term was to be disregarded.

Similarly, in *Groupe commerce, cie d’assurance c. Service d’entretien Ribo*[^109], a maintenance service company contracted a liability insurance. After causing damages to windows, the maintenance company was sued. The insurance company claimed that, according to the terms of the contract, they did not cover the goods that were under the control of the insured, as the windows were in that situation. Since it was the intention of the maintenance company to be covered when being sued, the Court decided that the utmost good faith foundation governing all insurance contracts required that the term be disregarded.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

**common law provinces**

An English case suggests it may be possible for an insurer to lose its right to avoid a policy if it failed to act in good faith.^110

**civil law (Quebec)**

In civil law, there is no case law that suggests that it may be possible for an insurer to lose its right to avoid a policy if it failed to act in good faith.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

**common law provinces**

The duty of good faith on the part of the insurer is mostly a common law duty.

In Ontario *Unfair or Deceptive Acts or Practices* includes “Any conduct resulting in unreasonable delay in, or resistance to, the fair adjustment or settlement of claims.”[^111] As such it is prohibited under the Act[^112] and a breach by the insurer technically exposes it to the general penalty provisions of the Act. Additionally, the insurance regulator has the power to issue a cease and desist order the breach of which would also expose the insurer to administrative penalties. To our knowledge this power is rarely if ever used and we are not aware of any Canadian case-law in this area.

**civil law (Quebec)**

As previously mentioned, the duty of utmost good faith of the insurer stems largely from what the courts have established over the years with respect to the interpretation of legislative provisions. Hence, there are few specific statutes expressly addressing the duty of utmost good faith for the insurers in a direct manner.

It bears mention, however, that if an insurer breaches its duty of utmost good faith, it may also breach thereby the general provisions on good faith provided for in the *Civil Code of Quebec.*[^113] In that sense, a breach of the utmost good faith could in some cases be a breach of that statute.

Also, if an insurer fails to act in the utmost good faith when paying an indemnity to its insured, where such failure arises from the insurer not paying for a claim in


[^110]: *Drake Insurance plc v Provident Insurance plc* [2003], EWCA Civ 1834.

[^111]: *Ont. Reg. 7/00 paragrapph 1. (9)

[^112]: Section 439 of the *Insurance Act of Ontario*.

[^113]: *See Civil Code of Quebec*, LRQ c C-1991, arts. 6, 7, 1375.
a timely fashion, it may be considered to be both a breach of the utmost good faith and a breach of article 2473 of the Civil Code of Quebec, which stipulates that payment of claims must be made within 60 days.\textsuperscript{114}

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

common law provinces

To our knowledge, with the exception of the discussion in answer to Question 25, there are no regulatory sanctions for a breach of the duty of utmost good faith.

civil law (Quebec)

Yes. Under section 358 of An Act respecting Insurance (Québec), the AMF, the body charged with regulating insurance companies in Quebec, may revoke the license of an insurer which, in the opinion of the AMF, contravenes any act of Quebec, of another province, or of the Parliament of Canada which governs its activities, or a regulation or rule made under any such acts.\textsuperscript{115}

The Civil Code of Quebec includes an express statutory duty of utmost good faith at article 2545; breach of this duty would, in principle, empower the AMF to revoke or suspend the license of an insurer. In addition, breaches of any of articles 2408-2409, 2466 & 2471-2472 of the Civil Code of Quebec will also breach obligations arising under the utmost duty of good faith. To the extent that the link between the duty of utmost good faith and these statutory provisions can be made, the Act in effect provides that the Authority may revoke an insurer's license on grounds of breach of such duty.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

common law provinces

English and American law has recognized reinsurance contracts as being subject to the duty of utmost good faith. It is probable that Canadian courts would follow English court decisions and find there is such a duty for reinsurance. They have the same duty to fully and fairly disclose all material facts just as with direct insurance; this duty falls on both parties, although does mainly fall on the party applying for the insurance. The duty of

\textsuperscript{114} See question 19.

\textsuperscript{115} See An Act Respecting Insurance, CQLR c A-32, s. 358.
China

JADE & FOUNTAIN

Jun Yang

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

There is no specific definition of “utmost good faith” in Chinese insurance laws. However, it is generally accepted that Article 5 of PRC Insurance Law is the legal basis of the principle of utmost good faith, “The parties to insurance activities shall follow the principle of good faith in their exercise of rights and performance of obligations.”

Article 16 and 17 of PRC Insurance Law further construe such principle by stipulating obligations of the insurer and the insurance applicant. As “Where the insurer makes any inquiry about the subject matter insured or about the insurant when entering into an insurance contract, the insurance applicant shall tell the truth.” “Where an insurance contract is entered into by using the standard clauses of the insurer, the insurer shall provide an insurance policy with the standard clauses attached and explain the contents of the contract to the insurance applicant.”

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The principle of utmost good faith is a statutory principle in Chinese insurance laws. Instead of principle of utmost good faith, there is the principle of good faith stipulated in other laws, i.e. PRC Contract Law. This being said Chinese insurance laws require a higher level of good faith than other laws.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Yes. As mentioned above, Article 16 of PRC Insurance Law provides, “Where the insurer makes any inquiry about the subject matter insured or about the insurant when entering into an insurance contract, the insurance applicant shall tell the truth.” However, such provision is deemed as a detailed article which construes the spirit of the principle of utmost good faith.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes, the abovementioned Article 5 is stipulated in Chapter I General Provisions of PRC Insurance Law, therefore, it is a general principle which could be applied to all types of insurance contracts.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

It is a continuous duty which should apply both pre-contractually and post-contractually. As per Article 5 of PRC Insurance Law, duty of utmost good faith shall be applied to “exercise of rights and performance of obligations”. Regarding the specific provisions, Article 52 of PRC Insurance Law provides: “Where the degree of peril of the subject matter insured greatly increases during the term of validity of the contract, the insured shall notify the insurer in a timely manner as agreed upon in the contract, and the insurer may increase the insurance premium or terminate the contract as agreed upon in the contract.”, this also reflects that such duty shall apply post-contractually.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

As a matter of fact, there is no specific provision stipulating the application of Principle of Utmost Good Faith to the insurer. However, as per Article 5 of PRC Insurance Law, Principle of Utmost Good Faith shall apply to all “the parties to insurance activities”. On that basis, both of the insured and the insurer should obey the principle of utmost good faith at the pre-contractual stage.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

As mentioned above, Article 16 of PRC Insurance Law provides, “Where the insurer makes any inquiry about the subject matter insured or about the insurant when entering into an insurance contract, the insurance applicant shall tell the truth.” An insured incident means an incident within the insurance
coverage as agreed upon in an insurance contract. “, which stipulates the insured’s pre-contractual duty of utmost good faith while the abovementioned Article 52 stipulates the insured’s post-contractual duty of utmost good faith.

To sum up, the insured should disclose all the information that can possibly affect the insurer’s decision regarding the conclusion of the insurance contract. The insured should also disclose all the information regarding the change of degree of peril of the subject matter insured.

Case: Mr Li had purchased a health insurance for himself in which he checked the answer “no” to the inquiry regarding whether he had suffered any heart attack. After that, he claimed insurance money for his stay in hospital to cure his heart attack. However, after investigation, Mr. Li was found to had been through several heart attacks before he entered into the insurance contract. The court finally rejected Mr. Li’s claim as he didn’t disclose his medical history of heart attacks, which information will definitely influence the insurer’s decision regarding the insurance fee or even whether to accept the insurance application.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

In Chinese judiciary practice, the insured’s duty of disclosure is merely limited to the insurer’s inquiry when entering into an insurance contract whilst the duty of utmost good faith is throughout the insurance contract. However, pre-contractually, these two duties are indistinguishable.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

Not Given.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

As duty of utmost good faith is stipulated as a principle in PRC Insurance Law, there is no specific remedy for a pre-contractual breach by the insured.

Regarding the remedies for breach of the duty of disclosure, as per paragraphs of Article 16 provides: “Where the insurance applicant fails to perform the obligation of telling the truth as prescribed in the preceding paragraph intentionally or for gross negligence, which is enough to affect the insurer’s decision on whether to underwrite the insurance or raise the insurance premium, the insurer shall have the right to rescind the insurance contract.

The right to rescind an insurance contract as prescribed in the preceding paragraph shall be annulled after the lapse of 30 days or more from the day when the insurer knows the cause of rescission. After the lapse of two years or more from the day when an insurance contract is entered into, the insurer may not rescind the contract; where an insured incident occurs, the insurer shall be liable for paying indemnity or insurance money.

Where the insurance applicant intentionally fails to perform the obligation of telling the truth, the insurer shall not be liable for paying indemnity or insurance money for an insured incident which occurs before the contract is rescinded, and shall not refund the insurance premium.

Where the insurance applicant fails to perform the obligation of telling the truth for gross negligence, which materially affects the occurrence of an insured incident, the insurer shall not be liable for paying indemnity or insurance money for an insured incident which occurs before the contract is rescinded, but shall refund the insurance premium. “

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

The duty of utmost good faith is a general principle stipulated in PRC Insurance Law, which functions as a declaration of the spirit of insurance law rather than a specific provision that could be directly applied to cases. On the contrary, the duty of disclosure is a specific provision that could be applied directly to cases. In other words, the duty of disclosure has precedence over the duty of utmost good faith but its interpretation shall be subject to the principle of utmost good faith.

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

Article 17 of PRC Insurance Law provides, “Where an insurance contract is entered into by using the standard clauses of the insurer, the insurer shall provide an insurance policy with the standard clauses attached and explain the contents of the contract to the insurance applicant.

For those clauses exempting the insurer from liability in the insurance contract, the insurer shall sufficiently warn the insurance applicant of those clauses in the insurance application form, the insurance policy or any other insurance certificate, and expressly explain the contents of those clauses to the insurance applicant in writing or verbally. If the insurer fails to make a warning or express explanation thereof, those clauses shall not be effective.”
This being said, the insurer should explain the content of the contract, especially the content against the insured/insurance applicant, otherwise the insurer may bear the unfavorable result.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Mrs. Han purchased a life insurance e-policy online for his husband, a farmer. However, after Mrs. Han claimed insurance money after his husband died in a car accident, the insurer raised the argument that the policy can only be purchased for vehicle drivers rather than farmers, should Mrs. Han disclose his husband’s occupation when entering into the contract, it would not accept the insurance application. Finally, the court upheld Mrs. Han’s claim as the court is of the view that the insurance company shall not avoid its obligation of explaining materials to the insurance applicant by promoting on-line insurance policy, the insurer shall still check with the insurance applicant re certain important issues even though the policy is purchased online. On that basis, the court found the insurer breach its duty of utmost good faith.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

No. It is not clearly stipulated that the insurers are obligated to notify the prospective insured of the nature and extent of the duty of disclosure. However, the scope of the information with respect to the insured’s duty of disclosure is only limited to the insurers’ inquiry. The insured are not obligated to provide other information.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

As mentioned above, “For those clauses exempting the insurer from liability in the insurance contract, the insurer shall sufficiently warn the insurance applicant of those clauses in the insurance application form, the insurance policy or any other insurance certificate, and expressly explain the contents of those clauses to the insurance applicant in writing or verbally. If the insurer fails to make a warning or express explanation thereof, those clauses shall not be effective.” Therefore, “liability exempting clauses” would be considered invalid should the insurer breach its duty of utmost good faith by failing to sufficiently explain such clauses.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

As per Article 21 of PRC Insurance Law: “After knowing the occurrence of an insured incident, the insurance applicant, insured or beneficiary shall notify the insurer in a timely manner. Where the insurance applicant, insurer or beneficiary fails to do so intentionally or for gross negligence, which makes it difficult to determine the nature, cause, degree of damage, etc. of the insured incident, the insurer shall not be liable for paying the indemnity or insurance money for the undeterminable part, unless the insurer has known or should have known the incident in a timely manner through any other channel.”

Moreover, Paragraph 3, Article 27 of PRC Insurance Law provides, “Where, after the occurrence of an insured incident, the insurance applicant, insurer or beneficiary fabricates the cause of incident or exaggerates the degree of damage by forging or altering the relevant certificates or materials or any other evidence, the insurer shall not be liable for paying indemnity or insurance money for the false part.”

On that basis, The insured should inform the insurer in a timely manner about the incident without exaggerating or fabricating relevant information.

In addition, Paragraph 1, Article 22 of PRC Insurance Law provides, “After an insured incident occurs, the insurance applicant, insurer or beneficiary claiming indemnity or insurance money against the insurer under the insurance contract shall provide the insurer with available certificates and materials related to the determination of the nature, cause, degree of damage, etc. of the incident.”

Therefore, when claiming for the insurance money, the insured was obligated to submit all the relevant certificates or materials related to the insured incident.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Yes, according to abovementioned Articles, the beneficiaries is not only obligated to provide all the materials concerned, but also is prohibited from exaggerating or fabricating relevant information.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Teng Fa construction company in China Pacific Insurance Co.,Ltd entered into an insurance contract in which a hoisting crane owned by Teng Fa construction company is insured as a tool for construction, but the company changed its usual function and used it as a tool for bungee jumping without notice to the insurer. Thereafter an accident happened, the company filed claim to the insurer for insurance money. The court upheld the insurer’s
argument as the risk of the insured subject increased appreciably during the term of the contract, which information shall be notified to the insurer in a timely manner by the insured. However, the insured failed to perform its obligation which shall be deemed as a breach of its duty of utmost good faith as prescribed in Article 52 of PRC Insurance Law: “Where the degree of peril of the subject matter insured greatly increases during the term of validity of the contract, the insurer shall notify the insurer in a timely manner, as agreed upon in the contract, and the insurer may increase the insurance premium or terminate the contract as agreed upon in the contract.”

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

Yes, as per Article 45 of PRC Insurance Law, “Where the insured is injured, disabled or dead for his or her intentional commission of a crime or resistance to any legally taken criminal compulsory measure, the insurer shall not be liable for paying insurance money. If the insurer has paid the insurance premium for two full years or more, the insurer shall refund the cash value of the insurance policy as agreed upon in the contract.”

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

Although the insured is obligated to provide all relevant materials related to the insured incident, as an expert who possesses more professional knowledge of insurance, the insurer is also obligated to assist the insured in performing its obligation. As per Paragraph 2, Article 22 of PRC Insurance Law, “If the insurer deems that the relevant certificates and materials are incomplete according to the contract, it shall notify, in a timely manner and at one time, the insurance applicant, insured or beneficiary of all certificates and materials to be supplemented.”

In addition, the insurer shall indemnify the insured in a timely manner should the claim be justified. According to Paragraph 1, Article 23 of PRC Insurance Law, “After receiving an insured’s or beneficiary’s claim for paying indemnity or insurance money, the insurer shall assess the claim in a timely manner. If the circumstances are complex, the insurer shall complete the assessment within 30 days, unless it is otherwise agreed upon in the insurance contract. The insurer shall notify the insured or beneficiary of the assessment result. For a claim which falls within the insurance coverage, the insurer shall perform the obligation of paying indemnity or insurance money within 10 days after reaching an agreement on payment of indemnity or insurance money with the insured or beneficiary. If the insurance contract provides otherwise for the time limit for payment of indemnity or insurance money, the insurer shall perform the obligation of paying indemnity or insurance money as agreed upon therein.”

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

Yes, the abovementioned Articles which stipulate the duty of utmost good faith for the insurer are all applicable to third party beneficiaries.

21. **Describe the post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In a case heard by a Beijing Court, the insurance company was sued by Mr. Du for the payment of insurance money. Mr. Du and Chinese Life Insurance Company entered into a contract in which Mr. Du’s life and health were insured. After that, Mr. Du was injured in an accident which was then ascertained by the insurance company. However, the insurance company withheld the payment of the insurance money for the reason that a small part of the payment has not been justified. Finally, the court not only justified the small part but also ordered the insurance company to bear late payment interest of the insurance money. The court was of the opinion that the insurance company breached its duty of utmost good faith for withholding the payment.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

Yes, there is a regulation issued by PRC Insurance Regulatory Commission named as *Code of Conduct of Insurance Practitioners*. However, it is just a regulation with certain principles to function as the guideline for insurance practice. Without any direct reference to the duty of utmost good faith, such code construe the spirit by stipulating several provisions. For instance, Article 14 provides, “He (NB: the insurer) shall, in an easily understandable manner, provide information about insurance products, and shall not mislead the clients in any form.” Article 17 provides, “He shall objectively, impartially and timely settle the claims, and shall not delay in or grudge the claims settlement.”

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

Yes, Article 17 of PRC Insurance Law provides, “For those clauses exempting the insurer from liability in the insurance contract, the insurer shall sufficiently warn the insurance applicant of those clauses in the insurance application form, the insurance policy or any other insurance certificate, and expressly explain the contents of those clauses to the insurance applicant in writing or verbally. If the insurer fails to
make a warning or express explanation thereof, those clauses shall not be effective.”

On that basis, courts can disregard the term should such term has not been fully explained to the insured.

There is a high-profile case which was heard by a court in Jiangsu Province. Mr. Duan, applied a vehicle driving insurance, based on which he claimed for damages after an occurrence of a car accident. However, the insurance company said it could only bear 80% of the loss as there is a 20% deductible franchise prescribed in the insurance contract should the car accident is fully attributable to the insured. Mr. Duan raised the argument that such clause has never been explained to him when entering into the insurance contract. Finally, the court disregarded the term prescribed in the insurance contract and upheld Mr. Duan’s claim as the insurance company breached the duty of utmost good faith.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Basically, the insurer will be entitled to rescind an insurance contract should the insured fail to perform its duty of utmost good faith. However, the insurance contract is a contract area where needs the cooperation of the insured and the insurer. Hence, under certain circumstances, the insurer will be prohibited to revoke the insurance contract should it also breaches its duty of utmost good faith. As per Article 16 of PRC Insurance Law, “Where the insurance applicant fails to perform the obligation of telling the truth as prescribed in the preceding paragraph intentionally or for gross negligence, which is enough to affect the insurer’s decision on whether to underwrite the insurance or raise the insurance premium, the insurer shall have the right to rescind the insurance contract.

The right to rescind an insurance contract as prescribed in the preceding paragraph shall be annulled after the lapse of 30 days or more from the day when the insurer knows the cause of rescission. After the lapse of two years or more from the day when an insurance contract is entered into, the insurer may not rescind the contract; where an insured incident occurs, the insurer shall be liable for paying indemnity or insurance money.

... Where the insurer knowing the truth which the insurance applicant fails to tell enters into an insurance contract with the insurance applicant, the insurer shall not rescind the contract and, if an insured incident occurs, shall be liable for paying indemnity or insurance money....”

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes, a breach of the statute will be found should the insurer breaches its duty of utmost good faith under such statute.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Yes, should the insurer breaches the duty of utmost good faith, it will be penalized for a certain amount. If the circumstance is serious, it shall be penalized with respect to its business operation.

As per Article 162 of PRC Insurance Law, “Where an insurance company commits any of the conduct prescribed in Article 116 of this Law, the competent insurance regulatory body shall order it to make correction and impose a fine of 50,000 yuan up to 300,000 yuan upon it; and, if the circumstances are serious, restrict its scope of business, order it to stop accepting new business or revoke its business operation permit.” For reference, the part concerned in Article 116 provides, “In their insurance business operation, insurance companies and their staff shall be prohibited from: ‘... hiding any important information about an insurance contract from an insurance applicant; ... refusing to legally perform the obligation of paying indemnity or insurance money under the insurance contract; ...’”

IV - Reinsurance

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

No, the duty of utmost good faith is equally applied in reinsurance contracts with an identical content as that of insurance contract.

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrima fides”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

In Costa Rica there is no general statutory provision containing the principle of utmost good faith. However, the Supreme Court has held in reference to insurance contracts that “in these relationships a principle of good faith governs, since, as the lower court notes, they are sustained on the basis of trust that, in the context of the agreement, causes the insured to expect and trust the insurer’s coverage in the event that the agreed upon conditional event (unforeseen) occurs, whereas the latter has the expectation that the insured will not incur conduct that affect the interest of the arrangement or the truth of what occurred.” (Emphasis added.) Supreme Court, 1\textsuperscript{st} Chamber, Judgment No. 756-F-2007 of 9:35 on 19 October 2007.

Similarly, another court held that “it is said that the insurance contract is a convention of utmost good faith, in the sense that there is at its base a relationship of trust between the parties taken to the extreme (the first party refraining from incurring in willful, negligent or imprudent actions, that affect the interest of the arrangement).” (Emphasis added.) Administrative Claims Court, 4\textsuperscript{th} Section, Judgment No. 41 of 16:00 hrs. on April 27\textsuperscript{th}, 2012.

Although there is no general statutory provision containing the principle of utmost good faith, insurance laws do contain various specific provisions derived from the principle of utmost good faith, for example:

- The insurance law contains a notice-prejudice rule regarding insurance loss notices, such that the insurer does not lose the right to coverage for giving notice late, except where the insurer’s conduct has been willful or grossly negligent. Insurance Contracts Law, art. 42.

- The insured is required to mitigate the effects of a loss through reasonable means. If the insured fails to meet this obligation through willful or grossly negligent conduct, the insured is relieved of any obligation to pay the loss. Insurance Contracts Law, art. 44.

- The insurer is relieved of any obligation to pay a claim if the insured causes the loss willfully or through grossly negligent conduct. Insurance Contracts Law, art. 46.

- The insurer is relieved of any obligation to pay a claim if the insured willfully or in a grossly negligent manner makes inexact or fraudulent statements that could have excluded, limited or reduced said obligation if such statement had been made truthfully. Insurance Contracts Law, art. 47.

- The insurer cannot exercise a right of subrogation against the spouse or other close relatives of the insured, except if there has been willful or grossly negligent conduct. Insurance Contracts Law, art. 49.

- If the insured risk increases during the life of the contract, the insured is required to disclose such increase to the insurer. If the insurer does not disclose such increase willfully or through gross negligence, the insurer will be relieved of its obligation to pay a claim. Insurance Contracts Law, art. 55.

- Insurers are permitted to cancel insurance contracts entered into by the insured in bad faith with the purpose of obtaining an undue benefit. Insurance Contracts Law, art. 61.

- Insurers are relieved of any obligation for damages caused by willful or grossly negligent conduct of the insured. Insurance Contracts Law, art. 76.b.i).

- Insurers cannot insure liability risks relating to willful or grossly negligent conduct of the insured. Insurance Contracts Law, art. 83.

- Insurers may not dispute health insurance coverage due to untrue or incomplete statements at the time of issuance of the policy if two years have passed since the policy was issued, except if the insured acted in bad faith (in which case the insurer can dispute coverage at any time). Insurance Contracts Law, art. 91.

- The beneficiary of a life insurance policy that causes the insured’s death by willful or grossly negligent conduct is not entitled to claim insurance proceeds. Insurance Contracts Law, art. 100.
2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The principle of utmost good faith is a statutory principle and a civil law principle recognized by courts. Costa Rica is not a common law jurisdiction.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Yes. See answer to question 1. above.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes. See answer to question 1. above.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

It applies both at the pre-contractual stage and post-contractual stage.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Yes, it applies to both. However, for practical reasons and given the manner in which insurance contracts are concluded (through form contracts pre-designed by the insurer), the duty of good faith at the pre-contractual stage falls mainly with the insured in terms of adequately declaring the risk that is to be insured.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

At the pre-contractual stage, the most common example of the duty of utmost good faith relates to declaring the risk at the contract’s inception. Although there is no case law given that the Insurance Contracts Law was enacted only recently (2011), the insurer is relieved of any obligation to pay a claim if the insured willfully or in a grossly negligent manner makes inexact or fraudulent statements that could have excluded, limited or reduced such obligation if such statement had been made truthfully. Insurance Contracts Law, art. 47.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

Yes, at the pre-contractual stage the duty of utmost good faith is equivalent to the duty of disclosure.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

N/A.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

As described above, the insurer is relieved of any obligation to pay a claim if the insured willfully or in a grossly negligent manner makes inexact or fraudulent statements that could have excluded, limited or reduced said obligation if such statement had been made truthfully. Insurance Contracts Law, art. 47.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

N/A

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

The insurer is obligated to present timely and truthful information to the insured regarding the insurance contract that is being negotiated. This duty is made effective through various legal (statutory) and administrative provisions requiring certain information about the insurance contract to be specifically disclosed and explained to the insured, including:

- Information on the product, including associated risks, benefits, obligations and costs.
- Clear explanation of the coverage and exclusions of the contract.
- Coverage term.
- Procedure for payment of premiums and making claims in the event of a loss.
- Termination of the contract.
- Cancellation, penalties, term and procedure for cancellation.
• Explanation of the right to receive timely response to any claims or requests.

• Companies that form part of the network of services auxiliary to the insurer (for example, doctors, auto repair shops, funeral homes, etc.).

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The Insurance Contracts Law is recent (it was enacted in 2011). Therefore, there have been no cases involving the insurer’s pre-contractual duty of utmost good faith recently. In general, the duty at the pre-contractual stage has been referred mainly to the items referred to in item 12 above.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

No, it is not. The duty of disclosure is a statutory provision and a such insurers cannot claim ignorance of the law.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The breach of the duty of disclosure in providing the insurer the information referred to in item 12 above can lead to the imposition of a fine by the Insurance Superintendent and, in extreme cases, to the revoking of the insurer’s license to operate. Furthermore, if the duty of disclosing the required pre-contract information to the consumer is not met in the context of an insured covered under a group policy, any applicable exclusions in the contract will become unenforceable. Insurance Contracts Law, art. 12.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

The content of the post-contractual duty of utmost good faith at the claim stage is mainly as follows:

• The insured is required to mitigate the effects of a loss through reasonable means. If the insured fails to meet this obligation through willful or grossly negligent conduct, the insured is relieved of any obligation to pay the loss. Insurance Contracts Law, art. 44.

• The insurer is relieved of any obligation to pay a claim if the insured causes the loss willfully or through grossly negligent conduct. Insurance Contracts Law, art. 46.

• Insurers are relieved of any obligation for damages caused by willful or grossly negligent conduct of the insured. Insurance Contracts Law, art. 76.b.i).

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Yes, the duty covers beneficiaries as well. For example, the beneficiary of a life insurance policy that causes the insured’s death by willful or grossly negligent conduct is not entitled to claim insurance proceeds. Insurance Contracts Law, art. 100.

17. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

See answer to item 16 above. In any event, the Insurance Contracts Law is very recent (2011) and there are no court cases based on that law.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Yes. In general (not only applicable to life insurance), insurers are permitted to cancel insurance contracts entered into by the insured in bad faith with the purpose of obtaining an undue benefit. Insurance Contracts Law, art. 61.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

The duty comprises the following elements:

• Insurers are permitted to request only those items specifically provided for in the
insurance contract as necessary to process a claim.

- Insurers are required to provide timely response to all requests made by the insured, defined as response within 30 days of the insured's request.

- In denying coverage of a loss, the insurer is required to provide specific motivation for such loss, referencing the legal and/or contractual principles on which the denial of coverage is based.

- Insurers are required to report to the Insurance Superintendent the appointment of beneficiaries of life insurance policies in order that such beneficiaries are able to verify with the Superintendent in the event that a close relative (possible insured) passes.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

Yes, the duty is the same whether the insurer is dealing with an insured or a third party beneficiary.

21. **Describe the insurer's post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

See answer to item 19 above. Although there are no cases given that the Insurance Contracts Law is very recent (2011), at the administrative level the Insurance Superintendent regularly enforces the duty of good faith in dealing with complaints filed by insureds against insurers.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no Code of Practice for insurers. However, the Insurance Superintendent has issued administrative regulations containing the “Insurance Consumers' Bill of Rights”, which comprises a defined list of statutory and regulatory rights that are equivalent to a Code of Practice. Superintendent Ruling SGS-DES-A-031-2014. These rights are listed as follows:

- The right to the protection of their legitimate economic interests.
- The right to choose freely among insurers, intermediaries (brokers, agents), products and auxiliary services.
- The right to obtain adequate and truthful information, prior to and after entering the contract.
- The right to fair and non-discriminatory treatment.
- In the event of doubt as to the interpretation of the principles of the insurance laws, the interpretation most favorable to the insured shall prevail.
- The right to swift service, through reasoned decisions issued in writing, in connection with claims, complaints and requests of the insurance consumer, within 30 days.
- The right to the protection of the insured's personal data.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

Yes. Although we have not found specific instances of a contract term being disregarded, there are court cases that have established that the duty of utmost good faith applies both to the insured and the insurer. Therefore, if such a situation arose, in our opinion a court could disregard such terms in a contract. However, the insured would have to claim that the contract terms are null based on the theory of contracts of adhesion.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Yes. Courts have sufficient powers in this regard.

25. **To the extent that an insurer's breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Yes. Insurers are required to enter into insurance contracts in accordance with statutory requirements. Failing to do so can result in the imposition of fines and/or cancellation of the license to operate. Insurance Market Law, art. 25.
IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

There are no specific rules regarding reinsurance in this matter. As a general rule, reinsurance contracts are governed by the same rules as insurance contracts, where applicable.

* * *
Denmark

BECH-BRUUN
Anne Buhl Bjelke

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The duty of utmost good faith has historically been recognized under Danish insurance law.

In general, the duty of good faith may be defined as an implied obligation to disclose relevant facts and ensure that no critical information is withheld from the parties to the contract. Under Danish law, the assessment of good faith is made on the basis of the qualifications and the background of each individual insurer and insured.¹ The duty of utmost good faith was made less strict on the part of the insured due to the codification of the rules into the Danish Insurance Contracts Act (in Danish forskringsaftaleloven)² in 1930.

There is no statutory definition, but the obligation for the insured is contained in Sections 4-7 of the Danish Insurance Contracts Act³. Section 4-7 are stipulating the legal effects if the insured misrepresents facts and implying that the insured is subject to a duty of good faith when contracting with the insurer.

The duty of good faith as presupposed for in sections 4-7 of the Insurance Contracts Act applies exclusively to the insured.

The insurer is not subject to a specific duty of utmost good faith. The insurer is obliged to act according to rules on good business practice laid down by statute.⁴ The rules on good business practice include a general obligation for the insurer to act with loyalty towards its customers. These rules are supervised and enforced by the Danish Financial Supervisory Authority. In respect of the insured’s obligations as described above the insurer may only invoke the legal consequences of the insured’s misrepresentation when the insurer is acting in good faith according to the rules stipulated in sections 8-10 of the Insurance Contracts Act. Furthermore, the insurer is required by statute to provide certain pre-contractual information as regards the insurance product and the rights of the insured.⁵

The general rules of Danish contract law also apply when the insurer and the insured enters into an insurance contract. These rules provide for the parties acting in good faith when contracting and – to some extent – preserving the interests of the other contracting party.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The duty of utmost good faith used to be a principle developed through case law, however, cf. question 1, the principle of utmost good faith on the part of the insured were codified and made less strict by way of introducing the rules into the Insurance Contracts Act.

The rules pertaining to the duty of good faith are stipulated in sections 4-10 of the Insurance Contracts Act. Section 5 provides for:

5.
(1) If it is presumed that the policyholder had neither actual nor constructive notice of the misrepresentation made by him when taking out the insurance, the company is liable as if the misrepresentation had not been made.
(2) In respect of general insurance, the company may terminate the insurance at one week’s notice – if the policyholder resides in Greenland, at one month’s notice.

In addition, section 7 states:

7. The policyholder’s failure to disclose information does not affect the liability of the company unless the policyholder should have realised that the non-disclosure was material to the company, and that his conduct may be attributed to him as gross negligence. In such case he is deemed to

³ Consolidated Act no. 999 of 5 October 2006.
⁴ Statutory order no. 928 of 28 June 2013.
⁵ Section 34e of the Danish Insurance Contracts Act and Section 5 of Executive Order No. 928 of 28 June 2013 on Good Business Practice for Financial Undertakings.
⁶ Our unofficial translation.
The principle of utmost good faith has been applied in various cases decided under Danish law.

There are, however, several exceptions, for example in relation to non-life insurance, where the duty of good faith applies both pre-contractually and post-contractually. According to the general interpretation of Sections 7 and 46 in the Danish Insurance Contracts Act, these provisions relate to types of non-life insurance where the insurer is to inform the insured of facts material to the risk coming to its knowledge during the policy period when such facts existed at the time of contracting and should have been disclosed to the insurer, had the insured been aware of such.11

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

The duty of good faith stipulated in sections 4-7 of the Insurance Contracts Act applies to the insured at the pre-contractual stage.

Further, the insurer’s obligations to act in good faith, as stated under question 1, applies pre-contractually.

A – For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

Insurance contracts are usually concluded by the prospective insured sending an insurance application to the insurer. The application is usually a template questionnaire prepared by the insurer and filled out by the prospective insured. If the insurer decides to take the risk, it will issue a policy on the basis of the application and forward the policy documents to the insured along with the relevant terms and conditions.

The insurance application usually includes the information necessary to make an accurate assessment by the insurer. The duty of good faith is, as stated under question 1 and 3, complied with under Danish law, when the prospective insured replies in good faith to the questions posed by the insurer and discloses all material and relevant facts when requested by the insurer.

Describe the insured's pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The insured’s pre-contractual duty of good faith is addressed in various cases decided under Danish law.
law. The following cases were decided by the Danish Supreme Court.

**UFR 2000.1567 H, The Danish Weekly Law Reports**
In this specific decision, the insured, when taking out a general insurance on a vessel, failed to disclose the full details of accidents/losses during the last five years in relation to the vessel. The insured claimed that he failed to disclose the said details, which were presumed to be material to the company, as he had poor English skills. Furthermore, he claimed that the representative of the company selling the vessel to the insured was liable as that representative filled out the insurance application on behalf of the insured.

The Supreme Court stated that the insured was obliged to ensure acquaintance with the contents of the insurance application before signing such application. Thus, the insured had failed to comply with the duty of good faith when taking out the insurance.

**UFR 1962.1 H, The Danish Weekly Law Reports**
The insured took out a life insurance and disclosed that he had previously suffered from a leg injury and that he had no permanent physical disability from the injury. The insured passed away one year after the insurance. During the trial and the production of evidence, it was revealed that the insured was registered at the Copenhagen University Hospital but the insured was discharged – at his own request – as the insured feared that he suffered from a severe illness.

The Supreme Court decided that the insured, when taking out the insurance, had fraudulently failed to disclose a fact which was presumed to be material to the insurer, and the company was not bound by the insurance contract.

The Insurance Complaints Board stated that the insured had failed to disclose that he suffered from post-surgery pain two weeks after a herniated disc operation in 1983. As a result of a traffic accident in 1993, the insured suffered from severe backache. On the basis of the medical records, the insurer stated that the insured had failed to disclose relevant facts when taking out the insurance, and that the insurer was not bound by the insurance contract.

The Insurance Complaints Board concluded that the insurer was liable as if misrepresentation had not been made.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

Under Danish law, the insured is in principle subject to the duty of good faith and the duty of disclosure when taking out insurance, cf. Question 3 above. The duty of disclosure applies in addition to the duty of good faith, for example, if the insured, prior to entering into an insurance contract and after the insurance application is sent by the insured, realises that the insurance application lacks the information necessary for the insurer to make an accurate assessment of the risk the insurer will be undertaking.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

As stated in question 3 and 8, the insured is in principle subject to the duty of disclosure when taking out insurance.

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12 The Danish Insurance Complaints Board was established in 1975 is a private complaints board authorised by the Danish Minister for Business and Growth.


14 Ivan Sørensen, Forsikringsret (Insurance Law), 5th Ed., 2010, Jurist- og Økonomforbundets Forlag, p. 64.
The duty of disclosure is described in section 7 of the Insurance Contracts Act. The section stipulates that the insured’s failure to disclose information does not, in principle, affect the liability of the insurer, unless the insured should have realised that the non-disclosure was material to the insurer, and that the insured’s conduct may be attributed to gross negligence. In such case, the insured is deemed to have made misrepresentations according to section 6 of the Insurance Contracts Act.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The remedies for pre-contractual breach by the insured of the duty of utmost good faith and the duty of disclosure are regulated in sections 4-7 of the Insurance Contracts Act.

The rules under section 4-7 state:

4. If, when taking out the insurance, the policyholder has fraudulently misrepresented or failed to disclose a fact which is presumed to be material to the company, the company is not bound by the contract. The same applies if the policyholder's conduct has otherwise been so that it would be contrary to the requirement of good faith to enforce the contract.\(^{15}\)

5.

(1) If it is presumed that the policyholder had neither actual nor constructive notice of the misrepresentation made by him when taking out the insurance, the company is liable as if the misrepresentation had not been made.

(2) In respect of general insurance, the company may terminate the insurance at one week’s notice – if the policyholder resides in Greenland, at one month’s notice.\(^{16}\)

6.

(1) If the policyholder has misrepresented facts without the matter falling within section 4 or 5, the company is exempt from liability if it would presumably not have accepted the insurance if the true facts had been disclosed.

(2) If it is presumed that the company would have accepted the insurance, but on other terms, the company is liable in so far as it would have undertaken liability against the agreed premium. If the company would have limited its net retention by reinsurance to any major extent, the compensation will be reduced proportionately.

(3) Notwithstanding subsections (1) and (2) hereof, consumer insurances and life, accident and health insurances and other personal insurances may provide that the company shall be liable, in full or in part, if warranted by particular circumstances. In the determination thereof, particular regard must be had as to whether the fact misrepresented is presumed to have affected the occurrence of the insurance event or the extent of the loss, to the negligence shown by the policyholder and to the time elapsed from the misrepresentation was made until the insurance event occurred.

(4) In respect of marine and other transport insurance and fidelity guarantee insurance, the rule of subsection (2) hereof is replaced by a rule providing that the company is liable only in so far as it is substantiated that the fact misrepresented has not affected the occurrence of the insurance event or the extent of the loss.\(^{17}\)

7. The policyholder’s failure to disclose information does not affect the liability of the company unless the policyholder should have realised that the non-disclosure was material to the company, and that his conduct may be attributed to him as gross negligence. In such case he is deemed to have made misrepresentations, cf. section 6 of this Act.\(^{18}\)

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

As stated above under question 3 and 8, the insured is in principle not subject to a separate duty of disclosure if an insurance application is filled out when taking out the insurance. Against this background, the duty of good faith is in principle considered to have precedence over the duty of disclosure due to the fact that most insurance companies provide the template questionnaire for the insurance applications when contracting with the insured.

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

The insurer is required to comply with the Danish rules on good business practice. These are contained

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\(^{15}\) Our unofficial translation.

\(^{16}\) Our unofficial translation.

\(^{17}\) Our unofficial translation.

\(^{18}\) Our unofficial translation.
in Executive Order No. 928 of 28 June 2013 and prescribe that the insurer shall act loyally in respect of the insured and provide essential information on the insurance product sold. Further, when advising prospective insureds, the advice of the insurer shall take into due consideration the interests of the customer.\(^{19}\)

Additionally, the Sections 9 and 10(1) and (3) of the Danish Insurance Contracts Act stipulate that the insurer may not rely on misrepresentation if the insurance company had actual or constructive notice of the true facts when effecting the insurance, or if the fact about which the insurer remained unaware was immaterial to it or later ceased to be material. Furthermore, the insurer may not rely on insurance contracts violating mandatory provisions of Insurance Contracts Act, and the insurer may not rely on misrepresentation if the insurer has described a fact in a policy without having obtained relevant information on the fact from the insured or others and has made a reservation of exemption from liability, in whole or in part, if the description should prove to be incorrect.

13. Describe the insurer's pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The insurer’s pre-contractual duty of good faith has been addressed in several cases:

**The Danish Weekly Law Reports, UfR 1931.1079 V**

The insurer disclosed to the insured that a particular insurance was cheaper with that company than the insurer where the insured had at the time placed his insurances.

This turned out to be incorrect. As such the insured was not bound by the insurance contract.

The following case was decided by the Insurance Complaints Board:

**20.498 (1988)**\(^{20}\)

The insurer, when concluding a property insurance contract with the insured, registered in the insurance policy that the property amounted to 102 square metres. The insurance contract was concluded in 1967. In 1987, the insured learned that the property in fact amounted to approximately 89 square metres.

The Insurance Complaints Board decided that the insured was entitled to claim reimbursement of the part of the insurance premium constituting the difference.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

It is generally not a breach of the duty of the good faith for the insurer to not notify the prospective insured of the nature and extent of their duty of disclosure. However, the insurer has certain specific obligations to provide pre-contractual information to the insured.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

In this situation the insured can chose to either rescind the contract or sustain it with the modifications provided by the incorrect statements made by the insurer. In a Danish case from 1997:

**The Danish Weekly Law Reports, UfR 1997.1706 H**

Through an insurance intermediary an insurer had issued a policy that covered travel insurance for both commercial and private travel, although the insurer did not intend for the insurance to also cover the private travels of the management of the insured. The Supreme Court ruled that the insured could rely on the representations by the insurer and that the insurer had to cover a claim made in relation to a private trip of one of the managers.

### III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

According to section 22 of the Insurance Contracts Act, the insured is – at the claims stage – obliged to disclose all relevant information available to the insured on matters that may be material to the assessment of the insurance event.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Third party beneficiaries of cover are also subject to section 22 of the Insurance Contracts Act at the claim stage.

\(^{19}\) Sections 5 and 7 of the Order.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In case of the occurrence of an insurance event, the insured is to notify the insurer without undue delay. The insured’s post-contractual duty of good faith extends to the insured ensuring that information provided the insurer is not false or otherwise inaccurate. The following case was decided by the Danish Supreme Court.

**The Danish Weekly Law Reports, UFR 1960.514**

A farm owner suffered a loss of grain during a blazing heat. The farm owner fraudulently disclosed that the total loss amounted to DKK 12,055, whereas the actual amount was DKK 2,008. The Supreme Court decided that the insurer was obliged to only pay the farm owner an amount of DKK 2,008.

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

The concealment of previous criminal activities does not in themselves constitute a breach of the duty of good faith for the insured. In a Danish Supreme Court decision from 1952:

**The Danish Weekly Law Reports, UFR 1952.278**

An insured under a life insurance policy had concealed an incident that occurred while the insured was a part of the Danish volunteer force with the German army during the Second World War. The insured had suffered a gunshot wound and used painkillers. The Supreme Court found that the misrepresentation was not by reason of a fraudulent intent on the insured, and that the insurer had not proved that it would not have entered into the insurance contract had the insured provided accurate information. Against this background, the insurer was obliged to pay the insurance money.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

The insurer is subject to the duty of good faith according to the rules stipulated in, for example, sections 24(1), second sentence, and 25 of the Insurance Contracts Act. The rules stipulate that the insurer must, within three months of being notified of the insurance event, notify the insured of his right to demand payment unless the insured’s claim for insurance payment has already been accepted or refused.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

When handling claims made by third party beneficiaries, the insurer is subject to the same rules as mentioned in the answer to question 19 above.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

The insurer’s post-contractual duty of good faith is addressed in a case decided by the Danish Supreme Court:

**The Danish Weekly Law Reports, UFR 2001.352**

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The insured, a Norwegian citizen, was involved in an accident in Canada in May 1993. The insurer was informed about some of the permanent injuries in June 1993, which included amputation of a foot and an arm lesion. The permanent injuries and the degree of disability were established at 30%. The insured was transported back to Norway in December 1993. The insurer informed the insured in March 1994 that he was covered by the insurance. In February 1996, a medical specialist declaration ascertained that the injuries constituted 80% disability. The insurer paid the insurance money in April 1996 – two and a half years after the degree of disability was initially established.

The Supreme Court decided that the insurer had failed to notify the insured of the right to receive payment from June 1993 with regard to the 30% degree of disability according to section 24(1) of the Insurance Contracts Act.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

Insurance companies are required to comply with the general rules on good business practice for financial undertakings as laid down in Executive Order No. 928

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21 Ivan Sørensen, Forsikringsret (Insurance Law), 5th Ed., 2010, Jurist- og Økonomforbundets Forlag, p. 381.

22 Section 24(1) stipulates that the insurance moneys are payable upon demand two weeks after the insurer has been able to obtain the information required to assess the insurance event and determine the amount of the insurance moneys.
of 28 June 2013 on Good Business Practice for Financial Undertakings, which is issued on a statutory legal basis.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

The insurer may not rely on misrepresentation if the insurer had actual or constructive notice of the true facts when effecting the insurance, or if the fact about which the insurer was unaware was immaterial to it or later ceased to be material.

Further, according to section 36(1) of the Danish Contracts Act (af taleloven), Danish courts may disregard a term of a (-n insurance) contract if it would be considered unreasonable to rely on the term.

The legal position is addressed in a case decided by the Danish Insurance Complaints Board.

*21.875 (årstal)*

The insured, when taking out a home and personal protection insurance, consulted the insurer with the intention of clarifying whether it had any significance to the provisions of cover that the insured lived in a basement. The insurer replied that it would be taken into consideration when the insurance was taken out. The insurance contract was sent to the insured, and it failed to contain information concerning the fact that the insured lived in a basement. Subsequently, the insured was subjected to a housebreaking. The insurer, after assessing the claim, refused to recognise insurance coverage for the insured based on the fact that the insured had fraudulently misrepresented a fact which was presumed to be material to the insurer.

The Insurance Complaints Board decided that the insurer had relied on misrepresentation in a situation where the insurer had actual and constructive notice of the true facts when effecting the insurance. Against this background, the insurer was obliged to pay the insurance money.

**24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Please see the answers to question 23 above.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

The rules on good faith in respect of the insurer are contained in the previously mentioned Executive Order on Good Business Practice for Financial Undertakings. An insurer’s breach of the duties prescribed in the Order is a violation of Section 43 of the Danish Financial Business Act, which forms the statutory basis for the Executive Order.

As stated in the answer to question 1, the insurer is not subject to a specific duty of utmost good faith. However, the insurer is subject to the duty of good faith according to the rules mentioned in the answer to question 1 above.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Yes, a breach of the duty of good faith by the insurer may result in regulatory sanctions being imposed on the insurer. According to the rules on good business practice laid down by the Executive Order, sanctions are imposed by the Danish Financial Supervisory Authority and consist of reprimands, decisions and orders. The Danish Financial Supervisory Authority may involve a correction of the insurer’s way of conducting business. In extreme cases of violation of the rules on good business practice the Danish Financial Supervisory Authority may suspend the licence of an insurer.

**IV - Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

A duty of utmost good faith is neither applied to reinsurance at the placement/pre-contractual stage, nor at the claim stage. The significance of the application of the general rules of contract law, when parties take out reinsurance, is that the contracting parties are subject to the general principles of good faith contained in the general rules of contract law.

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23 Consolidated Act no. 781 of 26 September 1996.


25 Executive Order no. 928 of 28 June 2013 on good business practice for financial undertakings.

26 Danish Consolidated Act No. 928 of 2 July 2013.

27 Executive Order no. 928 of 28 June 2013 on good business practice for financial undertakings.
France

BOP S
Alexis Valencon

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

French insurance laws do not provide for a specific principle of utmost good faith.

Article 1134 of the French Civil Code provides that all contracts “must be performed in good faith”. These provisions are therefore applicable to all insurance and reinsurance contracts.

However, the principle of good faith is reflected in insurance-related statutory provisions that define the obligations of both the insured and the insurer. French insurance laws outline, in each situation, the obligations of the parties.

That being said, it must be pointed out that some French legal scholars consider that the loyalty required between parties to an insurance contract is such that it qualifies as “utmost good faith”, with reference to Common Law insurance contracts.

A Councillor of the French Supreme Court, the Cour de cassation, also stated that “the duty of loyalty, which is the cornerstone of all contracts, is even more essential for insurance contracts, both pre-contractually and post-contractually, when the coverage is triggered”.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

As stated above, French insurance laws do not provide for a specific principle of utmost good faith.

The obligations of the insurer and the insured are mainly set out in the French Insurance Code and the French Civil Code, as interpreted by the courts.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

French insurance laws indeed provide for a separate duty of disclosure for the insured (see below).

Such a duty is an example of how the principle of good faith is implemented into specific statutory provisions.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

As mentioned above, the principle of good faith is implemented into provisions that apply to all types of insurance and reinsurance contracts (life insurance, general insurance, reinsurance, etc.).

Some statutory provisions are common to all insurance contracts; other ones are specific to a type of insurance contracts (e.g. life insurance).

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

The principle of good faith is a continuous duty which is implemented into provisions that apply both pre-contractually (e.g. reporting the risks) and post-contractually (e.g. reporting the claim).

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

The principle of good faith applies to both the insured and the insurer at the pre-contractual stage.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

At the pre-contractual stage, the principle of good faith is implemented for the insured through an obligation to declare truthfully the risks covered.

To this end, Article L. 113-2 of the French Insurance Code provides that “the insured shall be obliged to [...] truthfully answer the questions raised by the insurer, in particular, in the loss reporting form.

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whereby the insurer questions him at the time of executing the contract on circumstances that enable the insurer to assess the risks that it covers”.

It must be underlined that the duty to declare truthfully the risks covered is continuous: indeed, “the insured shall be obligated to [...] declare during the contract the new circumstances that have the effect of either increasing the risk or of creating new risks and which on this account render the answers, notably, in the form referred to [above], made to the insurer either untrue or lapsed. The insured must declare such circumstances to the insurer by registered letter within two weeks or a fortnight from the moment he/she is aware thereof”.

It results from these provisions that the obligation to declare truthfully the risks covered is limited in two respects: (i) the insured must only declare the risks he/she/it is aware of; and (ii) the insured must only declare the circumstances that enable the insurer to form a view of the risks covered by the insurance contract.

In addition, French law no longer provides for a mandatory spontaneous declaration of the risks – which, however, remains possible. Indeed, the mandatory declaration is now limited to the questions raised by the insurer, in general in a questionnaire (loss reporting form) for underwriting purposes.

In this regard, Article L. 112-3 of the French Insurance Code provides that “when, before the execution of the contract, the insurer may raise questions to the insured in writing, in particular, by means of the loss reporting form or by any other means, it may not complain that a question expressed in general terms procured only a vague reply”.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

At the pre-contractual stage, the duty of declaration of the risks (i.e., the duty of disclosure) is the transposition of the duty of good faith owed to the insurer by the insured. As a consequence, the duty of good faith and the duty of disclosure are two sides of the same coin and therefore indistinguishable at that stage.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

N.A. (see above).

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

In case the insured breached its duty to declare truthfully the risks covered, the remedies will depend on whether the insured acted in good or bad faith.

As a preliminary remark, it has to be underlined that independently from the bad or good faith of the insured, the remedies set out below are only available when (i) the declaration of the risks was untruthful and (ii) as a consequence, the insurer’s assessment of the risks is distorted. Accordingly, the Cour de cassation considered that no remedy was available for the insurer if it did not raise any questions to the insured regarding the facts that were not declared.3

This being said:

When the insured acted in bad faith, Article 113-8 of the French Insurance Code provides that “apart from the ordinary causes of nullity [...], the insurance contract shall be null and void in the event of reluctance or intentional false statement of the insured, when such omission or fraudulent misrepresentation changes the subject of the risk or decreases the insurer’s assessment thereof, even if the risk that the insured concealed or distorted has had no impact on the loss. The insurer shall then be entitled to the premiums paid. It shall be entitled to payment of all due premiums by way of damages [except for life insurance contracts]”.

According to the Cour de cassation, the reluctance or intentional false statement of the insured necessarily implies a breach of the duty of good faith.4 Hence, the declaration of the risks covered must be done with “loyalty and sincerity by the person who takes out the insurance policy, according to the duty of good faith which applies in contractual matters”.5 This is why the Cour de cassation invites the lower courts to assess if the insurer demonstrates that the reluctance or intentional false statement was done “in bad faith, for the purpose of causing the damage consisting in the obligation for the insurer to cover the

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3 Cour de cassation, 2nd civil chamber, 15 February 2007, Appeal on a point of law No. 05-20.865.
4 Cour de cassation, 1st civil chamber, 14 November 1995, Appeal on a point of law No. 91-12.56.
5 Cour de cassation, 1st civil chamber, 28 March 2000, Appeal on a point of law No. 97-18.737.
risk, by distorting the insurer’s assessment of the risk covered.\(^6\)

On the contrary, if the insured’s bad faith has not been proved, Article 113-9 of the French Insurance Code provides that “omission or misrepresentation by the insured shall not entail the nullity of the insurance contract.

If this is recorded prior to any loss, the insurer shall be entitled either to continue the contract in consideration of an increase in premium accepted by the insured or to terminate the contract ten days after notice sent to the insured by registered letter by returning the part of the premium paid for the period not covered by the insurance.

In the event that the recording took place only after the loss has occurred, the compensation shall be reduced in proportion to the rate of the premiums paid in relation to the rate of premiums that would be owed if the risks had been truthfully and exhaustively declared”.

In both cases, the burden of proof of the untruthful declaration of the risks – be it done in good or bad faith – and its influence on the assessment of the risks rests with the insurer.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

N.A. (see above)

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

At the pre-contractual stage, the duty of good faith for the insurer lies on its duty to inform and to advise.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

- The duty to advise, i.e. to provide the prospective insured with personalized advice, mainly emerges from case law. Such a duty is limited to the framework of the insurance contract. Said differently, the insurer has no duty to advise the prospective insured regarding circumstances that are external to the insurance contract. For example, an insurer is not obliged to remind a ship owner that, for regulatory reasons and independently from insurance issues, he must hold a seaworthiness certificate.\(^7\)

The content of the duty to advise depends however on the type of insurance contract. For instance, in matters of life insurance contracts, the duty to advise is quite specific and strengthened by regulatory provisions: in some cases, indeed, the insurer must ask the prospective insured about his knowledge and experience in the financial field. The insurer must also specify the needs expressed by the prospective insured, as well as the reasons for drawing the advice provided relating to a specific contract. When the prospective insured does not provide any information in this regard, the insurer must warn him prior to the conclusion of the contract (Article 132-27-1 of the French Insurance Code).

- The duty to inform is difficult to summarize since its extent depends also very much on the type of insurance contract. Indeed, in matters of information to the insured, French insurance laws are very specific to each kind of risk covered.

For example, life insurance contracts must contain clauses that aim, for the security of the parties and the clarity of the contract, at defining the purpose of the contract and the respective obligations of the parties (Article L. 132-5 of the French Insurance Code). In addition, prior to the conclusion of the contract, the insurer must provide the prospective insured with an information note that sets out the conditions required for the insured to exercise its right of renunciation, as well as the essential provisions of the contract (Article 132-5-2 of the French Insurance Code). Life insurance policies must specify also the costs incurred and inform the insured about the regulation applicable to beneficiary clauses, etc.

Almost all types of insurance contracts contain, like life insurance contracts, some specific clauses that aim at drawing the insured’s attention on particular items (e.g. loan insurance, health insurance, motor insurance, etc.).

Some provisions of the French Insurance Code, related to the insurer’s duty to inform, are however common to all insurance contracts. For example, Article L. 112-2 of the French Insurance Code states that “the insurer must provide an information note on

\(^6\) Cour de cassation, 2\(^{nd}\) civil chamber, 13 January 2012, Appeal on a point of law No. 11-11.114.

\(^7\) Cour de cassation, 1\(^{st}\) civil chamber, 2 July 2002, Appeal on a point of law No. 99-14.765.
the prices and covers prior to the conclusion of the contract. Prior to the conclusion of the contract, the insurer shall provide the insured with a copy of the draft contract and its attachments or a booklet on the contract that provides a precise description of the covers and exclusions as well as the insured’s obligations.

The documents handed over to the policyholder shall specify the governing law of the contract where the French law does not apply, the procedures for investigating claims that he may make under the contract, including in particular, if necessary, the authority in charge of such investigation, without prejudice to his right to bring a legal action, and the address of the branch office and, if necessary, the address of the branch office offering the coverage.

Prior to the conclusion of the contract comprising the covers for liability, the insurer shall provide the insured with an information note [...] describing the functioning, for the duration of the contract, of the covers triggered by the event causing liability, that of the covers triggered by claim as well as the consequences of the succession of contracts with different modes of trigger”.

Another good example of the insurer’s duty to inform is the written formalism that insurers must comply with in order to make certain clauses effective.

For instance:

- Article L. 113-15 of the French Insurance Code provides that “the duration of the contract must be stated in very clear print in the policy”;

- Article L. 112-4 of the French Insurance Code requires that “the policy clauses that stipulate nullities, forfeitures or exclusions shall be valid only if they appear in very clear print”;

- Article R. 112-1 of the French Insurance Code provides that “insurance policies [...] must specify: the duration of the contract; the conditions of the tacit renewal of the contract if it is stipulated; the cases and conditions of renewal or termination of the contract or of its effects; the obligations of the insured, at the pre-contractual stage and, possibly, in the course of the contract, related to the declaration of the risks and the declaration of other insurance policies covering the same risks; the conditions and procedure to file a claim in case a loss occurred; the timeframe within which the indemnity has to be paid [...]”. Insurance policies must remind the applicable time limit periods related to legal actions arising from an insurance contract”. In this regard, the Cour de cassation recently stated that the insurer must mention in the insurance contract all the grounds of interruption of the time limit periods, even the civil “ordinary” grounds that are not specific to insurance contracts. Otherwise, the limitation period is not enforceable against the insured.

Finally, it must be pointed out that the content of the duty to inform might also differ in function of the quality of the insured, that is, whether the insured is a consumer or not. Since the enactment of Law No.2014-344, consumers are defined as “natural persons who act for a purpose that is outside their profession” (Preliminary Article of the French Consumer Code).

As an example, the French Consumer Code provides that prior to the conclusion of the contract, the professional (i.e. the insurer) must provide the consumer (i.e. the insured) with readable and comprehensive information relating notably to the essential characteristics of the service and its price (Article L. 111-1 of the French Consumer Code). The burden of proof of the compliance with these provisions rests with the insurer (Article L. 111-4 of the French Consumer Code).

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

Article R. 112-1 of the French Insurance Code provides that “insurance policies [...] must specify [...] the obligations of the insured, at the pre-contractual stage and, possibly, in the course of the contract, related to the declaration of the risks and the declaration of other insurance policies covering the same risks”.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The remedies for a pre-contractual breach by the insurer of its statutory obligations depends on the specific rule that the insurer did not comply with.

8 Cour de cassation, 2nd civil chamber, 18 April 2013, Appeal on a point of law No. 12-19.519.
For example:

- As mentioned above, when the insurer did not mention all the grounds of interruption of the two year limitation period in the contract, the remedy is that the two year limitation is not enforceable against the insured;

- When an exclusion clause does not appear in very clear print, it is null and void;

- In any case, the insurer may be held liable to the insured and/or the third party beneficiary on the grounds of civil liability (contractual or tort liability), when the non-compliance with its statutory provisions caused a damage.

### III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

#### A - For the Insured and Third Party Beneficiary of Cover

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

At the claim stage, French mandatory insurance laws only provide for an obligation to inform the insurer of any loss that may trigger the insurance cover, within a certain timeframe in order to avoid forfeiture.

However, insurance contracts may stipulate other obligations resting on the insured, such as the obligation to communicate all supporting documents useful for the insurer to assess the implementation of the cover, or the obligation for the insured to take all necessary measures to avoid the aggravation of the loss.

16.1 **Do third party beneficiaries of cover have a duty of utmost good faith?**

Third party beneficiaries do not have a duty of utmost good faith since they are not a party to the insurance contract.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

With regards to the obligation to inform the insurer of any loss that may trigger the insurance cover, Article L. 113-2 of the French Insurance Code provides that “the insured shall be obligated to inform the insurer as soon as he is aware thereof and no later than the time set in the contract of any loss that may involve the insurer’s cover. Said time may not be less than five working days.

Said minimum time shall be reduced to two working days in the event of theft and to twenty four hours in the event of livestock mortality.

The above times may be extended by mutual agreement of the contracting parties.

When provided for in a contract clause, forfeiture due to lateness of report of loss […] may be invoked against the insured only if the insurer proves that it entailed a loss by reason of the late report of loss. In addition, it may not be invoked in all events where the late report of loss is the result of an accidental case or an act of God”. These provisions are not applicable to life insurance.

The assessment of the awareness of a loss that might trigger the insurance cover depends on the type of insurance contract (civil liability insurance, property insurance, etc.), therefore case law is really casuistic in this matter.

It remains that, Article L. 113-2 being mandatory, the insurer cannot be compelled, under the threat of forfeiture to be invoked, to declare a fact that is not likely to trigger the insurance cover. In addition, Article L. 113-2 does not specify the way for the insured to inform the insurer, so the insurance contract cannot impose the means to do so.

As stated above, insurance contracts may also stipulate other obligations resting on the insured, such as the obligation to communicate the documents useful for the insurer to assess the implementation of the cover, or the obligation for the insured to take all necessary measures to avoid the aggravation of the loss. In principle, such clauses are valid. The insured may be held liable if he does not comply with them. In this regard, it is important to remind that pursuant to Article L. 113-11 of the French Insurance Code, “shall be null and void all clauses providing that the insured shall forfeit his rights for simple lateness in reporting the loss to the authorities or submitting documents, without prejudice to the rights for the insurer to claim a compensation in proportion to the damage that it has caused to him ».

Finally, it is to be noted that any deliberate false statement regarding the occurrence of a loss may lead to forfeiture and even to criminal prosecution if the deliberate false statement qualifies as insurance fraud.

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

As stated above, at the precontractual stage, the insurer has a legitimate interest and right to be informed of the « qualities » of the risks covered.

As a reminder, Article L. 113-2 of the French Insurance Code provides that “the insured shall be obligated to […] truthfully answer the questions raised by the insurer, in particular, in the loss reporting form whereby the insurer questions him at the time of executing the contract on circumstances that enable the insurer to assess the risks that it covers”. The declaration is now limited to the questions raised by the insurer, in general in a questionnaire for underwriting purposes.
With regards to the intentional concealment of the insured’s criminal activities, the Cour de cassation stated that a false statement, which was intended to conceal the usual exercise of activities that exposed the insured to abnormal risks, was done intentionally and distorted the assessment of the risks covered by the insurer (in the present case, the life insurance contract had been underwritten by a “company manager” that was in fact registered as a member of an organized-crime group⁹).

B - For the Insurer

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

At the claim stage, the main obligation of the insurer is to implement the insurance cover. With regards to life insurance, the insurer has the obligation to search for the beneficiaries of the contract.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

Yes, an insurer owes the exact same duties towards third party beneficiaries of cover in handling claims.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied**

Article L. 113-8 of the French Insurance Code provides that “upon occurrence of the risk or the maturity of the contract, the insurer must perform the service defined in the contract within the agreed time and it may not be committed beyond said time”.

In other words, the parties are free to stipulate the time when the insurer will have to implement the insurance cover – except in some cases like natural disasters insurance where the time limits are imposed by law.

Failure for the insurer to comply with the agreed time limits triggers the application of Article 1153 of the French Civil Code, which provides that:

“In obligations which are restricted to the payment of a certain sum, the damages resulting from delay in performance shall consist only in awarding interests at the statutory rate […] Those damages are due without the creditor having to prove any loss.

They are due only from the day of a demand for payment or of another equivalent act such as a letter missive where a sufficient requisition results from it, except in the case where the law makes them run as a matter of right.

A creditor to whom his debtor in delay has caused, by his bad faith, a loss independent of that delay may obtain damages distinct from the interest on arrears of the debt”.

In other words, the remedy for a delay in the payment of the indemnity due by the insurer is to award interests at the statutory rate. But if it can be proved that the insurer was acting in bad faith, for example in an abusive or dilatory way, the insured may obtain damages distinct from the above-cited awarding interests to compensate a loss that is independent of that delay.

In matters of life insurance, another illustration of the duty of good faith is the obligation for the insurer:

- to get information, at least once a year, on the possible death of the insured (Article 132-9-3 of the French Insurance Code);
- when the insurer is informed of the death of the insured, to search for the beneficiary of the contract and, if the research is successful, to inform him/her of the stipulation for his/her personal benefit (Article L. 132-8 of the French Insurance Code).

The Prudential Supervisory Authority (in French: Autorité de Contrôle Prudentiel et de Résolution – ACPR), which is the public body in charge of supervising the banking and the insurance areas, recently sanctioned an insurer with a fine amounting to 10 million euros for its delays in searching for insurance life beneficiaries after the death of the insured (Decision 2013-03 bis, 7 April 2014).

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

- The French Federation of Insurance Companies (in French: Fédération Française des Sociétés d’Assurance – FFSA) took the initiative to conclude several Agreements that aim at regulating the relationships among insurers. However, these Agreements only bind on the insurers and cannot be enforced against the insureds. In addition, none of these Agreements actually deals with matters related to the duty of good faith, since such a duty is already reflected in mandatory statutory provisions of the French Insurance Code.
- In addition, the ACPR published some recommendations related to life insurance business practices. For instance, one recommendation contains a list of the questions that should be asked to the insured in the questionnaire to ensure that

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⁹ Cour de cassation, 1st civil chamber, 1st December 1993, Appeal on a point of law No. 91-17.201.
the insurer complied with its duty to advise. These recommendations are however not binding on anyone.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

The statutory provisions of the French Insurance Code cited in the present study are all mandatory (“of public policy”). This means that both insurers and insureds must comply with these provisions without any possibility to disregard them in the name of contractual freedom.

As a consequence, courts must disregard a term of a contract of insurance if it contravenes any statutory provision of French insurance laws. For example, an insurance contract cannot provide that the insured has only 10 hours to report a loss because such clause would not be compliant with Article L. 113-2 of the French Insurance Code (see above).

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

In principle, courts have no leeway or special powers to disregard any avoidance of the application of a policy, since French law is a codified legal system: either the conditions are met to avoid the contract – e.g. the insured acted in bad faith and committed a false declaration of the risks that decreased the assessment of the risks covered by the insured-, or said conditions are not met and courts cannot avoid the contract with no ground to do so.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

As stated above, under French law, the principle of good faith is reflected in statutory provisions that define, in each case, the obligations of the insurer/insured. Not complying with one of these provisions qualifies indeed as a breach of the statute.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Among its functions, the ACPR has the mission to protect the insurers’ clients, in particular by controlling the business practices of the insurers and by analyzing the claims received from clients.

In this regard, Article L. 612-1 of the French Monetary and Financial Code provides that the ACPR must ensure that insurers comply with the European/statutory/regulatory/codes of practice provisions, and that the means and processes used to this end are appropriate.

The ACPR has broad powers to sanction insurers that do not comply with their obligations:

- administrative police measures (warning, summons);
- disciplinary measures according to the seriousness of any failure to comply;
- other measures such as the publication of the penalties imposed.

IV - Reinsurance

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

The statutory insurance laws cited above are not applicable to reinsurance contracts (Article L. 111-1 of the French Insurance Code).

Under French law, reinsurance contracts qualify as contracts within the meaning of Article 1134 of the French Civil Code. As such, reinsurance contracts « must be performed in good faith ».

A French legal author summarizes as follows how the duty of utmost good faith is applied in matters of reinsurance:

« The reinsurance contract is a contract where the good faith plays a key role (contract of utmost good faith¹⁰). Reinsurance implies indeed that the reinsurer has full confidence in the ceding company policy regarding the acceptance and tariffication of the risks, as well as the settlement of the claims. Reinsurance implies a full transparency of the classes of insurance underwritten, of the risks covered, of the contractual and financial terms agreed. The necessity of good faith results from the fact that the reinsurer remains out of the relationship existing between the ceding company and its insured, whereas said relationship is the cause of the reinsurer’s commitments. As for the ceding company, it must be certain of the capacity of the reinsurer to carry its financial commitments. Both at the pre-contractual stage and during the course of the treaty, the ceding company must refrain from statements that would be likely to mislead the reinsurer on the extent of its commitments. It results from the principle of good faith in matters of reinsurance that the ceding company must declare exactly and completely the risks covered by the reinsurance. On the contrary, the reinsurer has the ¹⁰ In English in the original version.
duty to inform the ceding company of all the circumstances that are likely to influence the acceptation of the risks covered by the reinsurance, and that the insurer does not know for legitimate reasons ».

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Germany

OPPENHOFF & PARTNER
Peter Etzbach

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The principle of utmost good faith (“Grundsatz von Treu und Glauben”) is applicable in German insurance contract law and it is generally acknowledged that the insurance relationship is governed to a special degree by such principle.

Both, insurers as well as the insured are subject to the principle and in some respect also an aggrieved party is confronted with the principle. The reason for the strong emphasis of the principle of utmost good faith within the insurance relationship is that either party is dependent on support of the other party because of its inferiority: The insured only has knowledge of basic circumstances relevant for the conclusion of the contract as well as claim settlement. The insured has superior knowledge on actuarial practice, business, vast expertise and resources with special knowledge it can make use of.

A common definition of the principle of utmost faith does not exist. However, a general comprehension of the principle is that it obliges a person to consider the interests of third parties worth being protected and to an honest and loyal conduct in legal relations.

Requirement for the application of the principle is that a special relationship between the parties exists. The parties’ interests will be weighed against the background of accepted standards.

Also, the principle can have various functions: concretisation, supplementation, limit or control and correction.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The principle of (ordinary) good faith is provided for in Sec. 242 German Civil Code (Bürgerliches Gesetzbuch – BGB), thus is a statutory principle which, though, results from a civil law principle, in particular Roman law which was codified in the late 19th century. However, as it is a legal concept without a definition case law has developed various case groups and defined the principle more precisely.

The intensification of the principle, the duty of utmost good faith, however, is not codified but still relevant in German (insurance) law. The application of the principle of utmost good faith stems from case law developed on the basis of precedents.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

The insured’s duty of disclosure which is contained in Sec. 19 German Insurance Contract Act (Versicherungsvertragsgesetz – VVG) is the product of the principle of utmost good faith. In contrast to the general clause of Sec. 242 BGB, Sec. 19 VVG provides a detailed set of rules with regard to the insured’s duty and the legal consequences if not adhered to. However, besides the statutory rules in the VVG, the principle of utmost good faith nevertheless still is applicable where positive rules do not exist.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Generally, the principle does apply to all types of insurance. In particular, insurance contracts with consumers are always subject to the principle (if statutory law does not provide for certain rules).

Having said this, the parties to an insurance agreement can waive the application of the principle of utmost good faith between them within certain limits.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

During the pre-contractual stage, statutory law (i.e. Sec. 19 VVG) is primarily applicable. However, as stated above, also the principle of utmost good faith applies. But also during the term of the insurance agreement, the principle is applicable. First and foremost, the rules regarding the increase of risk in Secs. 23 et seqq. VVG apply which also constitute the written emanation of the principle of utmost good faith. Additionally, the insured is obliged to adjust objectively incorrect information if apparent to him and to give voluntary disclosure truthfully.

However, the principle also applies to the insurer, whose pre-contractual duties are codified in its duties to inform and advise the insured, Secs. 6, 7 VVG, and the duty to clarify any ambiguities. Whether or not the insurer is subject to a duty to secrecy is debated.
Thus, besides the ordinary good faith pursuant to Sec. 242 BGB, the principle of utmost good faith is a constant duty to both insurer and insured throughout the contractual relationship and irrespective of whether or not an actual insurance contract is concluded.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

As pointed out above, the duty applies to both the insured and the insurer. However, the main scope of the principle has been codified with respect to the insurer’s duty to inform and to advise and the insured’s duty to disclose.

A - For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The insured’s duties are codified in Sec. 19 VVG. Pursuant to this rule, the insured shall disclose to the insurer before making his contractual acceptance the risk factors known to him which are relevant to the insurer’s decision to conclude the contract with the agreed content and which the insurer has requested in writing. If, after receiving the policyholder’s contractual acceptance and before accepting the contract, the insurer asks such questions as are referred to in the first sentence, the policyholder shall also be under the duty of disclosure as regards these questions. If the contract is concluded by a person representing the policyholder, both the representative’s knowledge and fraudulent conduct as well as the insured’s knowledge and fraudulent conduct shall be taken into account in the application of the above. The insured may only invoke the duty of disclosure not having been breached intentionally or with gross negligence if neither the representative nor the insured has incurred responsibility for intent or gross negligence.

In personal insurance the examples are legion. They contain for example the duty to disclose serious heart diseases, HIV infections, habitual hashish consume. Not to be disclosed are, e.g., common illnesses (bronchitis etc.).

General insurance also provides many examples, e.g. the duty to disclose the insured’s prior conviction for arson.

The duty also contains the disclosure of indicating circumstances if the insurer has requested them in writing.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

In general, the duties are identical. However, the duty of utmost good faith supplements the statutory duty to disclose where the latter is not conclusive, e.g. the duty to correct previously misstated information.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

As stated above, the duty of utmost good faith supplements the duty to disclose.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The remedies for a breach of the duty to disclose are comprehensively regulated. They range from the insurer’s right to withdraw from the contract (if the breach was grossly negligent or intentional), the right to terminate the contract by giving one month’s notice (if the breach was not intentional or grossly negligent), and the right to increase the premium (if the insurance contract would have been concluded irrespective of the misstated or omitted information but on different conditions, even if the breach was grossly negligent).

The remedies for a breach of the duty of utmost good faith are not provided for in statutory rules. The injured party’s rights differ from case to case: Estoppel on the basis of *venire contra factum proprium* to the reversal of the burden of proof or the insurer’s right to refusal of performance. Alternatively, the insured’s claim may be forfeited.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

Generally, written statutory law, i.e. the duty of disclosure and its remedies, has precedence over the principle of utmost good faith.

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

The insurer’s duty comprises in particular the duty to inform and to advise, see Secs. 6, 7 VVG. In addition to this, the principle of utmost good faith obliges the insurer to clarify any ambiguities.
13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The statutory manifestation of the pre-contractual duty relates to information and advice: The insurer must ask the insured about his wishes and needs and, also bearing in mind an appropriate relation between the time and effort spent in providing this advice and the insurance premiums to be paid by the insured, the insurer shall advise the insured and state reasons for each of the pieces of advice in respect of a particular insurance if the difficulty in assessing the insurance being offered or the insured himself and his situation gives occasion thereto. The insurer shall document this, taking into account the complexity of the contract of insurance being offered. Furthermore, the insurer shall inform the insured in writing of his terms of contract, including the general terms and conditions of insurance, as well as the information set out in a statutory ordinance, in good time before the policyholder submits his contractual acceptance. This information shall be provided clearly and comprehensibly in keeping with the means of communication employed. If, upon the request of the insured, the contract is concluded by telephone or using another means of communication which does not permit the information to be provided in writing prior to the insured’s contractual acceptance, that information must be provided without undue delay after the contract is made; this shall also apply if the insured explicitly waives the right to information by a separate written declaration prior to submitting his contractual acceptance.

Additionally, if a clause in the general terms and conditions of insurance is ambiguous the duty of utmost good faith obliges the insurer to clarify this clause. The insurer may also be obliged to advise the insured if the latter apparently lacks knowledge which can easily be remedied. Last but not least the insurer is obliged to inform truthfully also in respect of information given besides the statutory information obligation, e.g. unrealistically high earnings promised by a life insurer.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

The notification obligation is provided for in Sec. 19 para. 5 VVG. The remedies of the insurer in case of a breach of the insured’s duty of disclosure are only available if the insurer has informed the insured of such remedies comprehensively including the preconditions for each remedy. However, if an insured fraudulently breaches his or her duty to disclose, he or she cannot rely on the insurer’s omission to notify.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

Statutory remedies for the breach of information and advice are claims for damages.

Additionally, the period in which the insured has the right of withdrawal from the insurance contract (generally 14 days, life insurance: 30 days) starts only upon proper information of the insured. If such information has not been given completely or correctly, the period does not start, thus giving the insured an extended time period in which he or she can withdraw.

Non-written remedies include estoppel on the basis of venire contra factum proprium and the reversal of the burden of proof, but also ultimately the insurer’s right to refusal of performance.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

Firstly, the insured has the obligation to notify the insurer of an insured event without undue delay. Statutory law provides for a duty of disclosure in so far that the insurer can demand from the insured that all information is provided which is relevant for the assessment of the claim or the scope of the insurer’s obligation to perform. This also comprises facts and circumstances which are to the detriment of the insured and may lead to the insurer being exempt from payment under the insurance contract, e.g. because the insured has intentionally caused a damage to the insured property.

Additionally, the insured has the statutory duty to mitigate any damage he/she suffered.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

The same applies to third party beneficiaries.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The content of the information which has to be provided depends primarily on the questions asked by the insurer.

However, the duty of utmost good faith means that also unasked circumstances have to be disclosed if evidently relevant for the insurer’s elucidation interests, e.g. the availability of witnesses or the use of the insured property by a third party. Apparently, only information known to the insured can be subject
to the duty to disclose even though the insured may have the obligation to enquire.

18. **Is the insured's intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

If the criminal activities are directly related to the questions whether or not the insurer would conclude the life insurance contract, e.g. potential danger of deadly accident during the criminal activities, this would constitute a breach of the duty of utmost good faith.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

The insurer has to assess any claim in good faith. This means that the insurer has to request from the insured promptly the information it requires for the assessment and shall not unduly delay the assessment.

Statutory law provides that the insurer has to pay the insured sum upon due date. The due date is the point in time the insurer has finalized his assessment of the claim and the claim amount.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

The same duty as vis-à-vis the insured applies to any third party beneficiaries of cover: due assessment of the claim and timely payment of any benefits.

21. **Describe the insurer's post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

As stated above, the insurer's post-contractual duty is statutory law.

Besides that, the duty of utmost good faith obliges the insurer to reject predated checks if it does not accept this as payment, to offset premium payments in a way favorable to the insured and reject premium payments which it cannot allocate to an insurance contract. The insurer further is obliged to request for clarification if the insured apparently has erred, an erroneous, misstated information in a claim form. Additional information obligations during claims handling do not exist in general. However, if an expert opinion leads to a gravely disadvantageous decision the insurer has to grant access to the expert opinion.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

The German insurance industry has adopted a Code of Conduct with respect to data protection. However, this code only relates to the handling of personal data of the insured and/or third party beneficiaries. Additionally, the German regulator has issued guidelines regarding complaints handling which are based on guidelines proposed by the European regulator. Such guidelines, though, do specifically not relate to claims and claims handling.

Besides the code of conduct and the guidelines, German law does not provide for an additional Code of Practice which is generally applicable.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

Terms and conditions in an insurance contract which deviate from the statutory principles stated above to the detriment of the insured are void and must be disregarded by courts, see Sec. 32 VVG.

For example, if terms and conditions of insurance provide for an undifferentiated termination right of the insurer in the event an insured does not or not properly comply with his/her duty to disclose the courts have to disregard the termination based on this clause.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer in the event an insurer does not or not properly comply with his/her duty to disclose the courts have to disregard the termination based on this clause.**

If the avoidance of a policy by an insurer does not comply with the statutory provisions (which, as stated above, are product of the duty of utmost good faith) the court must disregard such avoidance and apply the provisions of the insurance contract.

25. **To the extent that an insurer's breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

A continuous and repeated breach by the insurer of its duty of utmost good faith in the form it has been adopted in statutory provisions may constitute a violation of the interests of the insured and a breach of statutory law. The German regulator (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin) will demand from the insurer to remedy such deficiency which is relevant in prudential supervision. In case the insurer does not adhere to such order, additional measures of BaFin may apply. In such event, BaFin is authorized to issue any order vis-à-vis
the insurer and/or the insurer’s management which is appropriate and necessary to remedy the situation.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

The German Insurance Contract Act does not apply to reinsurance agreements, so that their substantive terms are governed by the general laws on contracts, in particular commercial contracts. These sets of rules again do not provide for any particular provisions on reinsurance, but state that the customs and practices of the particular commercial activity shall be taken into account, which in Germany are largely consistent with international reinsurance practices. Hence, the general duty of good faith applies.

In the context of reinsurance the principle of utmost good faith is not only generally accepted to apply to reinsurance contracts, but it is an important foundation of the relationship between the parties. Pre-contractually, the reinsurer relies to a large extent on the assessments made and information granted by the reinsured in respect of the portfolio of risks which shall be reinsured. During the term of the contract it is in the hands of the reinsured to handle the claims, while the reinsurer is expected to accept the claim handling as long as it was done properly. The duty to follow the settlements, which is acknowledged in the reinsurance law, is an offspring of this obligation. Hence, the reinsurer has to handle its affairs always with a view to the interest of the reinsurer in utmost good faith.

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Christopher Noblet

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei?”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Hungarian law does not recognise the principle of utmost good faith. However, Act V of 2013 on the Hungarian Civil Code (hereinafter: the “Hungarian Civil Code”) sets out certain general principles applicable to civil law relationships in general and to contractual relationships, including insurance contracts.

Section 1:3 of the Hungarian Civil Code sets out the principle of good faith and fair dealing, which is a general principle applicable to all civil law relationships including insurance contracts. The parties to a contract (including an insurance contract) and third parties (e.g. beneficiaries) that are linked to a contract are obliged to observe the above principle prior to and following the conclusion of a contract throughout the existence of the legal relationship. According to the Hungarian Civil Code, the requirement of good faith and fair dealing is considered as breached where a party’s exercise of rights is contradictory to his previous actions which the other party had reason to rely on. However, the above is only an example and the above principle can be applied to any unfair business practice and to any bad faith acts and omissions.

Section 6:62 of the Hungarian Civil Code sets out the principle of the duty to cooperate and communicate information, which is a principle applicable in contract law and thus applies to insurance contracts. The duty to cooperate and communicate information obliges the parties to cooperate during preliminary negotiations, at the time of the conclusion and termination, and throughout the term of the contract and to communicate information to each other on circumstances relevant to the contract. If the contract is concluded, the party who breaches the duty to cooperate and communicate information is liable for damages and for losses caused by the breach of the above duty to the other party.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

As indicated above, the principle of utmost good faith is not recognised under Hungarian law and only the statutory principles mentioned above are applicable.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

While the principle of utmost good faith is not recognised under Hungarian law, the Hungarian Civil Code sets out a duty of disclosure and notification of changes as a general contract law principle and an insurance law specific provision on the duty of reporting the occurrence of an insurance event, which is an obligation of the insured.

According to Section 6:452 (1)-(3) of the Hungarian Civil Code, at the time of conclusion of an insurance contract, the insured is obliged to disclose to the insurance company all circumstances of which the insured party is aware or should be aware and which are important in terms of providing the insurance coverage. The insured is obliged to satisfy the disclosure duty by truthfully filling out the questionnaire furnished by the insurance company.

The insured must notify the insurance company in writing of any changes in material conditions affecting the insurance contract. In the event of any breach of the obligation of disclosure and notification of changes, the obligation of the insurance company will not take effect, unless the contracting party is able to prove that the insurance company was aware of the concealed or undisclosed circumstance when the contract was concluded or that such circumstance had no influence on the occurrence of the insurance event.

The insured is also obliged to act in accordance with the duty of reporting the occurrence of an insurance event. According to Section 6:453 of the Hungarian Civil Code, the insurance company’s obligation will not take effect if (i) the insured fails to report to the insurance company the occurrence of an insurance event within the timeframe specified in the contract: or (ii) fails to provide the information necessary; or (iii) fails to facilitate verification of the information provided and, as a consequence of the above, the circumstances which are relevant from the aspect of the obligation of the insurance company become undetectable.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

N/A
5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

As indicated above, the principle of utmost good faith is not recognised under Hungarian law. The duty of disclosure and notification of changes, the duty to cooperate and communicate information and the principle of good faith and fair dealing are applicable to all contractual stages. By nature, the duty of reporting the occurrence of an insurance event is only applicable during the term of the insurance.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

N/A

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

N/A

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

N/A

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

N/A

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

As indicated above, the principle of utmost good faith is not recognised under Hungarian law.

Nevertheless, according to the Hungarian Civil Code, the following remedies are available in the case of a breach of the duty to cooperate and communicate information.

If the insured breaches the principle of duty to cooperate and communicate information at a pre-contractual stage and the contract is not concluded, the insured will be liable for damages and losses in accordance with the general provisions of tortious liability. If the contract is concluded and the insured breached the principle of duty of disclosure and notification of changes during the pre-contractual stage, the insured’s liability for such breach will be based on the liability for damages and losses caused by a breach of contract.

A breach of the general requirement of good faith and fair dealing may trigger both tortious liability and liability for a breach of contract depending on whether the breach of the above requirement occurred within a contractual relationship.

In the event of any breach of the obligation of disclosure and notification of changes, the obligation of the insurance company will not take effect, unless the contracting party is able to prove that the insurance company was aware of the concealed or undisclosed circumstance when the contract was concluded or that such circumstance had no influence on the occurrence of the insurance event.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

N/A

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

N/A

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

N/A

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

N/A

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

As indicated above, the principle of utmost good faith is not recognised under Hungarian law.

Nevertheless, according to the Hungarian Civil Code, the following remedies are available in the case of a breach of the duty to cooperate and communicate information.
If the insurer breaches the principle of duty to cooperate and communicate information at a pre-contractual stage and the contract is not concluded, the insurer will be liable for damages and losses in accordance with the general provisions of tortious liability. If the contract is concluded and the insurer breached the principle of duty of disclosure and notification of changes during the pre-contractual stage, the insurer’s liability for such breach will be based on the liability for damages and losses caused by a breach of contract.

A breach of the general requirement of good faith and fair dealing may trigger both tortious liability and liability for a breach of contract depending on whether the breach of the above requirement occurred within a contractual relationship.

II - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?
N/A

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?
N/A

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.
N/A

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?
N/A

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?
N/A

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?
N/A

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.
N/A

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

There is no specific Code of Practice for insurers under Hungarian law. Nevertheless, the Hungarian Financial Supervisory Authority, as the legal predecessor of the National Bank of Hungary as the regulatory authority currently competent to supervise financial services in Hungary, issued several opinions in the Hungarian insurance sector, which still serve as guidelines for insurance companies providing insurance services in Hungary.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

As indicated above, the principle of utmost good faith is not recognised under Hungarian law.

Nevertheless, if a term of an insurance contract is in breach of the principle of good faith and fair dealing, such term can be considered as null and void. In addition, terms of insurance contracts entered into with consumers may not deviate from the provisions of the Hungarian Civil Code to the detriment of the insured, the beneficiary or the consumer entering into the contract in relation to, amongst others, the disclosure and information obligations described above, since such terms would qualify as null and void. Otherwise, parties are free to define their contractual terms.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?
N/A

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?
N/A

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

As indicated above, the principle of utmost good faith is not recognised under Hungarian law.

Nevertheless, if an insurer breaches the duty of disclosure or other related obligations, the National Bank of Hungary as the competent authority may impose several types of sanctions on the insurer as set out in Act LX of 2003 on Insurers and Insurance Activity, which include, amongst others, warnings,
fines and the suspension or withdrawal of authorisation for operation. The maximum amount of a fine is the higher of HUF 2,000,000,000 (approx. EUR 6,500,000) and 200 % of the insurer’s annual statutory supervisory fee that the insurer is obliged to pay to the National Bank of Hungary.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

The principle of utmost good faith is not a recognised concept under Hungarian reinsurance law. With the exception of consumer protection related provisions, the general principles and provisions set out above are mutatis mutandis applicable to reinsurance contracts.

* * *
India

JURIS CORP

H Jayesh and Apurva Kanvinde

I. - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Yes, insurance laws in India do provide for the principle of utmost good faith.


There is no definition per se of the principle of utmost good faith under statutes governing insurance contracts or under case laws. However the said principle has been statutorily recognised.

The Insurance Act, 1938 provides that an insurer can call in question a life insurance policy if the insured had not disclosed material matters or suppressed facts which were material to be disclosed and were fraudulently made by the insured and that the insured knew at the time of making it that the statement was false or that it suppressed facts which were material to be disclosed.

Further the Marine Insurance Act, 1963 provides that a contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

What would amount to good faith has been explained by way of case laws in India. The Supreme Court of India has laid down the following:

“It is a fundamental principle of insurance law that utmost good faith must be observed by the contracting parties. Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. Just as the insured has a duty to disclose, similarly, it is the duty of the insurers and their agents to disclose all material facts within their knowledge, since obligation of good faith applies to them equally with the assured. The duty of good faith is of a continuing nature. After the completion of the contract, no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded.”

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The principle of utmost good faith is both a common law principle and a statutory principle. The principle has evolved through common law and it has been subsequently recognised in India by way of statutes as well as case laws. The Insurance Act, 1938, Marine Insurance Act, 1963, the Indian Contract Act, 1872, etc. recognise the principle of utmost good faith.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Yes, the insurance laws of our jurisdiction do provide for both the principle of utmost good faith and a separate duty of disclosure for the insured. It is a common law principle that the duty of disclosure ceases to exist upon the inception of the contract (unless otherwise contractually agreed to between parties). However the duty of utmost good faith in the performance of the terms of contract continues after the inception of the contract until the contract is in existence.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes, it is a common law principle that the duty of utmost good faith applies to all types of insurance contracts such as marine, fire, life, general insurance etc. It has been held by the Supreme Court of India that it is a fundamental principle of insurance law that utmost good faith must be observed by the

1 Section 45 of the Insurance Act, 1938
2 Section 19 of the Marine Insurance Act, 1963
3 Life Insurance Corporation of India v. Ajit Gangadhar Shanbag AIR 1997 Kant 157
contracting parties. Further, in an English case, London v/s Mansel, Jessel M R said that “Whether it is life, or fire or marine insurance, good faith is required in all cases, and though there may be certain circumstances from the peculiar nature of marine insurance which requires to be disclosed and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principles”.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

The duty of utmost good faith applies both at the pre-contractual stage and the post-contractual stage but the nature and extent of the duty may vary.

Parties to the contract are required to observe the principle of utmost good faith in performance of the contract. Further, the duty of good faith is of a continuing nature and no material alteration can be made to the terms of the contract without the mutual consent of the parties.

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

Yes, the principle of utmost good faith applies to both the insured and the insurer at the pre-contractual stage. If the principle of utmost good faith is not observed by either party, the contract may be avoided/set aside by the other party.

Good faith forbids either party from concealing (non-disclosure) what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary. Just as the insured has a duty to disclose. Similarly, it is the duty of the insurers and their agents to disclose all material facts within their knowledge, since obligation of good faith applies to them equally with the assured.

To illustrate better, an insured would be required to disclose all material facts and refrain from misrepresenting facts to the insurer at the pre-contractual stage. On the other hand the insurer/insurance agent would be required to disclose requisite information in respect of insurance products offered to the insured and ensure that any advertisement with respect to insurance products offered by him, are not deceptive or misleading etc.

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

At the pre-contractual stage, the insured is required to (i) disclose all material facts known to him (ii) refrain from suppressing facts knowing them to be true and material to be disclosed and (ii) refrain from misrepresenting facts knowing them to be false at the time of making it to the insurer. What would constitute as “material” would depend on the facts and circumstances of each case. The Supreme Court of India has discussed the term “material” facts in insurance contracts in Mithoolal v. Life Insurance Corporation of India. In this case the insured had entered into a life insurance policy with the insurer and fraudulently suppressed the fact that he had certain serious ailments such as anaemia, shortness of breath etc. The Supreme Court held that the same was essential to be disclosed. While deciding on the said case, the Supreme Court pointed out that “in order to call in question an insurance policy by the insured three conditions must be satisfied: (a) the statement of the assured must be of a material fact or must have suppressed facts which it was material to disclose; (b) the suppression must be fraudulently made by the policy holder, and (c) the policy holder must have known at the time of making the statement that it was false for that he suppressed facts which it was material to disclose”.

Further, in P. Sarojam v. LIC of India, it was held that, “A person seeking insurance is bound to disclose all material facts relating to the risk involved. False answers to the questions in the proposal form given by the assured relating to the state of health vitiate the contract of insurance.”

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5 The United India Insurance Co. Ltd. vs. M.K.J. Corporation AIR 1997 SC 408

6 [1879] 11 ch D 363 at 367

7 Hanil Era Textiles Ltd. v Oriental Insurance Co. Ltd. (2001) 1 SCC 269


9 The United India Insurance Co. Ltd. vs. M.K.J. Corporation AIR 1997 SC 408

10 Insurance Regulatory and Development Authority (Licensing of Insurance Agents) Regulations, 2000


12 Section 45 of the Insurance Act, 1938

13 1962 AIR 814

14 AIR 1986 Ker 201, 203
The English case, *Carter v. Boehm*\(^{15}\), has been heavily relied upon by the courts in India. This lays down the extent of the insured’s pre-contractual duty of utmost good faith. “It may be presumed that the underwriter knows nothing about the subject matter in question, it is the duty of the insured to disclose all material circumstances which may greater the risk involved”.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

No, the duty of utmost good faith for the insured is not equivalent to the duty of disclosure, although the latter is an indispensable facet of the former. While entering into an insurance contract, the insured is also required to refrain from misrepresenting facts etc. to the insurer\(^{16}\).

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

Parties to an insurance contract are required to observe the duty of utmost good faith and the duty of disclosure while entering into such a contract. To illustrate how the two operate separately, the duty of disclosure would cast an obligation on an insured obtaining a life insurance policy to refrain from concealing material facts with respect to his serious illness, etc. from the insurer. However, the duty of utmost good faith would cast an obligation on the insured to refrain from misrepresenting the seriousness of his illness to the insurer.

Therefore, both the duties are independent of each other and co-exist together. Failure to observe either of the duties may entitle the insurer to set aside the contract.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

A breach by the insured of the duty of utmost good faith allows the insurer to avoid/set aside the contract. The remedies for breach of the duty of utmost good faith are no different from a breach of the duty of disclosure.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

The duty of utmost good faith and the duty of disclosure both are important facets of an insurance contract. However, depending on the facts and circumstances of each case the duty of good faith may have precedence over the duty of disclosures. To illustrate, an insurance contract cannot be set aside by an insurer on the grounds that there was a failure to observe the duty of disclosure merely by making out some inaccuracy or falsity in the respect of some of the recitals or items in the proposal for insurance and the insurer must prove that material facts have been suppressed with the full knowledge of the assured.\(^{18}\)

Therefore, if the insured is able to prove that certain facts not material to the insurance policy were not disclosed but there was no intention on his part to conceal the same or they were not known to the insured at the time of entering into the contract, the court may not entitle the insurer to set aside the contract\(^{19}\). In other words non disclosure is not necessarily fatal while breach of duty of good faith is.

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

The various regulations framed under the Insurance Regulatory and Development Authority Act, 1999 set out the duties cast on an insurer while dealing with the insured at the pre-contractual stage. Some of these are listed below:

(i) The insurer is required to provide all material information in respect of a proposed cover to the insurer to enable the insured to decide on the best cover that would be in his or her interest and where the insured depends upon the advice of the insurer, the insurer must advise the prospect dispassionately;\(^{20}\) and

(ii) The insurer must ensure that any advertisement with respect to an

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\(^{15}\) (1766) 3 Burr 1905

\(^{16}\) Mithoolal Nayak v/s. LIC, AIR 1962 SC 814

\(^{17}\) Mithoolal Nayak v/s. LIC, AIR 1962 SC 814

\(^{18}\) Life Insurance Corporation Of ... vs Parvathavardhini Ammal AIR 1965 Mad 357

\(^{19}\) Section 45 of the Insurance Act, 1938

\(^{20}\) Regulation 3(2) and 3(3) of the Insurance Regulatory and Development Authority (Protection of Policyholders’ Interests) Regulations, 2002
insurers for not notifying the insured of the risk. There is no contractual relation between the insurer and a third party. The duty of utmost good faith binds the parties to the contract and since a third party beneficiary is not a party to a contract, strictly speaking there is no duty cast on a third party.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

It is a common law principle that the duty of disclosure ceases once the insurance contract has been entered into, unless the contract provides otherwise. The famous case *Agapitos v Agnew (The Aegeon)*

The said case lays down that “the post-contractual operation of the duty of good faith by the insured does not require a duty of disclosure but a duty not to make misrepresentations. In other words, where a policy requires the assured to make post-contractual notifications, the duty is not one of disclosure (ie the same as pre-contractual disclosure) but a lesser duty not to misrepresent”. Indian courts will follow a similar approach.

18. **Is the when completing a proposal insured’s intentional concealment of his/her criminal activities for life policies a breach of the duty of utmost good faith?**

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21 Regulation 6 of the Insurance Regulatory and Development Authority (Licensing of Insurance Agents) Regulations, 2000

22 (1766) 3 Burr 1905

23 LIC v/s Shakunthalabai, AIR 1975 AP 68

24 The United India Insurance Co. Ltd. vs. M.K.J. Corporation AIR 1997 SC 408

25 National Insurance Co. Ltd. vs. Laxmi Narain Dhut AIR 2007 SC 1563

26 [2002] EWCA Civ 247
Any failure on the part of the insured to disclose material facts to the insurer at the time of entering into the insurance contract would entitle the insurer to call in question the contract. The policy cannot be avoided on the ground of mis-statements or untrue answers unless the insurers establish (a) that the statements were inaccurate or false; (b) that such statements were on material factors or that material facts were suppressed and not disclosed, and (c) that the assured knew at the time of making those statements that they were false to his knowledge or knew that these facts were material to disclose and deliberately suppressed. Therefore depending on the facts and circumstances of each case, in the event the disclosure of criminal activities would be a material factor and the insurer intentionally concealed the fact, it would amount to a breach of the duty of utmost good faith.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

The insurer’s duty of utmost good faith continues until the contract is in existence.

While dealing with a claim of insurance an insurer cannot avoid or repudiate an insurance policy on the ground of non-disclosure of facts which had no bearing on the risk taken by the insurer.

Further, the Insurance Regulatory and Development Authority (Protection of Policyholders’ Interests) Regulations, 2002 provides that the insurer, upon receiving a claim, is required to process the claim without delay. Any queries or requirement of additional documents, to the extent possible, all at once and not in a piece-meal manner, within the period stipulated in the regulations. In the event there is a delay on the part of the insurer in processing a claim, the insurer is required to pay interest on the claim amount as per the provisions of the regulations.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

The duty of utmost good faith is required to be observed by parties to a contract. There is no contractual relation between the insurance company and the third party. Therefore strictly speaking the insurer does not owe a duty of utmost good faith towards third party beneficiaries. However since a third party is protected by such a contract, while handling a claim, the insurer will have to ensure that he processes the claim without any delay.

21. Describe the insurer's post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The insurer cannot make any alterations in the contract without the consent of the insured and is required to disclose any change in the risk factors etc. to the insured pursuant to the execution of the contract. In United India Insurance Co Ltd. v. M.K.J. Corporation the Supreme Court of India has laid down the principle relating to the post-contractual duty of utmost good faith which states as follows:

“The duty of good faith is of a continuing nature. After the completion of the contract, no material alteration can be made in its terms except by mutual consent. The materiality of a fact is judged by the circumstances existing at the time when the contract is concluded”.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

Yes, the Insurance Regulatory and Development Authority prescribe and regulate the code of conduct for insurers in India.


For example the Code of Conduct for insurance agents under the Insurance Regulatory and Development Authority (Licensing of Insurance Agents) Regulations, 2000 stipulates that every insurance agent is required to disseminate the requisite information in respect of insurance products offered for sale by his insurer. The Code of conduct laid down for insurance brokers etc. is also similar to

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27 Section 45 of the Insurance Act, 1938

28 New India Assurance Co. Ltd. v. T. S. Raghava Reddi

29 National Insurance Co. V. Rais Abbas Naqvi 1996 (2) CPR 108.


the code of conduct laid down for insurance agents. These regulations are in line with the common law principle of the duty of utmost good faith.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

Yes, courts can disregard a term of the contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term. All insurance contracts are required to observe the principle of utmost good faith and if a term in the insurance contract breaches the same, the court has the power to disregard the term despite being contractually agreed. A contract which defeats the purpose of law is void.34

In Jai Pal Singh v. Deputy General Manager, United India Insurance Co. Ltd. and Ors.,35 the rejection of an insurance claim on an unjust and unreasonable condition was quashed. The courts held that "the condition was liable to be ignored as being one sided and irrational and directed the insurance Company to settle the claim of the petitioner in accordance with law ignoring the alleged condition in the insurance policy as expeditiously as possible".34

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Yes, the courts are required to apply the principles of natural justice while deciding upon a dispute. If the balance of convenience lies in favour of the insured and he can establish that while avoiding the policy, the insurer has breached the duty of utmost good faith, then the court may disregard the avoidance of the application of a policy and direct the insurer to grant the claim. This would depend on a case to case basis.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes, an insurer’s breach of the duty of utmost good faith would amount to a breach of the statute. The various statutes dealing with insurance laws stipulate penalties for submitting false documents or making false statements etc.36

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Yes. A breach by the insurance agent or any director or partner of an insurance company of the duty of utmost good faith entitles the insurance authorities to cancel the license issued by them to such insurance agent.37

**IV. Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

The insurance regulations governing re-insurance contracts in India do not categorically stipulate the application of the principle of utmost good faith to re-insurance contracts. However it is a common law principle for reinsurance, that both the reinsurer and the reinsured owe to the other the duty of utmost good faith which applies both before the contract is entered into and continues until the contract is in force. Utmost faith has to be observed at all times by the parties to the reinsurance contract also and the insurer has a duty to disclose material facts to the reinsurers.38

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34 Section 23 of the Indian Contract Act, 1872
35 2007 7 AWC7738All
36 Section 103 of the Insurance Act, 1938
37 S. 42(4) (g) and S. 42(5) of the Insurance Act, 1938
38 London General Insurance Co. vs. General Marine Underwriters Association (1921) 1 KB 104
Ireland

MATHESON
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I - Definition of the Principle of Utmost Good Faith:

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The principle of utmost good faith is set out in statute in section 17 of the Marine Insurance Act 1906 which provides that “a contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.” Although the Act relates specifically to marine insurance this section, together which section 18(1) which sets out the duty of disclosure, are generally regarded as applicable to all forms of insurance.

Case law has established that the principle of utmost good faith imposes a duty to disclose all material facts. According to McMahon J in Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd, “the uberrimae fidei principle applies with the greatest force to situations where the relevant facts are peculiarly within the knowledge of the insured and are not easily available to the underwriter”. However, it has also been established that such a duty does not negate the insurer’s duty to carry out “normal inquiries or investigations”.

The importance of the principle of utmost good faith was also enunciated by Kenny J in the Supreme Court in the case Chariot Inns Ltd v Assicurazione General Spa where he held “a contract of insurance requires the highest standard of accuracy, good faith, candour and disclosure by the insured when making a proposal for insurance to an insurance company”. It was also held by Kenny J in this case that the standard of materiality is “objective, not subjective”.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute or otherwise?

The principle of utmost good faith is set out in statute. Section 17 of the Marine Insurance Act 1906 provides that “a contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.” Despite referring specifically to marine insurance the principle is regarded as applying to all insurance contracts. The principle of utmost good faith has also been further expanded and developed by the Courts in Ireland as an accepted common law principle.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

The duty of disclosure and the principle of utmost good faith are separately enshrined in Statute under section 18(1) and section 17 of the Marine Insurance Act 1906 respectively. The duty to disclose material facts is a more extensive duty than the obligation to act with the utmost good faith, because it has been held that an insured might honestly believe he was in full compliance with the duty of utmost good faith while still failing to discharge the duty of disclosure. The burden of proving non-disclosure rests with the insurer. The duty to disclose has also been interpreted as requiring the insurer to ask a comprehensive range of questions which covers all

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1 Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd [2009] 1 IRM 190.
4 Aro Road & Land Vehicles Ltd v Insurance Corporation of Ireland Limited [1986] IR 403
5 Kelleher v Irish Life Assurance co. Ltd, Unreported, Supreme Court, 8 February 1993.
material information relating to the proposal. Any failure on behalf of the insurer to ask specific, relevant questions cannot later be relied upon by the insurer to repudiate the claim. As such, it can be said from case law that insurers are obliged to play an active role in the disclosure process. This sentiment is also expressed by Buckley who notes that the "scope of the duty of disclosure may be limited by the express questions asked". Furthermore, it has been noted that the insurer "should not use the duty of the utmost good faith as a crutch or an excuse not to carry out his own investigations which form part and parcel of the profession".

4. **Does the principle of utmost good faith apply to all types of insurance contracts (life, insurance, general insurance, reinsurance etc.)?**

Case law has established that the duty applies to all classes of insurance contract, regardless of whether the contract is for fire, life, marine insurance or reinsurance.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

A great deal of uncertainty has surrounded the issue of a post-contractual duty of good faith. However, according to the decision of Murphy J. in *Fagan v General Accident* 10 "the duty to exercise the utmost good faith…continues throughout the relationship up to and including the making of a claim on foot of a policy". Similar sentiment was also expressed by Hoffman J.J. in the English case *Orakpo v Barclays Insurance Services*, which held "in principle insurance is a contract of good faith. I don’t see why the duty of good faith on the part of the assured should expire when the contract has been made. The reasons for requiring good faith continue to exist".

According to Professor Henry Ellis however "at common law the duty of disclosure exists throughout the pre-contractual negotiation stage. Once an insurance contract is concluded, the duty to disclose is suspended; it revives again at renewal; which legally is the negotiation of a fresh contract". This echoes the sentiment of the Law Reform Commission as expressed in its consultation paper published in December 2011. 11 The Law Reform Commission considered whether or not there is a post-contractual duty of utmost good faith in the context of claims processing. The LRC was of the view that a duty of good faith on the part of the insurer has been conceded in *Carter v Boehm* 12 and is supported by the principle of mutuality in Section 17 of the Marine Insurance Act 1906. However, the perspective of the LRC is that there is a fundamental difference between the circumstances in which an insured’s and an insurer’s possible duties might arise. The LRC’s view that while the duty on the part of an insured arises, primarily at least, pre-contractually, the duty which arises for an insurer occurs mainly at the post-contractual stage in relation to the processing of claims. As a result, the view of the LRC is that this post-contractual duty of good faith on the part of an insurer is more likely to be recognised, if at all, in a binding authority as the subject of implied contractual term which would result in different remedies in the event of a breach. The LRC caveats this prospect by stating that a shift in the perception of the nature of an insurance contract is likely to be necessary before greater duties on an insurer are established in case law.

### II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

The principle of utmost good faith is a mutual one at the pre-contractual stage. The mutuality of the duty is established in section 17 of the Marine Insurance Act 1906. Although the duty applies to both the insurer and the insured, it has been noted the scope of the insurer’s duty in this regard has received far less judicial scrutiny than the duty as applicable to the insured. 13 As far back as the landmark case of *Carter v Boehm* 14 it has been held, per Lord Mansfield, that the uberrimae fidei obligation in insurance contracts is a mutual one. More recently in the case of *Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd* 15

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7. *Arro Road & Land Vehicles v Insurance Corporation of Ireland Limited* [1986] IR 403 per McCarthy J.
13. *LRC CP 65-2011*
14. (1766) 3 BURR 1905
Mahon J found that the insurance company concerned was in breach of its duty of uberrimae fidei for failing to carry out proper investigations, inform itself of the facts and failing to deal fairly with the insured.

A - For the Insured:

7. What is the content of the duty of utmost good faith? Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The principle of utmost good faith is understood to mean an obligation on both parties, the proposer and the insurer, to disclose all material facts relating to the risk prior to concluding the contract. The landmark case establishing this principle is Carter v Boehm. However, more recent case law has attempted to update and fine tune this principle. In reality it requires the proposer to answer the questions on his proposal form to the best of his knowledge. Whether a non-disclosure will be viewed as material or not is decided by the objective yardstick of the “reasonable and prudent insurer”.

In the judgment of Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd, McMahon J held that “the principle of uberrimae fidei, which applies to all insurance contracts, imposes a heavy onus of disclosure on the insured”. He further asserted that “the uberrimae fidei principle applies with the greatest force to situations where the relevant facts are peculiarly within the knowledge of the insured and are not easily available to the underwriter.”

In Irish law, in cases involving health insurance and similar types of insurance, a distinction has been drawn between cases where the proposer honestly believes that a medical condition or symptom will have no long-lasting or serious consequences, and situations where the proposer is completely ignorant of the existence of any medical condition. The decision in Curran v Norwich Union Life Insurance Society suggests that once an individual experiences symptoms and consults a medical practitioner a duty of disclosure is triggered. In contrast, in Keating v New Ireland Assurance Company, the court found in favour of the insured’s estate as he had not known of the existence of his fatal medical condition prior to obtaining life assurance cover. Given this circumstance McCarthy J held that “one cannot disclose what one does not know”. The duty of uberrimae fidei may also be limited in instances where the proposer is not questioned by the insurer about a particular matter which is later relied upon by the insurer in repudiating the contract as was held in Arro Road and Land Vehicles Ltd v Insurance Corporation of Ireland. In contrast, a stricter approach was taken by Kenny J in Chariot Inns v Assicurazioni General Spa where he held that “the correct answering of any questions asked is not the entire obligation of the person seeking insurance: he is bound, in addition, to disclose to the insurance company every matter which is material to the risk against which he is seeking indemnity”.

More recently in Coleman v New Ireland, Clarke J reiterated that a proposer for an insurance policy must make full disclosure of material facts while adding that any material non-disclosure or inaccurate answer to a question on the proposal form is to be “judged by reference to the knowledge of the proposer and whether answers given were to the best of the proposer’s ability and truthful”.

The recent Law Reform Commission Consultation Paper on Insurance Contracts expressly recommends that although the pre-contractual duty of disclosure should be retained, its application should be limited to facts or circumstances of which the proposer has actual knowledge.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

According to the recent Law Reform Commission Consultation Paper the utmost good faith principle and the duty of disclosure, are in most instances linked together. However there are cases, such as Curran v Norwich Union Life Insurance Society, in which it has been held that non-disclosure may occur even in the absence of mala fides on behalf of the proposer.

18 Carter v Boehm (1766) 1 Wm. B1. 593, 97 E.R. 1162.
19 Kelleher v Irish Life Assurance co. Ltd, Unreported, Supreme Court, 8 February 1993.
23 Arro Road & Land Vehicles v Insurance Corporation of Ireland Limited [1986] IR 403 per McCarthy J.
9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences. However the majority of case law inclines towards placing an emphasis on the duty of disclosure as a means of protecting the insurer and separates the duty from the wider implications of the mutual duty of utmost good faith.

None of the reported decisions in Ireland on the duty of disclosure involve consideration of the duty continuing beyond the formation of the insurance contract. However, it would seem that the duty arises whenever the insurer is required to decide whether they will accept the risk in question or the terms on which they will do so. Such a decision has to be made on a proposal for renewal of an existing policy and in respect of a material change in an existing insurance contact of such a kind “as to substantially alter the nature of the bargain as affecting both sides”.

In practice it is generally accepted that there is no duty of disclosure at any other time. However, the duty of utmost good faith from which the duty of disclosure stems is a continuing duty in other respects. Unless the contract of insurance stipulates otherwise, the insurer’s common law and equitable duty to make full and accurate disclosure of all material facts only applies up to moment when a binding contract of insurance is concluded.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

An insurer who successfully invokes a pre-contractual breach by the insured of the duty of utmost good faith will generally be able to have the contract declared void ab initio. The burden of proof rests with the insurer who must establish on the balance of probabilities that there has been a breach of the principle of utmost good faith and the duty of non-disclosure. For example, in Molloy v Financial Services Ombudsman the High Court upheld the earlier decision of the FSO declaring an insurance policy void for failure on the insured’s behalf to disclose material facts.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

Although the two principles are generally interlinked in Irish insurance law, according to Dockery the duty to disclose is a more extensive duty than the obligation on both parties to act with the utmost good faith. As can be seen earlier in the case of Curran v Norwich Union Life Insurance Society a situation of non-disclosure may arise even if the insured has complied fully with his duty of utmost good faith. However, in the Law Reform Commission Consultation Paper the two duties are described as “complementary to one another in most cases”.

B - For the Insurer:

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

As has been noted earlier the obligation of uberrimae fidei is a mutual one. However, the duty of the insurer in this regard has received far less judicial scrutiny than the proposer’s parallel duty. In the case Banque Financiere de la Cite S.A. v Westgate Insurance Co. Ltd it was held that the insurer was obliged to disclose to the insurer facts known to the insurer at the time of entering into the contract which would reduce the insurer risk.

More recently in Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd McMahon J held that “the insured’s duty is balanced by a reciprocal duty on the insurer to make its own reasonable inquiries, to carry out all prudent investigations and to act at all times in a professional manner. In fact the onus to do this, because of its experience and expertise, lies primarily on the insurer”. McMahon J further stated that “where the insurer has full access to the property to be insured, as in this case, so that it can easily measure the risk for itself, it cannot refrain from such reasonable inquiries as a prudent insurer would make to assess the risk and calculate the premium and hope to profit from the insured’s lack of skill or his honest mistake”.

28 Lisham –v- Northern Maritime (1875) L.R. 10. Cp 179 @ 181 per Bramwell
29 Harrington –v- Pearly Life Assurance Co (1914) 30 T.L.R. 613 C88
30 Joel v Law Union Insurance Co [1980] 2 KB
31 (Unreported, High Court, Macmenam; 15 April, 2011)
34 Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd [2009] 1 ILRM 190.
13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it is applied.

The mutuality of the principle was first enunciated by Lord Mansfield CJ in the seminal case of *Carter v Boehm*.[35] Also in the case *Banque Keyser Ullman v Skandia*,[36] it was held that the insurer owed a duty of good faith to the insured to inform him that his broker had been dishonest. According to some commentators the scope of this duty has been expanded following the decision of *Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd*,[37] referred to above. It is clear that in order to discharge this duty an insurer must act prudently to investigate any aspect of a risk which could be ascertained by it through the course of carrying out reasonable enquiries and investigations.[38]

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

A failure to act with utmost good faith is not limited to situations involving dishonesty, although a lack of honesty would certainly constitute a breach of the duty. The duty of utmost good faith requires insurers to act in accordance with commercial standards of decency and fairness and to conduct itself reasonably, transparently and with candour. Over the last two decades increasing regulation and increased expectations of ethical corporate behaviour has required higher standards of conduct on the part of insurers.

One illustration of this is the Consumer Protection Code 2012, which was issued by the Central Bank of Ireland and which contains specific disclosure requirements which must be adhered to by insurers. Clause 4.35 states that a regulated entity must explain to a consumer, at the proposal stage, the consequences for the consumer of a failure to make full disclosure of relevant facts including:

(a) the consumers medical details or history; and

(b) previous insurance claims made by the consumer for the type of insurance sought

The explanation must include, where relevant, that a policy may be cancelled;

(a) that a policy may be cancelled;

(b) that claims may not be paid;

(c) the difficulty the consumer may encounter in trying to purchase insurance elsewhere; and

(d) in the case of property insurance, that the failure to have property insurance in place could lead to a breach of the terms and conditions attaching to any loan on that property.

The principle of utmost good faith with respect to insurance contracts imposes a bilateral duty of disclosure on insurers as well as on the insured. In practice, the duty tends to bear more heavily on the insured but the insurer does have a duty to disclose to the insured material facts within the insurers knowledge of which the insurer knows the insured to be ignorant. In *Banque Keyser Ullman v Skandia* it was held that the insurer owed a duty of good faith to the insured to disclose to him that his broker had been dishonest.

The duty of the insured must extend at least to disclosing all material facts known to them, being material either to the nature of the risk sought to be covered or to the recoverability of a claim under the policy, that a prudent insurer would take into account in deciding whether or not to place the risk for which they seek cover with that insurer.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

In principle an insured could claim damages from an insurer arising out of loss suffered by the insured as a result of the insurer’s breach of its obligation of “utmost good faith”. In the aforementioned case of *Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd* [2009] McMahon J held that the insurance company in question was in breach of its duty of uberrimae fidei in failing to educate itself fully as to the facts and also in failing to deal fairly with the insured. The defendant insurance company was ordered to pay the insured €1,015,000 on foot of the policy.

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35 *Carter v Boehm* (1766) 1 Wm. B1. 593, 97 E.R. 1162.


37 *Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd* [2009] 1 ILRM 190.

38 Ahern, “The formation of insurance contracts and the duty of insurers” (2009) 4 Commercial Law Practitioner 84.

39 *Manor Park Homebuilders Ltd v AIG Europe (Ireland) Ltd* [2009] 1 ILRM 190.
III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

The law on the continuing duty of utmost good faith remains unclear, however, there is authority for the view that an insured’s duty of utmost good faith operates post-contractually, including at the claims stage. The continuing nature of the duty of utmost good faith was accepted by Murphy J. in Michael Fagan v General Accident Fire and Life Assurance Corporation plc.\(^{40}\):

“…the duty to exercise the utmost good faith continues throughout the relationship up to and including the making of a claim on foot of the policy.”

The duty of utmost good faith requires the insured to make full disclosure of the circumstances of the loss relevant to the claim, in addition to a general duty not to act fraudulently or dishonestly in making a claim. The presence of fraud in a claim may defeat the entire claim and terminate the contract.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

The law relating to third party beneficiaries and the duty of utmost good faith is not well established under Irish law. In accordance with the common law doctrine of privity of contract, a contract cannot generally be enforced in favour of or against a person who is not a party to the contract. This is subject to certain exceptions, for example under Section 76(1) of the Road Traffic Act 1961 and Section 62 of the Civil Liability Act 1961. In circumstances where a third party beneficiary supports another party’s fraudulent claim, there are conflicting judgments as to whether that third party’s own genuine claim will be upheld or forfeited. There is an argument to be made, therefore, that a third party beneficiary is also required to act with utmost good faith.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

It is generally accepted in practice that the duty of utmost good faith, from which the duty of disclosure flows, is a continuing duty. Although there are few Irish decisions which have examined the continuing duty of disclosure on the part of an insured beyond the formation of the contract, it appears that the duty of disclosure arises whenever the insurer is required to consider whether to accept the risk or the terms on which the risk will be accepted.

Such consideration on the part of the insurer occurs on the proposal of new insurance, on renewal of an existing policy or where there is a material change in an existing insurance contract so “as to substantially alter the nature of the bargain as affecting both sides.”\(^{41}\)

Depending on the terms of the contract, it is generally accepted that there is no duty to notify a change in risk during the duration of the contract. Where there is an extension or modification of the contract affecting the risk, there is a limited duty of disclosure on the part of the insured as regards the change in risk. Only facts material to the change, however, are required to be disclosed.\(^{42}\)

There are a number of English cases, of persuasive authority in Ireland, which demonstrate how the law on the continuing duty of utmost good faith remains unclear. In The Star Sea\(^{43}\), Lord Hobhouse confirmed that “utmost good faith is a principle of fair dealing which does not come to an end when the contract has been made.” In La Banque Financiere v Westgate Insurance,\(^{44}\) it was suggested that the continuing duty of utmost good faith was confined to the making of a claim under a policy. In New Hampshire Insurance Co. v MGN Ltd\(^{45}\), the trial judge stated that:

“the obligation of good faith...does not....apply so as to trigger positive obligations of disclosure of matters affecting the risk during the currency of the cover except in relation to some requirement, event or situation provided for in the policy to which the duty of good faith attaches.”

In K/s Merc-Skandia\(^{46}\), Longmore L.J. confined the existence of the duty of utmost good faith to certain specified situations. As regards the insured, he confined the duty to situations where the contract itself required information to be disclosed.

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\(^{40}\) [1999] I.C.L.Y. 635.

\(^{41}\) Lishman v Northern Maritime (1875) L.R. 10 Cp 179 at 181

\(^{42}\) Lishman v Northern Maritime (1875) L.R. 10 Cp 179 at 182

\(^{43}\) [2003] 1 AC 469 at [48]

\(^{44}\) [1990] 1 All E.R. 947


18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

Under the general duty of utmost good faith, the insured has an overriding duty to disclose all material facts to the insurer. It is possible for the insurer to breach the duty by omission or concealment in relation to a material fact.

A material fact is one which would influence the judgement of a prudent underwriter in deciding:

(i) whether to underwrite the contract; or

(ii) the terms (such as the premium) on which it might do so.

Almost all insurance proposal forms contain questions relating to the moral hazard of the proposer and this typically includes enquiring as to whether the insured has any previous convictions. In the absence of legislative provision to the contrary, it would seem that every conviction material to the risk within the timeframe specified on the proposal form must be disclosed, in addition to convictions material to the “moral hazard”, even in circumstances where they occurred outside the timeframe.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

The duty of utmost good faith imposes a bilateral duty on both the insurer and the insured.

In practice, the insurer has a duty to disclose to the insured material facts within the insurer’s knowledge of which he knows the insured to be ignorant. When an insurer is dealing with a claim, it is implied that the insurer will conduct a reasonable investigation into the insured’s claim. An insurer cannot attempt to avoid a claim by alleging that they were misled by the insured, if the relevant fact was common knowledge or they were aware of it from other sources.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

There is little Irish case law on this matter. In relation to third party insurance claims under Irish law, in accordance with the common law doctrine of privity of contract, a contract cannot generally be enforced in favour of or against a person who is not a party to the contract. There is no Irish equivalent of the UK Contracts (Rights of Third Parties) Act 1999.

There are certain exceptions to this under Section 76(1) of the Road Traffic Act 1961 and Section 62 of the Civil Liability Act 1961. Under the law of trust a beneficiary can, in certain circumstances, directly enforce the rights of the trust against an insurer. The beneficiary has the burden of proving that a trust exists. The beneficiary must also be able to demonstrate that he is entitled to the benefit of the policy by proving “more than a reasonable expectation” that he is to benefit.

In the UK Court of Appeal decision in Gorham v BT it was held that an insurance company owed a duty of care to the dependents of an insured and the intended beneficiaries of the policy. This case followed the decision in White v Jones and is likely to be of persuasive authority in Ireland. It follows, therefore, that where an insurer is found to owe a duty of care to the intended beneficiaries of an insurance policy, it is arguable that the insurer’s duty of utmost good faith also extends to such parties.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

The duty of utmost good faith, a bilateral duty imposed on both the insurer and the insured, is generally accepted to be a continuing duty under Irish law. An insurer has a duty to disclose to the insured information within the insurer’s knowledge and of which he knows the insured to be ignorant. The bilateral nature of this duty was reiterated in Banque Financiere de la Cite SA v Westgate Insurance Co and is likely to be of persuasive authority in Ireland. It follows, therefore, that where an insurer is found to owe a duty of care to the intended beneficiaries of an insurance policy, it is arguable that the insurer’s duty of utmost good faith also extends to such parties.

An issue which must also be borne in mind by insurers when drafting insurance policies issued to consumers is the effect of the Unfair Terms in Consumer Contracts Regulations 1994. A consumer (i.e a natural person acting for purposes outside those of his business) can claim that a contractual term is

47. Re Irish Board Mills Ltd (in Receivership) [1980] ILRM 216
49. [1995] 2 A.C. 207
50. [1991] 2 AC 249
invalid where it has not been individually negotiated and where it is unfair. An unfair clause is one which “contrary to the requirement of good faith causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”. Core terms, such as those that define the scope of the cover, will not be subject to this restriction.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There are various codes and guidance which (re)insurers in Ireland must comply with when selling insurance policies to consumers. Member companies of the Insurance Ireland (previously the Irish Insurance Federation) subscribe to voluntary codes of conduct, applicable to consumer insurances, both life and non-life. While the codes have no legal effect, they represent best industry practice and compliance with their provisions is strongly encouraged by the insurance industry bodies. For example, provisions of the code of conduct for non-life insurance prohibit an insurer from avoiding liability to indemnify on certain grounds, including non-disclosure of a fact which the insured could not reasonably be expected to have known.

The Central Bank of Ireland has also issued various codes and guidance including the Corporate Governance Code for Credit Institutions and Insurance Undertakings and the Consumer Protection Code (“CPC”).

Compliance with the CPC is mandatory for all regulated financial services providers, including insurance companies. Chapter 2 of the CPC outlines the general principles applicable to insurers in all dealings with customers and within the context of its authorisation.

These include the requirement for an insurer to:

(i) act honestly, fairly and professionally in the best interests of its customers and the integrity of the market;

(ii) act with due skill, care and diligence; and

(iii) make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer.

Therefore, although the CPC does not expressly provide for a duty of utmost good faith, it is implied through the general principles outlined in Chapter 2 and through the letter and spirit of

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

In the case of a breach of the duty of utmost good faith, the remedy is to declare the contract void. In the case of non-disclosure of a material fact the remedy of avoidance of the policy is available. Pursuant to the Marine Insurance Act 1906, avoidance of the policy is the remedy for non-disclosure (Section 18) or material misrepresentation (Section 20) by the insured. The policy is voidable by the insurer from inception. However, the Irish courts have not permitted insurers to avoid a policy for material misrepresentation where an incorrect answer is given by an honest proposer. An insurer is not entitled to opt to decline cover of the claim in lieu of avoidance, unless the policy in question contains an innocent non-disclosure clause with this effect.

The Law Reform Commission in Ireland has recommended that avoidance of an insurance policy should no longer be the main remedy and that in cases of non-disclosure and misrepresentation, the principal remedy should be one of damages in proportion to the failure by the insured.

Regulation 6 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 provides that an unfair contractual term is not binding on a consumer. A contractual term is regarded as “unfair” if, “contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.” In making an assessment of good faith, a number of factors are taken into consideration, including the strength of the bargaining positions of the parties and the extent to which the seller has dealt fairly and equitably with the consumer.

Notwithstanding the presence of an unfair term, Regulation 6 provides that the contract shall continue to bind the parties, if it is capable of continuing in existence without the unfair term.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

An insurer may be prohibited from seeking to avoid an insurance contract in certain circumstances. For example, provisions of the code of conduct on non-life insurance issued by Insurance Ireland prohibit an insurer from avoiding liability to indemnify on certain grounds. These include (i) non-disclosure of a fact which the insured could not reasonably be expected to have known, (ii) on grounds of misrepresentation save where that misrepresentation is deliberate or negligent, and (iii) on grounds of breach of warranty where the circumstances of the breach are unconnected with the loss.
To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

The doctrine of utmost good faith is expressly set out under Section 17 of the Marine Insurance Act 1906 as a duty to be observed by either party:

“A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.”

The remedy of avoidance of the policy is therefore available where the insurer does not adhere to the duty of utmost good faith.

Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

A breach of the duty of utmost good faith will not in itself attract a regulatory sanction. However, where an insurer fails to comply with a requirement of the Consumer Protection Code, including a failure to act honestly, fairly and professionally in the best interests of its customers, this may result in the Central Bank of Ireland imposing an administrative sanction on the insurer for a contravention of the Code, pursuant to Part IIIC of the Central Bank Act 1942.

IV - Reinsurance

To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

The principle of utmost good faith applies equally to reinsurance in the same way as it applies to insurance, at both the placement / pre-contractual stage and at the claim stage.
Italy

MACCHI DI CELLERE GANGEMI
Ernesto Pucci

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

In the Italian jurisdiction, insurance laws do not provide for the “uberrimae fidei” or “uberrima fides” principle. This principle may apply only to reinsurance agreements as these are often regulated by customary uses and/or foreign laws providing for such a principle.

However, it is worth noting that a number of civil law principles, particularly the fairness, diligence and good faith principles, apply to the insurance law, thus imposing certain duties on the involved parties. In general terms, the debtor and the creditor shall behave pursuant to the duty of fairness as provided by art. 1175 of the Italian Civil Code (“CC”); under art. 1176 CC, the debtor shall fulfill its obligation with the ordinary care and due diligence and, in the case of a professional (as the insurer), the diligence shall be evaluated with reference to the nature of the activity carried out (i.e.: qualified diligence and care). Under the duty of good faith (art. 1375 of the CC), according to a definition of good faith given by the Scholars¹, in executing the contract each party shall:

- tolerate the non-fulfillment of the other party or its delay in the execution if they have a modest impact on the contractual balance;
- take action, within the limit of an acceptable sacrifice, to inform the counterpart on all relevant circumstances of the deal;
- take action, within the limit of an acceptable sacrifice, to ensure the counterpart obtains a useful contract;
- abstain from the execution of agreed obligations when this may cause a prejudice to the other party.

Accordingly, each party shall act in a manner to safeguard the interest of the other party, regardless of specific contractual or legal obligations².

The same principle of good faith applies at a pre-contractual stage, in the negotiations preliminary to the execution of a contract, pursuant to art. 1337 of the CC.

The application of these principles, jointly considered among them, has an impact similar to the one that the uberrima fides principle would have if existent under Italian law.

The above being said, in replying to this questionnaire, I will refer to the above general principles instead of the uberrima fides principle, without mentioning yet again that the latter does not exist under the Italian law.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The abovementioned duties of fairness, diligence and good faith are civil law principles. With specific reference to reinsurance agreements, the uberrima fides principle may be considered as a common law principle applicable under the Italian law³.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Yes insurance laws provide for separate duties of fairness, diligence, good faith and disclosure (with the specification given under point 7 below), at a pre-contractual stage, for both the insurer and the insured.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

See above under point 1.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

In insurance contracts the abovementioned civil law principles are continuous duties that apply at both pre and post-contractual stage. For further details please refer to the following.

² Supreme Court, 5 January 1999 no. 12310.
³ Please refer to the answer given under question 27 below.
II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

As mentioned, under Italian law, the abovementioned duties of fairness, diligence and good faith apply to both the prospective insured and the insurer.

**A - For the Insured**

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Pursuant to the general principle provided by art. 1337 of the CC, in the negotiations preliminary to the execution of an agreement and up to its execution, the prospective policyholder shall comply with the general principle of good faith. Furthermore he shall comply with the duties imposed by articles 1892 and 1893 of the CC with reference to insurance contracts. Namely, he has to inform the insurer, fairly and without omissions, of any factual or law circumstance which may affect the likelihood of a risk or the extent of its consequences. In other words the future policyholder shall provide the insurer with a fair description of the risk (usually by filling in a questionnaire provided by the insurer).

Unfair declarations or omissions that affect the risk may be considered relevant, thus allowing the insurer to claim the nullity of the insurance contract or to withdraw from the same. In other words there should be a causal link between the declaration or omission of the prospective insured and the will of the insurer to execute the insurance contract or to execute the same under certain conditions.

In this respect, it is relevant under art. 1893 of the CC, the omission of the prospective insured of a credit insurance policy, who being aware of the insolvency of the debtor (or provided that he should have been aware of this pursuant to a duty of diligence) did not disclose the debtor’s insolvency to the insurer.

In an insurance policy against theft, the insurer was declared to have validly claimed the nullity of the agreement, when the prospective insured:

- omitted that the insured vehicle was highly damaged upon the execution of the insurance contract;
- declared that he never suffered thefts in the premises where the goods were kept or that he had suffered only one theft whilst actually having suffered two;
- declared that the commercial activity covered by the insurance was only opened seasonally and not during all the year.

On the contrary the declaration of the prospective insured, who declared that he had not suffered thefts in the previous two years, was not considered relevant when, based on the ascertainment of objective facts, the insurer would have executed the insurance contract under the same conditions even being aware of the lie of the insured (i.e.: no causal link between the lie of the prospective insured and the consent of the insurer to execute the agreement).  

In life insurance policies, the omissions of the prospective insured were considered relevant under art. 1892 of the CC, when the same omitted to declare serious and prior diseases, or when two brothers and his parents died from cardiovascular disease, or a prior surgery, or the fact that the insured was addicted to alcoholism and had followed a detoxification program.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

Please refer to point 7 above.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

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6 Tribunal of Rome, 4 April 1996, parties Micocci c/ Toro.
7 Court of Appeal of Turin, 31 October 1975, parties Petruso c/ Nordstem.
8 Supreme Court, 17 December 1975, no. 4148.
9 Tribunal of Milan, 27 November 2000.
10 Supreme Court, 25 May 1994 no. 5115.
11 Supreme Court, 9 May 1977 no. 1779.
12 Supreme Court, 5 July 1973 no. 1881.
13 Tribunal of Rome, 8 July 1963.
14 Court of Appeal of Milan, 12 February 1965.

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4 For further details, please refer to the answer provided to question 10 below.
5 Supreme Court, 9 February 1987 no. 1373.
The duty of disclosure, as mentioned under points 7 and 10, operates separately and as a specification of the general principles of fairness, diligence and good faith as mentioned under point 1 above.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

The remedies in case of breach of the duty of disclosure by the insured are provided by the CC, as follows.

- Under article 1892 of the CC, the insurer has the right to claim the nullity of the insurance contracts within 3 months from the date he becomes aware of the unfair declarations or omissions made by the policyholder with fraud or gross negligence, if (being aware of the latter) the insurer would not have executed the insurance contract or would have executed the same under different conditions. Should the insurer not claim for the nullity of the insurance contract, the same will remain valid and enforceable. In case the insurer claims for nullity he has the right to keep the insurance premium paid by the policyholder. Moreover, if the accident occurs before the expiration of the abovementioned 3 months term, the insurer is not obliged to indemnify the insured. The insurance contract, however, remains valid for those persons and goods that are not compromised by the unfair declarations or omissions.

- Similar rules apply if the policyholder acted without fraud or gross negligence, in such a case the insurer has the right to withdraw from the contract only within 3 months from the date he was informed of the unfair declarations or omissions. Moreover, if the accident occurs before the expiration of the abovementioned 3 month-term, the insurer has the obligation to pay the insured but the amount is reduced proportionally by the difference between the agreed premium and the premium that would have been agreed had the insurer been fairly informed (art. 1893 of the CC). The general rule, however does not apply to the maritime insurance coverage of goods, as provided by article 524 of the Navigation Code (“NC”), under which the insurer shall indemnify the insured even when the master or the crew of the ship acted with fraud. This is because the master and the crew are considered third parties and not auxiliaries of the insured party and their acts are “risks posed by shipping”.

There are no other specific remedies set by the insurance law in case of breach of the duty of fairness, diligence and/or good faith by the insured, however the insurer having suffered a damage, may be able to claim for damages the prospective policyholder/insured.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

The duty of disclosure as mentioned under point 1 above operates separately and as a specification of the general principles of fairness, diligence and good faith, however under Italian law it is not possible to identify any rule which allows one duty to precede over the others in terms of application.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

As mentioned the general principles of trueness, diligence and good faith apply under the Italian law, thus imposing the insurer (and the insurance intermediaries) duties that are similar to those that would have applied if the principle of utmost good faith existed. Regarding the prospective insured the general principle provided by art. 1337 of the CC apply, therefore in the negotiations preliminary to the execution of an agreement and up to its execution, the insurer (and the insurance intermediaries) shall comply with the general principle of good faith.

Furthermore the duty of fairness provided by art. 1175 of the CC (the debtor and the creditor shall behave pursuant to the duty of fairness) and by art. 183 of the PIC applies. In this respect, the insurer/intermediary shall behave, within the limit of a substantial sacrifice of its interests, in such a way to avoid that the execution of the insurance contract causes a damage or that the same is useless for the other party, thus safeguarding the utilitas that the counterpart shall obtain from the contract. In this respect, the insurer has the obligation to collect the information necessary to evaluate the insurance contract needed by the prospective insured (so called adequacy duty).

Other general principles applicable to insurers (and insurance intermediaries) are the following.

(i) the duty of diligence provided by art. 1176 of the CC (in fulfilling the obligation, the debtor shall act with the diligence required by the nature of the activity carried out if the obligation concerns the exercise of a professional activity) and by art. 183 of the PIC. In other words the diligence required from the insurer can be qualified as the exacta diligentia dell’homo eiusdem generis et condicionis. As a consequence in the

15 For the adequacy rule please refer below.
negotiations preliminary to the execution of the contract, the insurer/intermediary shall behave vis-à-vis the prospective insured just like any other diligent insurer/intermediary would have behaved in the same circumstances. In this respect, the following examples shall be considered: a) the insurer may be considered as having violated the duty of diligence if its conduct was negligent, thus meaning that its behaviour is different from the one that would have taken any other ideal and zealous insurer in the average that complies with the rules; b) in a matter concerning the riskiness of an investment proposed to a client, the bank’s conduct (i.e. intermediary) was deemed inappropriate as a result of its malicious and reticent behaviour evaluated under the profile of the ordinary professional diligence pursuant to art. 1176 of the CC.

(ii) The duty of transparency and prevention of conflict of interests, as provided by art. 183, par. 1, letter a) of the PIC. In this respect, the insurer/intermediary shall behave in such a way so as to ensure that the prospective insured is aware of its role (insurer, broker, agent, etc.) and all the terms and conditions of the insurance contract that he proposes. In this respect the transparency duty consists in the drafting of the insurance contract in a manner which will allow the prospective insured to easily understand its content and consequently make his conscious decisions. Furthermore, art. 183, par. 1, letter c) of the PIC obliges the insurers and the intermediaries to organize themselves in a manner to identify and avoid (where possible) any conflict of interests and, when the latter occurs, to ensure full transparency vis-à-vis the prospective insured by disclosing to the same the possible negative consequences. In this respect an example may be the case in which the insurance intermediary should have informed the client that the insurance contract did not cover the illness from which the client was suffering, thus complying with the duty of transparency and with the provisions of art. 1337 of the CC.

(iii) The duty of information as provided by art. 183, par. 1, letter b) of the PIC (for insurers) and by art. 120 of the PIC (for intermediaries). The contents of the duty of information of the intermediaries may differ from that of the insurers because of their different relationship with the prospective insured parties. In general terms the insured shall receive at least the following: a) the information related to the relationship existing between the insurer and the intermediary (agent, broker, exclusive or non-exclusive contract, etc.) only in case he negotiates with an intermediary; b) information on the main elements of the agreement (costs, risks covered, risks not covered, etc.); c) information on the existence of possible conflict of interest. To ensure the compliance with such duty, the prospective insureds shall receive written informative notes, drafted in accordance with certain templates provided by Ivass. In general terms, pursuant to the abovementioned general principles and to art. 49 of Ivass Regulation no. 5/2006 on insurance intermediation, the intermediaries shall provide the prospective insured parties with all information that will allow the prospective insured to make conscious decisions. Further specific information duties are provided with reference to particular insurance contracts (Ivass Regulation no. 35/2010, Consob Regulation no. 16190/2007, as amended from time to time, on financial intermediaries and Consob Regulation 11971/2009, as amended from time to time, on issuers) and in general, in case of distance selling of insurance policies (art. 121 and 191 of the PIC and art. 67-bis and ff. of the Consumer Code, Ivass Regulation no. 34/2010).

(iv) Duty of adequacy as provided by art. 120, 183, par. 2 of the PIC, art. 52 of Ivass Regulation no. 5/2006 on insurance intermediation. In this respect the insurer,

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16 Supreme Court, 30 October 2001, no. 13533.
18 By way of example, a possible conflict of interest could be the proposal of an insurance policy linked to funds, by the insurer to the prospective insured, where the insurer has made substantial investments or the sale by the bank of financial products of which the bank has undertaken the risk of placement (Court of Venice, 22 November 2002).

20 *Ex multis* the Tribunal of Rome (25 May 2005), with reference to the sale of financial products, has stated that the financial intermediary has always the specific duty to inform the client on the specific characteristics and risks of the investment, both upon execution and during the course of the contract. Moreover, this duty has to be calibrated to the skill of the client and cannot be considered as duly accomplished by the financial intermediary, if the latter has delivered to the investor a generic informative note.
also in compliance with the abovementioned duty of fairness, shall follow a number of rules as follows: know your customer rule, suitability rule\textsuperscript{21} and the best execution rule. In this respect the insurer shall collect from the prospective insured, any and all information required to evaluate the insurance product which is the most suitable for the prospective insured and, in general, behave, within the limit of a substantial sacrifice of its interests, so that the insured purchases only the most adequate insurance product.

Furthermore, according to articles 117 ff. of the PIC the amounts paid to the intermediaries and those belonging to insurers or required to compensate damages shall be paid in a separate account. Intermediaries may however be exonerated from such obligation if they provide a bank guarantee. To protect the consumer/insured party on such bank account lawsuits, seizures or pledges by creditors, except those of insured parties or insurers, are not admitted. Moreover, premium payments made by policyholders acting in good faith to the insurance intermediary or to its co-workers, are considered as having been made directly to the insurer.

Lastly, with reference to the protection of customers/insured parties, art. 119 of the PIC sets forth the joint responsibility of insurers for losses caused by certain insurance intermediaries (those directly employed by the insurers, so called “produttori”, banks and financial intermediaries acting as insurance intermediaries and their co-workers), even if such losses are caused by criminal offences committed by the latter.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The decisions rendered on insurance matters at a pre-contractual stage are not so many. In this respect, please also note that only recently the PIC\textsuperscript{22} has converted into written rules the abovementioned general principles, as they were prior applied by the Courts also based on the abovementioned Consob Regulation on financial intermediaries and on issuers, especially with reference to financial products (to which such duties apply in the substance). Some cases are mentioned from time to time under point 12 above.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

In referring to the abovementioned duties of the insurers (please refer to point 12 above), yes the default of the insurer to notify the prospective insured on the nature and extent of their duty of disclosure, is a breach sanctioned by law (art. 184 of the PIC). As for any violation of the duties by the insurer, and with the aim to protect the insureds, Ivas (the Italian Supervisory Authority) may sanction the insurer, by suspending it, on a precautionary basis, from the sale of the insurance product (for a maximum of 90 days) or by imposing a definitive ban to sell the insurance product.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

In referring to the violation of the abovementioned general principles and duties of the insurer (please refer to point 12 above), the only remedy of the insured is the right to claim for damages (consisting in the lower advantage or the higher economic liability originated by the unfair conduct of the insurer)\textsuperscript{23}. In this respect, please note that the violation is only relevant when the insurance contract would have been different if the insurer would have acted in compliance with its duties (e.g.: this will not be the case if the insurer has duly informed the prospective insured in accordance with all applicable rules, but not in writing). In particular, at the pre-contractual stage if the accident has not occurred, the damage will be equal to the costs borne by the insured for the negotiations and the execution of the insurance contract; on the contrary if the accident has already occurred, the damage will be equal to the indemnification that the insured would have obtained, if the insurer will have duly behaved.

Moreover, the insured party may claim the nullity of the insurance contract executed only if the insurance policy is sold by distance and in case of serious violations of the duties (art. 67 - septiesdecies, par. 4 of the Consumer Code), or further in case of violation of

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\textsuperscript{21} The Supreme Court (27 September 2010, no. 12973) has stated that a broker charged by a producer of water pipes, has not fulfilled the suitability rule when, selling a more convenient civil liability insurance policy (if compared to the prior one) did not ensure that this new policy was covering the claims occurred, and unknown at the time of execution of the new policy, under the old insurance policy.

\textsuperscript{22} The PIC was issued by Legislative Decree 7 September 2005, no. 209.

\textsuperscript{23} Supreme Court, 19 December 2007 no. 26724 and 29 September 2005, no. 19024. These judgments refer to the violation of the duties of financial intermediaries, to whom the abovementioned duties also apply in substance. Before such decisions, the Italian Courts sanctioned the violation of the duties with the nullity of the contract executed (ex multis, Tribunal of Florence 19 April 2005, Tribunal of Venice 22 November 2004) or with the right of the consumer (insured) to claim the nullity of the contract executed (Tribunal of Rome 25 May 2005, Tribunal of Monza 27 July 2004).
art. 1418 of the CC (e.g.: the insured purchased the insurance contract by deeming it was another kind of insurance contract, so called insurance alud pro alio). A violation of the duties will be considered “serious” only when it substantially affects the execution of the insurance contract.

In any case, the burden of proof is always on the insured.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

First of all, please note that as above mentioned pursuant to art. 1175, 1176 and 1375 of the CC, the contract has to be executed with fairness, ordinary care and due diligence and in accordance with the good faith principle.

The above being said, the policyholder/insured has to fulfil its obligation in compliance with the above principles and namely:

(i) pay the insurance premium (the payment is due upon execution, even if it may be paid in more than one instalment). Under article 1901 of the CC (applicable only to non-life insurance contracts), if the policyholder does not pay the premium or the first instalment of the same, the insurance will remain suspended up to 24.00 hours of the date in which the payment is made. The same rule applies in case of default of payment of the next premium, or portion of it. Furthermore, the insurance contract is terminated by law, within six months starting from the date on which the premium was due, unless the insurer claims for its payment. To this end please note that the default of payment is considered a breach of the principle of good faith and allows the insurer to request the termination of the insurance contract24. Furthermore, in a non-life insurance contract whose premium is subject to adjustment (so called “assicurazione con la clausola di regolazione del premio”), the insured has to notify, on a regular basis, the adjustable elements. The breach of such duty by the insurer can legitimize the termination of the insurance contract by the insurer based on the application of the principles of good faith and of the relevance of the breach 25;

(ii) in case of increase of the insurance risk, he shall immediately notify the insurer on the circumstances which imply an increase of the risk that, if known at the time of execution, would have caused the insurer not to cover the risk or to cover the same against the payment of a higher premium (art. 1897 of the CC)26;

(iii) with limited reference to non-life insurance, the insured has to notify the insurer, or the agent authorized by the same, within 3 days from the date the accident occurred (or from the date the insured became aware of it); in maritime insurance, the insured shall notify the surveyor (when provided by the insurance contract) and the insurer; moreover the insurer shall be notified when the ship is declared unfit for navigation, regardless if the goods have suffered any damage (art. 533 of the NC);

(iv) with limited reference to non-life insurance, the insured shall prove the damage covered by the insurance contract. In this respect the latter shall act in good faith and not request a damage higher than the one suffered27;

(v) with limited reference to non-life insurance, the insured shall do everything in his power to avoid or minimize the damage pursuant to art. 1914 of the CC. Should this be the case and unless the insurer proves that the expenses were improvidently borne by the insured, these are charged to the insurer in proportion to the insured value if compared to the value of the good at the time of the accident, even if the amount of such expenses, added to the damage, exceeds the amount of the insurance, regardless if the purpose is achieved or not. In this respect, however, pursuant to art. 1915 of the CC, please note that if the insured does not do what is in his power to avoid or minimize the damage, the insurer shall have

25 Supreme Court, 19 December 2013, no. 28472.
the right to refuse the payment of the indemnity (if the insured acted with fraud) or to reduce the indemnity on the basis of the prejudice suffered (if the insured acted with negligence);

(vi) if the insurance contract is executed on behalf of a third party (assicurazione per conto altrui), or on behalf whom it may concern (assicurazione per conto di chi spetta), pursuant to art. 1891 of the CC, the policyholder shall fulfil all obligations provided by the insurance contract, except those reserved to the insured. In this respect, the policyholder shall inform the insured of the existence of the insurance contract, of its terms and conditions, including any limitation applicable to the payment on the indemnification. In case the above duties are not fulfilled, the insurer cannot oppose to the insured the exceptions based on the insurance contract.

(vii) In general terms, to carry out what is necessary to allow the debtor (insurer) to fulfil its obligation (e.g. payment of the indemnification)

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

The obligation of a third party to fulfil the abovementioned principles (which as mentioned may have a similar impact if compared to the principle of utmost good faith), may be found under art. 148, par. 3, of the PIC, which applies to insurance against motor vehicles civil liability. In this respect, the third party who suffered the damage (beneficiary of the indemnification) is banned from refusing the medical examinations necessary to evaluate the damage.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Please refer to point 16 above.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Yes, the insured’s intentional concealment of his/her criminal activities is a breach of the general principles of fairness, diligence and good faith resulting at least in the consequences provided by art. 1892 CC (please refer to point 7 and 10 above).

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

As mentioned above under point 1, art. 1176 and 1375 of the CC apply, therefore the contract has to be executed with fairness, ordinary care, diligence and in accordance with the good faith principles. As mentioned, provided that the insurer is a professional pursuant to art. 1176, par. 2 of the CC, its diligence shall be evaluated with reference to the nature of the activity carried out (also called qualified diligence and care).

With specific reference to the insurer, and in general terms, once the accident occurred and received the claim by the insured, the insurer shall:

- in non-life insurances, indemnify the insured upon the occurrence of an accident covered by the insurance contract;
- in life insurances, pay a capital or constitute an annuity upon occurrence of an event related to the human life;
- carry out the activities provided by the insurance contract (by way of example in the case of legal assistance or long term care coverage).

In this respect, based on the provisions of art. 1176 and 1375 of the CC, once notified by the insured, the insurer cannot sit and wait for the insured to provide all the elements required to evaluate the damage in respect of the coverage but shall, on the contrary, carry out any activity necessary to evaluate the damage.

Further, the insurer shall comply with the provisions of the insurance contract, which usually provide the obligation to reach an agreement with the insured on the amount of the indemnification and, if the agreement is not reached and the insurance agreement provides so, to make a recourse to an arbitration panel. Even in this case the insurer shall act in accordance with the above mentioned principles and cooperate with the arbitration panel in order to allow it to carry out any activity necessary to evaluate the damage.

Moreover, in the negotiations following the claim’s request, the insurer has the duty to protect the legitimate interest of the insured and cannot have him believing that he would make the payment, where on the contrary he is looking to achieve the expiration of the statute of limitation period. In this respect, the insurer shall behave in compliance with the general principle of fairness and objective good faith, that

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28 Supreme Court, 9 April 2009, no. 8670.
29 Art. 1206 of the CC.
30 Ex multis, Tribunal of Rome, 10 March 1997.
requires a prompt notice indicating the reasons for the refusal to pay the indemnification, in default of which the insured who may not be aware of the statute of limitation would remain in a status of prolonged uncertainty up to the expiration of the above period.\footnote{Tribunal of Florence, 26 March 2007.}

Lastly, under art. 1917 of the CC, the insurer is obliged to keep harmless the insured on what he has to pay to the damaged third party based on and within the limit provided in the policy, including interests and revaluation. Such a limitation can be disregarded if the insurer’s behavior is not in compliance with the good faith principle.\footnote{Supreme Court, 25 May 2004, no. 10036.}

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

The insurer has certainly a duty of good faith towards a third party beneficiary of the insurance cover. In this respect, in a matter concerning insurance against motor vehicles’ civil liability, the Court of Florence\footnote{Supreme Court, 19 July 2005, no. 15213.} stated that, when the insurer’s behaviour is manifestly dilatory in settling the claim, the limit of the indemnification, as set forth by the insurance policy and due by the insurer to the damaged third party, can be disregarded, in terms of interests and revaluation (pursuant to art. 1224 of the CC and based on the delay in fulfilling a payment obligation).

In another case, however, in a life insurance matter in favor of a third party beneficiary, the Supreme Court\footnote{Supreme Court, 18 June 1998, no. 6062.} stated that the insurer does not have the obligation to notify the third party beneficiary on his right to an indemnity and such a behavior is not in conflict with the duties of fairness and good faith. In other words the fact that such third party is not aware of the existence of the life insurance policy which indicates him as a beneficiary, is only considered as a factual impediment and is not suitable to suspend the 1 year delay of the statute of limitation, that starts from the date of occurrence of the accident (death of the policyholder) and from which the right of the third beneficiary originates.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

Please refer to point 19 above.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no code of practice providing the above duties.

23. **Can Courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

Please refer to points 19 and 20 above.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

No, the Italian Courts do not have special powers to disregard the application of a policy in cases where the insurer has established that it would be a breach of the duties of trueness, diligence and/or good faith to allow the insurer to avoid the policy.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

The breach of the abovementioned general principles and duties by the insurer is a breach of the law.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Yes, the breach by the insurer or by the intermediary results in regulatory sanctions, consisting in fines, calls to order, censures and radiations, depending on the seriousness of the violation. In general terms, in case of breach of the duties provided by art. 183 and 191 of the PIC (as detailed under point 12 above), the PIC provides fines ranging from € 2.000 to € 20.000; in case of default in providing the policyholder with the informative note (as per art. 185 of the PIC) the fine ranges from € 2.500 to € 25.000.

With reference to insurance against motor vehicles’ civil liability, other fines, ranging from € 1.000 to € 10.000 apply in case of violation of specific provisions on transparency and from € 300 to € 30.000 in case of delays in tendering to the insured the offer of indemnification and paying it.
IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

The reinsurance industry, because of its own nature, focuses on the international market and as such is governed by international customary uses, and laws of foreign countries, including the principle of *uberrima fides* (which expresses a particular duty of qualified diligence and fairness, implying the obligation of a party to take care and look after the interests of the counterpart as if they were its interests).

In general terms, the compliance with such principle is required by both the cedent/insurer (who tenders the declaration of risk, needs significant freedom in managing the relationships with the direct insurance policyholders) and the reinsurer (who pays the cedent/insurer on the basis of the declaration made by the latter and renounces to any intervention on the activity of the cedent/insurer vis-à-vis the direct insurance policyholders and in principle follows the fortune of the cedent/insurer). In this respect, the execution of a reinsurance treaty creates a particular situation where the cedent/insurer, that usually cedes to the reinsurer a portion of the risks covered by the insurance contracts executed with the policyholders, maintains its right of business management without transferring its legal position within the direct insurance relationship vis-à-vis the policyholder.

As mentioned this is the only hypothesis in which the *uberrima fides* principle applies to contracts governed by the Italian law, even if the same does not refer to it.\(^{35}\)

At a placement/pre-contractual stage, the parties of a reinsurance treaty will therefore comply with the *uberrima fides* principle which acts as a social rule chosen by the parties and overlaps the good faith principle provided by art. 1337 of the CC. The cedent/insurer shall certainly comply with such principle in the evaluation of its portfolio which is contained in the declaration of risk. In case of breach of this duty the provisions of art. 1892 and 1893 abovementioned shall apply by analogy, thus implying the right of the reinsurer to, *inter alia*, claim the nullity of the reinsurance treaty in case of fraud or gross negligence or withdrawal from it.\(^{36}\)

Pending the reinsurance treaty, in principle the parties shall behave in accordance with the abovementioned art. 1175 and 1375 of the CC, however the evaluation of a possible breach shall be done having regard to the principle of *uberrima fides* which – as in the pre-contractual stage - replaces the duty of due diligence and good faith provided by the abovementioned provisions. In other words the content of the *uberrima fides* principle is the criteria to be used to evaluate the behaviour and the possible breach of the parties.

Therefore, in general terms both the parties shall comply with the duty of *uberrima fides* and namely:

- the cedent/insurer shall: (i) tender the declaration of risk; (ii) pay the reinsurer and manage the insurance business; (iii) notify the reinsurer on a possible increase (or decrease) of the risk, on the execution of other reinsurance treaties (thus allowing the reinsurer to follow the fortune) and, if any, on the occurrence of the event; (iv) shall do everything in his power to avoid or minimize the damage;

- the reinsurer shall follow the activity and the fortune, pay as may be paid thereon, thus covering the losses of the cedent/insurer.

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\(^{35}\) According to the Scholars, the application of the *uberrima fides* principle is allowed under art. 1374 of the CC being the same a customary use.

\(^{36}\) Please refer to par. 7 above.
Malaysia

SHOOK LIN & BOK

Michael Anthony

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The duty to act with utmost good faith has been expounded in Carter v Boehm (1766) 3 Barr 1905 and Rozanes v Bowen (1928) 32 LI L Rep 98, and was cited with approval and adopted in the Malaysian case of National Insurance Co Ltd v S Joseph [1973] 2 MLJ 195, wherein Yong J (as he then was) stated as follows:

“I am of the opinion that a contract of insurance is a contract of utmost good faith. Any suppression or non-disclosure of material facts by the proposer will entitle the insurance company to avoid the contract. A fact is material if it would influence the judgment of a prudent or reasonable insurer in fixing the premium or in determining whether he will or will not take the risk.”

It is noteworthy that the UK Marine Insurance Act 1906 ("MIA 1906") is applicable in Malaysia by virtue of section 3 of the Civil Law Act 1956, Section 17 of the MIA 1906, in particular, confirms that contracts of marine insurance are premised on the duty to act with utmost good faith.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

(i) Please refer to Answer No. 1 above.

(ii) The Court of Appeal's decision in Leong KumWhay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710 confirmed that the principle of utmost good faith is a settled principle at common law:

"It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act uberrimae fidei towards each other.......But the duty to make full disclosure of all material facts is not an implied term of a contract of insurance. There is in fact no contract at the point at which the duty arises; the parties being still at the stage of negotiations. It is therefore a pre-contractual duty imposed by the common law.”

(iii) Not applicable.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

The Malaysian insurance laws provide for both the principle of utmost good faith at common law and under statute (see s. 17 MIA 1906 and Leong KumWhay (supra)) and a separate duty of disclosure (S. 129 Financial Services Act 2013).

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes, the principle has been applied in the following cases involving different species of insurance contracts, e.g. Leong KumWhay (supra) (life insurance), National Insurance Co Ltd v S Joseph [1973] 2 MLJ 195 (motor car insurance) and Abu Bakar v Oriental Fire & General Insurance Co Ltd [1974] 1 MLJ 149 (fire insurance).

Halsbury’s Laws of Malaysia 2011 Reissue (Insurance) further states as follows:

“The principle of utmost good faith – It is a principle of universal application to all insurance contracts that the utmost good faith (uberrimae fidei) must be observed by either party to an insurance contract.”

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

The duty to act in utmost good faith is a continuous duty, as is apparent from the decision of the Malaysian Court of Appeal in Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd & Another Appeal [2004] 1 MLJ 353, wherein the court cited with approval the principle enunciated in Whiten v Pilot Insurance Company [2002] DLR (4th) 257, that the duty of an insurer to act in utmost good faith extends even to handling of claims made by the insured:

“I note that in upholding the award of punitive damages in Whiten, the court observed that a contract between an insurer and its insured was one of utmost good faith because, although the insurer is not a fiduciary, it holds a position of power over an insured since the insured is in a vulnerable position and is entirely dependent on the insurer.
when a loss occurs. For that reason, in every contract of insurance, an insurer has an implied obligation to deal with the claims of its insured’s in good faith. It was held that a breach of the implied duty of good faith meets the requirement of an independent actionable wrong.” (emphasis added)

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Section 129 of Financial Services Act 2013 provides that:

i. (Schedule 9 para 4) an insured has a pre-contractual duty to disclose a matter that:
   • He knows to be relevant to the insurer on whether to accept the risk or not; or
   • A reasonable person in the circumstances could be expected to know to be relevant.

ii. (Schedule 9 para 11) as for the insured, it is obligated:
   • not make misleading statements;
   • not to conceal a material fact; and
   • not to use sales brochures not authorised by a licensed insurer

At common law, it is trite that the insured has a pre-contractual duty of disclosure (see National Insurance v S Joseph).

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

a. In the case of Teh Say Cheng v North British and Mercantile Insurance Company Ltd [1921] FMSLR 248, it was held that the insured is under a duty to disclose his financial position to the insurer.

b. In Leong Chee Yeong v China Insurance Co and Leong Chee Yeong v The Eastern United Assurance Corp Ltd [1952] 1 MLJ 246, it was held that there is a positive duty on the insured to inform the insurer of his change of occupation.

c. In National Insurance v Joseph (supra), the insurer, in responding to the questions on the policy forms indicated that no company had cancelled his policy of insurance and he has never met with any motor vehicle accident. This was subsequently found out to be untrue. It was held that the two untrue statements made entitled the insurer to hold the contract of insurance void.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

In Malaysia, whilst theoretically the duty of pre-contractual disclosure is a subset of the duty to act with utmost good faith on the insured, at common law and under the statute (s. 129 FSA 2013) the insured’s pre-contractual duty of disclosure appears to be the predominant manifestation of the duty to act with utmost good faith by the insured.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

Pre-contractually, the duty of disclosure operates in a way that is virtually indistinguishable from the duty of utmost good faith. (see schedule 9, para 4 (4) of the FSA 2013 and Leong KumWhay (supra) at para (19))

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

The remedy for pre-contractual breach by the insured of the duty of utmost good faith and duty of disclosure is identical – it would entitle the innocent party to avoid the contract. (see Asia Insurance Co Ltd v Tat Hong Plant Leasing Pte Ltd [1992] 4 CLJ (Rep) 324)

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

See Answer to Question No. 9 above.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

Generally, the insurer would be under a duty to disclose to the insured all facts known to him that are material, either as to the nature of the risk or recoverability of a claim under a policy. This is the
13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In *Tan Jing Jeong v Allianz Life Insurance Malaysia Bhd & Anor* [2012] 7 MLJ 179, it was held that the insurer had a positive duty to inform the insured that 55% of the insured’s investment would be used to pay administrative charges. The insurer, it was held, had failed to disclose a material fact thereby breaching its duty to act in utmost good faith.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

This point has yet to be tested in the Malaysian courts.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

By virtue of the *Tan Jing Jeong case (supra)*, the insurer’s failure to disclose amounted to a misrepresentation which entitled the plaintiff (insured) to avoid the contract and claim the premiums he advanced on the policy as damages.

**III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)**

A - For the Insured and Third Party Beneficiary of Cover

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

The post-contractual duty imposed on the insured, at the claim stage, is a duty not to put in a fraudulent claim. This was confirmed in the *Britton case (supra).*

“It gives the go-by to the origin of the fire, and it amounts to this –that the assured took advantage of the fire to make a fraudulent claim. The law upon such a case is in accordance with justice and also sound policy. The law is, that a person who has made such a fraudulent claim could not be permitted to recover at all. The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained.” (emphasis added)

16.1 **Do third party beneficiaries of cover have a duty of utmost good faith?**

This point has not been tested in the Malaysian courts.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In *Pacific & Orient Insurance Co Bhd v Vigneswaran a/l Rajarethinam & Ors* [2014] 8 MLJ 423, the insured had lodged a police report stating that an accident took place thereby allowing second and third defendant to make a 3rd party claim against the Plaintiff (insurer). It was subsequently revealed that the said claim was a false claim. The High Court held that:

“the insured has breached the duty to exercise utmost good faith in his contract with the plaintiff and by committing an unlawful act of involving himself in the fabrication of a false claim upon the plaintiff, he and the other defendants should not be allowed to benefit from his/her dishonest and illegal act.”

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

In Malaysia, the principle stated in the case of *Schoolman v Hall [1951] 1 Lloyd’s Rep 139*, is applicable. It was held there that non-disclosure of a previous conviction amounted to a non-disclosure of a material fact and was tantamount to a breach of utmost good faith.

However, this principle was distinguished in the case of *New India Assurance Co v Pang Piang Chong [1971] 2 MLJ 34*, where Syed Othman J (as he then was) held as follows:

“The purpose of insurance in this case is to cover the insured in the event of an accident. The primary concern of an insurer before he insures a proposed insured is therefore to determine whether he is a bad risk. I do not think it should be the concern of the prudent insurer as to whether or not the proposed insured has committed an offence for non-compliance of statutory requirements which are not pertinent to show that he is a bad risk…..the real test….. is whether the proposed insured is a bad risk. I am unable to see that by the conviction for the five offences the [insured] is a bad risk.”

Based on the New India case (supra), it can be concluded that the key consideration is whether or not the criminal activity was a material fact. The courts will hold that there is a breach of the duty of utmost good faith should the criminal activity be a material fact.
The Duty of Utmost Good Faith

B - For the Insurer

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

The case of *Leong KumWhay (supra)*, has confirmed the position that an insurer is expected to exercise utmost good faith in considering the insured’s claim. The following principle (found in *Maschke Estate v Gleeson* (1986) 54 OR (2d) 753) was cited by his Lordship Gopal Sri Ram JCA (as he then was) with approval:

“…..the duty to act promptly and in good faith arises the day the insurer receives the claim. To find otherwise is to fail to understand the realities of the market place.”

It would therefore appear that the insurer must deal with an insured’s claim promptly upon receipt of the same.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

Whilst the point has not been specifically tested in the Malaysian courts, 3rd Party beneficiaries are customarily assigned all the rights and benefits of the insured. As such, the insurer’s duty to handle the insured’s claim in good faith would typically extend to 3rd Party beneficiaries as well, subject to the terms of the policy.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In *Whiten v Pilot insurance Co [2002] DLR (4th) 257* (cited with approval in *Leong KumWhay (supra)*), the insured’s property was destroyed by fire. The insurer asserted that there was arson perpetrated by the insured and rejected the claim. The insurer, it was held, had in fact failed to take into account various reports which proved that there had been, in fact, no arson. The court granted punitive damages in favour of the insured.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no such Code of Practice available, although there are informal understandings amongst Malaysian insurers on, for example, the wording of tariff rates for motor insurance policies or the enforcement of certain clauses in medical and health insurance policies which are uniform, industry wide.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

This point has not been tested in the Malaysian courts.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

It was held in *Carter v Boehm* (which has been applied in Malaysia) that an insurer in seeking to avoid a contract could potentially be guilty of a breach of the duty of utmost good faith. In such circumstances, the court may exercise its inherent powers to disregard the said avoidance.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes (see section 17 Marine Insurance Act 1906).

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

In Malaysia, insurers are regulated by the Central Bank of Malaysia (Bank Negara). Bank Negara has extensive powers under the Financial Services Act 2013 to enforce regulatory sanctions against an insurer, acting on complaints by the insured or on its own initiative.

IV - Reinsurance

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

A reinsurance contract would attract the same duty of utmost good faith as is applicable to a contract of insurance in all respects. This was established in the case of *China Traders’ Insurance Co v Royal Exchange Assurance Corp [1898] 2 QB 187*, where his Lordship Vaughan Williams LJ held as follows:

“A reinsurer is himself an assured who takes upon himself the duty, not only before but after the contract comes into operation, to act with the greatest good faith.”

* * *
Malta

GANADO ADVOCATES
Matthew Bianchi

I - Definition of the Principle of Utmost Good Faith

1. **In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”)?**

   The principle of utmost good faith in insurance contracts is not provided for by written law, but it is accepted customary law. There is no definition of the principle of utmost good faith in jurisprudence, but the Maltese Courts refer to and apply English common law on utmost good faith.

2. **Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?**

   The principle of utmost good faith was introduced by the Maltese courts with the application of English common law in relation to contracts of insurance. The principle of utmost good faith is not expressly provided for in written law, although certain duties emanating from this principle have been.

   The duty of utmost good faith is now also statutorily provided for in other areas not relating to insurance contracts such as the Trusts and Trustees Act in relation to the trustee’s duties¹ and the Civil Code in relation to the fiduciary’s duties.²

3. **Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?**

   Yes. The insured’s duty of disclosure at the pre-contractual stage is seen as an obligation arising from the fact that the contract of insurance is one of *uberrimae fidei* (utmost good faith).

   In the case of the insured, the duty of utmost good faith is frequently applied by the Maltese courts as the duty of disclosure of material facts and the duty not to make misrepresentations. This duty also extends in relation to facts which are material to a third party which will benefit from cover under the contract.³

4. **Does the principle of utmost good faith apply to all types of insurance contracts (life, insurance, general insurance, reinsurance etc.)?**

   Yes.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

   The Maltese courts have held that since the contract of insurance is one of utmost good faith, both parties to the contract of insurance are to enter into, conclude, and perform the contract with utmost good faith.³ The utmost good faith principle applies during the negotiations between the proposer and the insurer until the policy is issued, but also during the execution of the contract of insurance policy.⁴ This does not mean that both parties are equally bound by the duty of utmost good faith at all stages of the contract of insurance, as shall be illustrated further below.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

   Yes.

   A - For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

   In the case of the insured, the duty of utmost good faith is frequently applied by the Maltese courts as the duty of disclosure of material facts and the duty not to make misrepresentations. This duty also extends in relation to facts which are material to a third party which will benefit from cover under the contract.⁵

   Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

   There are various cases in relation to third party motor vehicle insurance where insurers or their agents bring claims in court to avoid an insurance policy on the basis that the insured failed to disclose

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¹ Article 21 of the Trusts and Trustees Act, Chapter 331 of the Laws of Malta.
² Article 1124A of the Civil Code, Chapter 16 of the Laws of Malta.
³ Carmel Bajada et v Middle Sea Insurance Company Limited (Court of Appeal, 5 October 2001).
⁴ Adriano Cassar Galea noe vs Paul Cuschieri (Court of Appeal, 31 July 1996).
⁵ Middlesea Insurance plc v Emanuel Ciantar et (First Hall Civil Court, 17 February 2014).
in the proposal form that he has pending criminal proceedings.\(^6\)

A further example is *Baron et v Thos.C.Smih Insurance Services Ltd noe* where the insured had failed to disclose to the insurance agent when submitting the proposal form that he had made a claim four years earlier with another insurer in relation to the same insured property, motorboat.\(^7\)

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

No. The two are distinguishable in that the duty of disclosure stems from the principle of utmost good faith. There are other obligations that stem from this principle such as the insured’s duty to read and understand the terms of the insurance policy.

Indeed, the Maltese courts do not always distinguish between the principle of utmost good faith and the duty of disclosure, but it is clear from the judgments delivered that the duty of disclosure stems from the principle of utmost good faith.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

The principle of utmost good faith does not operate separately from the duty of disclosure. Maltese jurisprudence has repeatedly held that the duty of disclosure is a natural consequent of the rule that parties to a contract of insurance should enter into it and execute it in utmost good faith. In this sense the duty of disclosure does not apply unless the insured is not bound to enter into the contract of insurance with utmost good faith.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The remedy for a breach of the duty of disclosure is the avoidance of the insurance policy, and therefore, the insurer may refuse to pay the claim lodged by the insured or a third party beneficiary (or request the return of any claims paid) and the insured may request the return of the premium paid. The Maltese Courts traditionally either declare the contract of insurance null and void *ab initio* (as if the contract was never entered into), or allow the rescission of the contract (the contract is annulled, but it is acknowledged that the contract was entered into by the parties), and thus the parties will be restored to the position they were previously in before entering into the contract.\(^8\)

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

Please see Questions 9 to 10. The principle of utmost good faith is an over-arching principle which applies to the negotiation and performance of the insurance contract. It is the source of the duty of disclosure, and in this sense, the duty of utmost good faith can be said to have ‘precedence’ over the duty of disclosure.

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

In the case of the insurer, the principle of utmost good faith requires, according to the Maltese courts, that the insurer has an obligation:

- to inform the prospective policyholder of the limitations and restrictions which the insurance policy (to be issued) has; but also
- to assess the proposal form submitted by the prospective insured with due prudence, diligence, and attention.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

A particularly clear example of the breach of the duty of utmost good faith is *Camilleri et v Harold Bartoli noe.*\(^9\) In the case, the insurer had accepted to cover against theft for over 40 boxes filled with car seat covers which were stored in a warehouse owned by the insured for a maximum value of approximately 186,000 Euro. Unidentified third parties broke into the insured’s warehouse and robbed him of the goods stored. The insured proceeded to make a claim under the policy. The insurer claimed that the insured had made misrepresentations in the proposal forms since it was clear that the insured’s warehouse could not have contained 40 boxes. From the evidence

\(^{6}\) *Middlesea Insurance plc v Anthony Borg* (First Hall Civil Court, 18 May 2012); *Montaldo Insurance Agency Limited noe v Christian Bugeja* (First Hall Civil Court, 29 July 2013); *Middlesea Insurance Plc v Emanuel Ciantar et* (First Hall Civil Court, 17 February 2014).

\(^{7}\) *Paul Baron et v Thos.C.Smih Insurance Services Ltd noe* (First Hall Civil Court, 8 October 2004).

\(^{8}\) *Mario Mizzi noe et v Mario Grech noe* (First Hall Civil Court, 3 October 2003).

\(^{9}\) *Bertu Camilleri et v Harold Bartoli noe* (First Hall Civil Courts, 9 October 2003).
presented in court it turned out that one of the insurer’s employees had actually visited the insured’s warehouse to collect the premium money, and he then remarked in court, that it was clear to him at the time that there were only 20 boxes stored in the insured’s warehouse. The First Hall Civil Court held that the insurer, through its employee, acted against the principle of utmost good faith when it went down to the insured’s warehouse and failed to verify the quantity of the insured property and only claimed that it resulted to it that there was a difference after the claim was lodged.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

No. According to Maltese jurisprudence, the duty of disclosure is always implied when entering into a contract of insurance. Some cases have also held that the prospective insured is bound to disclose a material or substantial fact even if there was nothing indicated to that effect in the proposal form or if the insurer/intermediary did not specifically ask for that fact.  

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The remedy given by the Maltese courts in such cases is to restrict the insurer’s right to avoid the contract of insurance (rescission) and to order its performance by paying the claim to the insured.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

For the insured, the principle of utmost good faith requires, according to the Maltese courts, that the insured has an obligation:

- to interpret the terms of the insurance policy in good faith; and
- not to make any misrepresentations or false statements in the claim.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

No. The third party is not a party to the contract of insurance, and thus, has no obligations in relation thereto. The third party is still bound to use good faith when lodging a claim to the extent that the law or the terms of the insurance policy allows him to do so.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In Grech et v Rausi Insurance Agency Limited 11 the insureds had obtained cover through the insurance agency in relation to a motorboat. The motorboat had caught fire, an event which was insured in terms of the insurance policy. However, the insurance policy required that the motorboat was equipped with three fire extinguishers of a particular quality. In support of their claim, the insureds had presented a falsified receipt of the sale of the fire extinguishers. The First Hall Civil Court found that the insureds had breached the principle of utmost good faith and also the express terms of the insurance policy which required that all claims lodged are not fraudulent.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

In the provisions specifically relating to Life Insurance Contracts in the Civil Code there is no provision for a duty on the insured to disclose a record of his or her criminal activities. 12 Having said that, the Maltese Courts have repeatedly held that it is for the presiding judge to determine whether a particular fact was material for the insurer when assessing whether and to what extent it would insure the insured, therefore, we are inclined to take the view that it is material that the insured is conducting criminal activities and failure to disclose that fact is a breach of the duty of disclosure.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

For the insurer, the principle of utmost good faith requires, according to the Maltese courts, that the insurer has an obligation:

- to interpret the terms of the insurance policy in good faith; and
- to assess and pay the claim in good faith.

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10 Charles Degiorgio noe v Austin Agius et (Commercial Court, 25 June 1962); Joseph Muscat v Joseph Gasan et noe (Court of Appeal, 6 October 1999).

11 Charles Grech et v Rausi Insurance Agency Limited (First Hall Civil Court, 31 January 2007).

12 Article 1712A et sequitur of the Civil Code, Chapter 16 of the Laws of Malta.
20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

No. Maltese jurisprudence have held that between an injured party (who was not party to the insurance contract) and an insurer a contractual relationship is created,\(^\text{13}\) and therefore, the general principle that contracts are to be carried out in good faith applies.\(^\text{14}\)

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In *Bajada et v Middle Sea Insurance Company Limited*,\(^\text{15}\) the Court of Appeal threw out an argument brought by the insurer that the insured was not covered under the terms of the insurance policy since the insured’s property was on a hill and thus it was geographically impossible for there to be a “flood” in terms of the policy. The Court of Appeal held that it would be a breach of the principle of utmost good faith to allow the insurer to rely on such an interpretation of the terms of the insurance policy.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no general Code of Practice for insurers in Malta, but the Malta Insurance Association regularly updates a ‘Handbook of Best Practice for Third Party Motor Liability Claims’.\(^\text{16}\) This Handbook contains non-binding guidelines which derive from jurisprudence and market practice specifically in relation to third party motor vehicle insurance. The Handbook complements the insurer’s duty of utmost good faith especially in relation to the handling of claims and ineffectual policy restrictions.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

The term of the insurance policy may be disregarded if it is illegal or against public policy, or if it is deemed an unfair term in accordance with the Consumer Affairs Act.\(^\text{17}\) The Maltese courts usually interpret the terms in accordance with rules on interpretation of contracts in such a way that the insurer cannot rely on a bad faith interpretation of the terms of the insurance policy. The case referred to in Question 23 is an example.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

No.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

The principle of utmost good faith is not expressly provided for in Maltese legislative acts, and unless the duties which emanate from that principle are expressly provided for at law (such as the duty of disclosure in relation to third party motor vehicle insurance\(^\text{18}\) there is no breach of a duty at law.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

We are not aware of any instances where the Malta Financial Services Authority imposed any administrative fines or other regulatory sanctions where the insurer was found to be in breach of the principle of utmost good faith. As a matter of law, the MFSA’s Consumer Complaints Manager has the power to investigate complaints from private consumers arising out of or in connection with any financial services transaction (including insurance contracts), and to ‘refer such cases as may be necessary or appropriate to the Supervisory Council for its consideration’.\(^\text{19}\) These complaints frequently relate to handling and payment of claims. Unless the breach by the insurer is systematic and repeated and is detrimental to its policyholders, we do not envisage that any regulatory sanctions will be taken against the insurer.

\(^{13}\) Joseph Micallef noe v Carmelo Cassar (Court of Appeal, 27 April 1953); Joseph Mallia v Joseph Falzon et (Court of Appeal, 31 July 1996); Carmelo Camilleri et v John Preca et noe (Court of Appeal, 5 October 1998).

\(^{14}\) Article 993 of the Civil Code, Chapter 16 of the Laws of Malta.

\(^{15}\) Carmel Bajada et v Middle Sea Insurance Company Limited (Court of Appeal, 5 October 2001).


\(^{17}\) Chapter 378 of the Laws of Malta.

\(^{18}\) Motor Vehicles Insurance (Third-Party Risks) Ordinance, Chapter 104 of the Laws of Malta.

\(^{19}\) Article 20 (2) of the Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta.
IV - Reinsurance

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

Reinsurance disputes seldom feature before the Maltese courts. However, it is likely that when applying the principle of utmost good faith the Maltese courts would take into consideration the fact that both the reinsurer and the insurer are well-versed in the business of insurance.

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Netherlands

HOUTHOFF BURUMA

Hans Londonck Sluijk and Jantien Dekkers

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The principle of utmost good faith is recognized as a general principle of Dutch insurance law, as evidenced in the legislative history, under case law and in the literature. The principle has (greatly) influenced the codification of Dutch insurance law, but the principle itself is not mentioned in statutory insurance provisions.

Although it has no precise definition, the meaning of the principle of utmost good faith under Dutch law could be described as follows: given the nature of an insurance contract (as a ‘contractus uberrimae fidei’), the parties to that contract can rely on a high degree of mutual confidence.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

Under Dutch law, the principle of utmost good faith (or “uberrimae fidei”) is a civil law principle, that has not been codified separately in a statutory provision. However, two Dutch statutory principles do contain elements of the principle of utmost good faith:

(a) The principle of legitimate expectations (in Dutch: vertrouwensbeginsel) and more specifically, the principle of good faith (in Dutch: goede trouw). This principle of good faith has been provided for in article 3:11 of the Dutch Civil Code (“DCC”) and entails that both parties may rely on the other parties’ good faith.

(b) The principles of reasonableness and fairness (redelijkheid en billijkheid). This principle is stated in article 3:12, 6:2 and 6:248 DCC and can also be found in case law. It entails that both parties should act according to the criteria of reasonableness and fairness, the substance of which is to be determined by a judge on the basis of general principles of law, Dutch juridical views and the public and personal interests of the case at hand. It has been established in Dutch case law that both parties are already in a legal relationship with each other at the time of concluding the insurance agreement. It is in this pre-contractual relationship that the principle of reasonableness and fairness most clearly contains elements of the principle of utmost good faith.

It should be emphasized that the principle of reasonableness and fairness is more influential than the principle of legitimate expectations. Whereas the principle of reasonableness and fairness can come into play in each contractual relationship, the principle of legitimate expectations does not, since this principle is fully codified in the relevant statutory provisions to which it applies.

2 HR 18 december 1981, NJ 1982, 570 m.nt. BW (Mr. Gielen q.q./Magna Insurance), concl. A-G; HR 8 juni 1962, NJ 1962, 366 m.nt. HB (Tilkema’s duim).
4 Cf. Van Orsouw, supra 2.
5 Please note that, as a civil law jurisdiction, all Dutch law is civil law. A distinction between common law and statutory principles is not known.

6 See, for instance, the case law mentioned in the response to question 23.
3. **Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?**

The operation of the principle of utmost good faith has largely been codified in Dutch insurance law provisions, but the principle as such is not explicitly provided for. Dutch insurance law does provide for a duty of disclosure for the insured in article 7:928(1) DCC.

4. **Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?**

As a general principal of Dutch insurance law, the principle of utmost good faith applies to all types of insurance contracts.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

The principal of utmost good faith applies to both the pre-contractual and the post-contractual stage. Please see the responses to the questions in paragraphs II and III.

It should be noted in advance, however, that the operation of the principle of utmost good faith has been so influential in the codification of Dutch insurance laws, that the principle’s role outside of the statutory provisions is (very) limited. In the answers to the following questions, the content of the principle of utmost good faith will be explained largely by referring to the operation of the Dutch statutory insurance law provisions in which the principle has been codified. In so far as the principle has a role outside of the statutory principles, it will be found and referred to within the context of the principle of reasonableness and fairness.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

As a general principle of Dutch insurance laws, the principle of utmost good faith applies to both the insured and the insurer.

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The two are indistinguishable in the sense that the principle has been codified within the statutory provision that provides for the duty of disclosure. However, it cannot be ruled out that, as a general principle of law, the principle of utmost good faith may (within the context of the principle of reasonableness and fairness) also have other implications for the insured under insurance law.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

Although the duty of utmost good faith and the duty of disclosure are distinguishable in theory, they largely coincide in practice. There is not an abundance of case law in which the duty of utmost good faith is separately or even explicitly referred to. However, it is clear that the duty of utmost good faith (in the context of the principle of reasonableness and fairness) may have a role in narrowing down the circumstances in which an insured is under an obligation to disclose information to the insurer, as evidenced by the case-law examples provided above.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

If the insured has breached the duty of disclosure, several remedies are available for the insurer. Firstly, the insurer has the right to terminate the insurance agreement (1) if the insured has mislead him with wilful intent or (2) if the insurer would not have entered into the insurance agreement would he been aware of the actual state of affairs (article 9:729(2) DCC). Secondly, in the same circumstances, the insurer may refuse payment under the insurance contract (article 7:928(4 and 5) DCC). Thirdly, the insurer is allowed to reduce the payable insurance benefit in proportion to the amount that the insured coverage would have been decreased if he had been aware of the actual state of affairs. Where the insurer, if he would have been aware of the actual state of affairs, would have stipulated other conditions, the insurer is allowed to pay out (or refuse to pay out) the insurance benefit as if these conditions would have been included in the insurance agreement (article 7:928(3) DCC).

The remedies for a breach of the duty of utmost good faith are not explicitly mentioned in Dutch statutory provisions. The remedy for salvaging a situation in which a party has acted unacceptably contrary to the principle of reasonableness and fairness is at the discretion of the court.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

It is hard to say that the duty of disclosure has precedence over the duty of utmost good faith. As said, since the implications of the duty of utmost good faith has (already) been codified in the duty of disclosure in the statutory provision. For example, article 7:928(6) DCC states that, when the insurance agreement has been concluded on the basis of a questionnaire formulated by the insurer, the insurer cannot appeal to the fact that the insured has not provided relevant information if the questionnaire did not (specifically) ask for that information, unless the insured does so with the intent to mislead insurer. Therefore, the statutory provision rules out the duty of utmost good faith in these instances, unless the insurer can prove that an insured acted with the wilful intent to mislead.

However, if an appeal to a statutory provision (such as the duty of disclosure) would - in special circumstances - result in a party acting unacceptably contrary to the principle of reasonableness and fairness (which may be influenced by the principle of utmost good faith) then the principle of utmost good faith could in theory take precedence over the duty of disclosure.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

As an effect of the duty of utmost good faith, the insurer has a duty to disclose all information which is or could be relevant for the insured’s decision to enter into an insurance agreement. 13

In addition, if the insurer makes use of a questionnaire, he may not (after concluding the agreement based on the questionnaire) invoke the fact that the insured has provided insufficient or inadequate answers to the questions, unless the insured acted with the intent to mislead the insurer. The insurer therefore also has a pre-contractual duty to examine the questionnaire and further investigate if answers are missing, inadequate or conflict with the answers to other questions.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

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The following examples can be found in case law:

- HR 21 januari 1966, NJ 1966, 183 (Booy/Wisman): the insurer has a duty to take care that he is aware of all the facts that are relevant for his decision to enter into an insurance agreement. This means that the insurer has a pre-contractual duty to examine the questionnaire and to further investigate if an answer is missing.\(^{14}\)

- Hof Amsterdam 17 september 2013, NJF 2014/101: generally, a credit insurer has more access to information than the prospective insured, which implies that the insurer has a duty to further investigate the payment history of the secured object.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

The duty of utmost good faith entails a pre-contractual obligation to warn the prospective insured. Among other things, this obligation entails a duty to notify the prospective insured of the nature and extent of their duty of disclosure.\(^{15}\)

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The remedies for a breach of the duty of utmost good faith are not explicitly mentioned in Dutch statutory provisions.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

It follows from the duty of utmost good faith that:

- The insured should not mislead the insurer, for instance by making up the occurrence of an insured event.

- The insured should notify the materialization of a risk to the insurer as soon as he has become aware or ought to have become aware of this risk.

It should be emphasized that the above-mentioned elements are also laid down in statutory provisions. The role of the duty of utmost good faith is therefore limited.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Although this is not fully clear whether a third party beneficiary of cover is usually assumed to have the same duty of utmost good faith as the insured in the event the third party wishes to rely on an insurance agreement for coverage.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The Supreme Court ruled that if the insured has mislead the insurer with wilful intent, for instance by making a false claim, it is allowed that the insurer decides not to pay under the insurance agreement.\(^{16}\) This rule is codified in article 7:941(5) DCC. Hence, upon the insured rests a post-contractual duty to file claims correctly and truly, a duty that follows from the duty of utmost good faith.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Article 7:928(5) states that the prospective insured is only obliged to inform the insurer about facts of his criminal past if these facts have occurred within eight years prior to the conclusion of the insurance agreement and as far as the insurer has explicitly asked a question about that past in clear wording. This provision could be considered a reflection of the principle of legitimate expectations (i.e. the principle of utmost good faith, see the response to question 2). In that sense, a breach of this provision includes a breach of the duty of utmost good faith. However, the role of the principle of utmost good faith in this matter is not explicitly mentioned in case law or literature.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

The insurer needs to handle a claim with due care. Furthermore, the duty of utmost good faith implies that claims should be dealt with speedily.\(^{17}\)


\(^{17}\) See Van Orsouw, supra 2.
20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

The duty of utmost good faith applies to the relationship with third party beneficiaries as well. Therefore, the same applies towards them.

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In this context, we are not familiar with relevant case-law.

22. Is there a Code of Practice for insurers in your jurisdiction, and, if so, how does it sit with the duty of utmost good faith?

There is a Code of Practice for insurers in the Netherlands, established by the Federation of Dutch Insurers (Verbond van verzekermaars) in 2012. However, the Code only states that ‘the process of dealing with claims should be sufficiently clear to the insured’ (principle 7). Hence, the Code does not contain any standard to the way claims should be dealt with or other aspects of the duty of utmost good faith.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

Yes, a term of a insurance agreement can be disregarded by the court if this term is, under the given circumstances, unacceptably contrary to the standards of reasonableness and fairness (article 6:248(2) DCC). Furthermore, a more stringent rule applies to general provisions (i.e. insurer’s standard terms). Such provisions are voidable, if these are unreasonably burdensome for the insured (article 6:233(a) DCC). Both statutory provisions can be used to remedy a (grave) breach of the duty of utmost good faith.

The following examples can be found in case law:18

- HR 20 april 1990, NJ 1990, 526 (OTOS/Jonkman): a buildings insurance agreement included the provision that any insurance benefit was not payable if the insured building was left empty. The Supreme Court ruled that, in the given circumstances, invoking this term was not in accordance with the principles of reasonableness and fairness (i.e. the duty of utmost good faith). The beneficiary made it plausible that they had sent a letter to the insurer within the set time frame, even though the insurer did not receive that letter.

- HR 12 januari 1996, NJ 1996, 683 (Kroymans/Sun Alliance): a insurance agreement included the provision that any insurance benefit was not payable if the insured failed to lodge a claim within six months after the insured event. Since the insurer failed to notify the insured of this provision, the Supreme Court ruled that – according to the principles of reasonableness and fairness – the provision was not applicable in the given case.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

Under Dutch law, the insurer cannot avoid the application of the policy as such. Instead, the insurer is allowed to stipulate the loss of an entitlement to an insurance benefit if certain events occur (to be determined in the policy). Under Dutch insurance law, the insurer may only invoke such rights if the breach of the obligation has infringed upon his reasonable interests. However, the insurer is always entitled to avoid payment under the policy if the insured acted with the intent to mislead him.

As said, the principles of reasonableness and fairness can override the application of statutory provisions or contractual terms. The duty of utmost good faith may give substance to this principle and thereby influence the decision of the court to allow avoidance of payment. For instance, the Supreme Court has ruled that – in short – the principles of reasonableness and fairness determine whether the insurer is harmed in his reasonable interests.19 Furthermore, the principles of reasonableness and fairness could imply that, given the circumstance, no loss of entitlement can be stipulated.20

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25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

As mentioned in the response to question 2, an insurer’s breach of the duty of utmost good faith can be seen as conduct contrary to the principle of reasonableness and fairness. Though the latter principle is stated in article 6:248(2) DCC, such conduct does not result in (liability for) a breach of statute. Article 6:248(2) DCC can only result in the non-applicability of a contractual term or claim.

Whether the insurer is liable, should in fact be decided according to the rules which determine liability arising from a wrongful act. According to article 6:162(2) DCC, a wrongful act may also exist if a person’s conduct is in violation of the due care required by society.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

A breach of the duty of utmost good faith cannot result in regulatory sanctions as such, since this duty is not laid down in Dutch regulatory law. However, if an insurer acts contrary to specific, codified elements of the duty of utmost good faith, this can have regulatory consequences. For instance: an insurer who fails to inform the insured correctly and completely about the insurance, can face a fine or even a license suspension (article 4:20 in conjunction with articles 1:80 and 1:104 Dutch Financial Supervision Act (Wft)).

**IV - Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

The principle of utmost good faith – as a general principle of law – applies to reinsurance in the same way as it applies to regular insurance. It could be argued however, that its role is more prominent, since regular insurance law provisions do not apply to reinsurance contracts. Therefore, the general principles of law could be more influential on what parties may reasonably expect from one another in the specific case at hand. However, there is no specific case law or literature on this subject.

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Nigeria

DELA W CHAMBERS
Kamar Raji

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The Insurance Act, 2003, which is a general law on insurance, does not make any specific provision for the principle of utmost good faith. However, S.19 of the Marine Insurance Act, 1961 states, inter alia, that “a contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party”.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

In general term, the principle of utmost good faith is a common law principle. It is the specific reference to it under the Marine Insurance Act, 1961 that has, somehow, elevated it to statutory principle, at least, as far as the referenced Act it concerned.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

There are specific provisions for duty of disclosure in almost all the relevant enactments while the co-terminus principle of utmost good faith is derived from the express provision on the principle of disclosure.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes. It applies to all types of insurance in Nigeria.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

From the perspective of Nigerian law, it appears that the principle extend to post contractual stage.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Yes, the duty is applicable to both insurer and the insured at pre-contractual stage.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

The content of duty of utmost good faith is limited to the specific questions asked in the proposal form in general and life insurance saves for the marine insurance where it is not commonly used. Other information deemed material, though not part of the proposal form, is expected to be volunteered.

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The duty of the insured is to disclose only material facts within his knowledge; an insured is not bound to facts unknown to him. A previous insurance of the same type is a material fact to be disclosed and so is a previous refusal of insurance of the same type.

Examples of cases where the principle had been applied:

(a) issuing a policy despite the insured’s failure to answer a question on the proposal form means that the insurer does not regard the fact as material and would be deemed to have waived his rights to insist on full disclosure of fact. See: Adeyeye v. Liberty Assurance Co. Ltd (unreported suit No. HOD/15/81 of 13/3/83.

(b) Fraudulent collusion by the insured’s representatives with the insurer’s agent in misappropriating premiums will deprive the insured of his claim under the policy. See: Bamidele & Anor. v. Nigerian General Insurance Co. Ltd (1973) 3 U.I.L.R. 418.
8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually they are indistinguishable?

Yes.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

In Nigeria, the duty is inseparable.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

As earlier stated, the duty of care has its root in the duty of disclosure; as such both terms are used interchangeably. On the issue of remedies applicable, the only remedy for breach of the duty of good faith, in so far as non-disclosure is involved, is avoidance of the contract ab initio by the injured party and the award of damages is not applicable.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

Not applicable. See the response in question 10 above.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

The duty falling on the insurer extends to the disclosure of all facts known to him which are material either to the nature of risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Where proposal forms are used i.e. in relation to the applicable law (s. 54 (1) of the Insurance Act, 2003), the onus of asking facts considered material lies firmly with the insurer. This thus abolishes a residual duty on the insured to disclose.

Examples of known cases:

(a) Issuing of a policy in spite of the incomplete application means that the insurer did not regard the fact as material and would be deemed to have waived its right to insist on full disclosure.

(b) Non-objection to over insurance especially when the assessment of premium paid was done on the recommendation of the insurer. Held, the insured’s claim pursuant to extensive damage to the his car was not fraudulent and he had not breached the duty of utmost good faith since a contract of insurance is valid based on agreed valuation of premium. See: Ado v. Nigerian Insurance Company Ltd. (1980) 4-6 C.C.H.C.J. 27.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

Yes, it is.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The contract is void ab initio and the insurer must refund the insured the premium paid without any further claim for damages.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insurer at the claim stage?

(a) To state clearly and truthfully, in the claim form, the circumstance that led to the claim.

(b) Not to exaggerate the claim.

(c) Not to collude with a third party with the aim of defrauding the insurer.

(d) In cases of motor vehicle insurance, not to admit liability without Police Report.

(e) To promptly inform the insurer about the incident leading to the claim.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

No. The mere fact that there is no privity of contract between the insurer and the third party makes the requirement of utmost good faith between them far fetched.
17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

(a) It was held in Martins v. National Employers’ Mutual that the conditions requiring the giving of notice of loss are not intended to enable insurers to escape liability, but rather to give them a reasonable opportunity of investigating the claim under the most favourable circumstances. See: (1969) N.C.L.R 46 at p. 56.

(b) In Onuh v. United Nigeria Insurance, it was held that for there to be a compliance with the warranty requiring the insured to keep a complete book of account and stock sheets, and to produce them in the event of a claim, the details must be sufficient to enable the insurer to ascertain the character and amount of loss and to check exaggeration and falsity. And if the insured fails to comply with the requirement as a whole, he cannot recover in respect of those items, the details of which were not supplied. See: (1975) N.C.L.R 413 at p. 420.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Yes.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

The insurer is enjoined to settle the claim of the insured promptly when there is no material or fraudulent breach of the policy of insurance by the insured.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

In general, insurers are obliged to deal with the consumers/beneficiaries of insurance products with utmost good faith i.e. to settle the claim promptly and fairly in the absence of material breach or fraud by the insured. This principle also extends to the third party, especially in mandatory insurance products (e.g. Third Party Motor Vehicle Insurance).

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best-known cases in which it has been applied.

(a) Recommendation of risk improvement measures to the insured.

(b) Equitable and prompt settlement of claim to only genuine beneficiaries.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

Yes, there is a Code of Practice which essentially emphasises good corporate governance, integrity and professionalism among the insurance companies and their employees. The byproduct of these three identified ethos is the principle of utmost good faith.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

Yes. A breach of the principle renders insurance contract void ab initio.

By a condition in a third party policy, the insured was required to give notice to the insurer of any proceeding, which may result in a claim. A third party was injured by the negligent driving of the insured, whereupon the former wrote two letters to the insured wherein he demanded damages and stated his intention to institute a suit respectively. Each of the letters was copied to the insurer. In a third party suit against the insurer to satisfy the judgment of the court obtained against the insured, the defendant insurer asserted that the insured had breached a condition in the policy by not having notified it of the proceeding as stipulated in the policy. The court held that the whole essence of the notice is not to enable the insurer escape liability but to afford it the opportunity of investigating the claim and detect falsehood. Therefore, the letters of the third party addressed to the insurer constitutes sufficient notice of the action. It is not essential that the notice be given by the insured himself.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

Yes.

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?
Yes, As far as Nigeria is concerned, the principle is a common law derivation and not statutory save for the provision in the Marine Insurance Act, earlier stated.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

No. The regulatory authority (National Insurance Commission) employs a robust persuasive approach (including informal ADR) to ensure compliance, upon the complaint of the insured, in the absence of prior litigation on the same matter.

The regulator only wields the big stick if there is a consistent pattern of failure on the part of the insurer to settle claims or where it involves a disaster of national attention (like plane crash) and the insurer fails to compensate as at when due. The regulator interest, in this wise, would be the maintenance of sanity in the market and for the improvement of the image of the industry.

IV - Reinsurance

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

There is no different application; the principle is the same.

* * * *

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The exact principle of utmost good faith has not been expressed directly in the Polish insurance law. However, the insurance contract is also referred to as a contract of the supreme confidence (contractus uberrimae fidei), which requires from the parties to insurance contract special diligence and loyalty in performance of their obligations. The principle of supreme confidence especially emphasizes trust, which connects the parties to the contract, which is mainly expressed in the obligations of the policyholder to disclose all facts and information of potential particular importance for the insurer. The obligation of good faith is not limited to declaration of risk before conclusion of the insurance contract as described in the preceding sentence. It is recognized as the mutual obligation of the policyholder and the insurer under which those two parties cooperate and endeavour to prevent the occurrence of the insurance event or to minimize its effects.

Other principles (general clauses) are applicable to insurance contracts e.g. the principle of good faith, principles of community life or the socioeconomic purpose of a right. Those indirectly constitute the principle of utmost good faith in the insurance relationship and will be discussed under the subsequent points of the questionnaire.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

Good faith, as a general clause that applies to the whole of civil law is expressed in Article 7 of the Act dated 23 April 1964 – Civil Code (unified text: Journal of laws of 2014, item 121) (“Civil Code”). Other similar clauses that apply to the insurance contracts are rather statutory. Sometimes, they constitute a part of the so-called soft-law, which does not constitute legal provisions but provides for further protection for the consumers (they are protected against failures to comply with a code of practice to which the company voluntarily joined and informs that is bound by its provisions under Article 5 section 2 point 4 of the Act dated 23 August 2007 on counteracting unfair market practices (Journal of Laws of 2007, No. 171, item 1206).

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

The principle of utmost good faith is recognized in the legal doctrine and a duty of disclosure makes an important part of it. The duty to provide the insurer with information is regulated under Article 815 § 1 [notification obligation], stating that: “The policyholder is obliged to provide to the insurer all the circumstances known to it about which the insurer has enquired in the offer form or in other letters before contract execution. If the policyholder executes the contract through a representative, this obligation also rests on the representative and also covers the circumstances known to the representative” together with Article 815 § 2 stating that “if the insurance contract is executed on another person’s account, the obligations set forth in the preceding paragraphs rest on the policyholder and the insured unless the insured did not know about the contract having been executed on his account”.

Pursuant to Article 815 § 3, “the insurer is not liable for the effects of circumstances about which, in violation of the preceding paragraphs [of Article 815 of Civil Code], he was not informed. If the preceding paragraphs are breached due to willful misconduct, in case of doubt it is assumed that an event provided for in the contract and its consequences result from the circumstances referred to in the preceding sentence”. But the above principle does not apply, according to Article 815 § 1, “if the insurer executes the insurance contract despite receiving no reply to particular enquiries, the omitted circumstances are deemed insignificant”.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

As already observed above, the principle of good faith as the general clause applies to all type of civil law contracts.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

As it was mentioned above before the conclusion of insurance contract the policyholder is obliged to provide the insurer with information on any circumstances known to him, for which the insurer asked for in the offer form or prior to the contract’s conclusion in other letters. This is so called an
obligation to declare a risk provided in Article 815 of the Civil Code.

Furthermore in post-contractual stage during the duration of insurance contract policyholder and insured are obliged to promptly report any changes of circumstances for which insurer asked before the conclusion of insurance contract the insured party shall be obliged to notify the insurer on these changes immediately after having received information of such changes. This is so called obligation to notify a risk. Unlike the declaration of risk specify in Article 815 § 1 of the Civil Code obligation to notify a risk occurs only when such obligation has been imposed in insurance contract or in the general terms and conditions of insurance. This obligation shall not apply to life insurances.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

One of the most characteristic features of insurance contract is the duty of good faith. Insurance contract is a contract of the supreme confidence (contractus uberrimae fides). Good faith refers to keeping the confidence between parties of a contract. The supreme confidence, which applies to an insurance contract, consists in policyholder’s duty of performing insurance contract’s obligations, especially in an appropriate declaration of risk at the pre-contractual stage. The base of insured good faith is provided in Article 815 of Civil Code. As regards the supreme confidence of insurance company it is caused by the fact, that only the policyholder has full information regarding the possible risk. The insurance company when concluding the insurance contract performs in confidence to this information. The supreme confidence rule comes from uneven distribution of contract risk between parties which refers to uneven access to information used for concluding and performing the insurance contract assessment. This does not mean that the good faith in the insurance contract obliges only one party. The good faith should be interpreted in accordance with general requirement of keeping good faith when concluding and performing contract obligations, which are mentioned in the general part of Civil Code.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

As it was mentioned, the Polish law provides the answer for questions system (questionnaires). Pursuant to Article 815 of Civil Code, the insured, the policyholder and the representative (if the contract is concluded by him) is obliged to provide to insurance company only such circumstances, which he asked for before concluding the insurance contract. The system is more favorable for insured, because the burden of determination the substantial circumstances is bound on the insurance company, which as a professional should know what is substantial in a particular insurance. The insurance company suffers the consequences of imprecise questions. The system of declaration of risk in insurances concluded under the Civil Code provisions has binding character. This means that, except for answers to specific questions, the insurance company has no right to demand from other party providing unspecified information about other known circumstances, which could impact the risk assessment.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

Good faith is a general contractual rule, according to which both parties should obey the good faith rule and fair trade rule. The parties cannot exclude these rules. Polish law (regarding insurances) provides the duty of good faith in Article 815 of Civil Code, which applies the duty of risk declaration in a period before concluding the insurance contract. Pursuant to Article 815 § 1 of the Civil Code “The insurance taker shall be obliged to inform the insurer about all the facts known to it about which the insurer asked in the form of the offer or in other letters before the conclusion of the contract.” As it was mentioned, Polish system provides risk declaration by answer for questions system. Despite existence of the policyholder’s duty of good faith and supreme confidence, it cannot be identified with the duty of disclosure, which is in force in a system of spontaneous risk declaration in common law. In Polish law there is no policyholder’s obligation to disclose the facts, which were not covered by insurer’s questions.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

Duty of disclosure, which is in force in a system of spontaneous risk declaration, concerns all facts substantial for insurer in order to establish the risk and the insurance premium. Pursuant to Article 815 § 1 of the Civil Code, except answers for specific questions, the policyholder has no duty to disclose to insurer the information about all other circumstances known, which could impact the risk assessment.

Please note, that the duty of disclosure is provided by Article 304 Paragraph 1 of the Act dated 18 September 2001 Maritime Code (Journal of laws of
10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The Insured shall not be obliged to inform the insurer of all circumstances known to them, and only those for which the insured was asked before the conclusion of the insurance contract. If the policyholder does not answer all the queries of the insurer, this does not mean an automatic avoidance of liability of the insurer. The negative consequences of incorrectly or not precisely formulated questions or absence of a specific question are imposed the insurer.

The provision of 815 § 3 as amended by the Act of 13 April 2007, amends penalties for inaccurate information as to the circumstances which asked the insurer, given by the policyholder and the persons required to supply information according to Article 815 § 1 and 2, 1 of the Civil Code. The Insurer shall not be held liable only if the circumstances that have been brought to his attention in violation of § 1 and 2, 1 by the policyholder (representative of the insured), resulted in the occurrence of the accident. This regulation does not have to apply to a situation in which the insured or the policyholder did not provide information unintentionally and in case that there is no direct causal link between violation of the above obligation and the accident.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

N/A

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

Notwithstanding the above, the provision of Article 815 of the Civil Code relates generally to information provided to the insurer primarily in the application for conclusion of the insurance contract. From this point of view, the main duty of the insurer in presented circumstances is to provide application for insurance with detailed questions, after having analyzed any potential insurance risks. The insurer also suffers consequences of lack of appropriate question or imprecise question.

Informational duties of insured and collecting information by the insurance company are connected also with regulations in Act of 22 May 2003 on insurance activity (Journal of Laws of 2013, item 950 as amended) ("Insurance Activity Act"). Pursuant to Article 21 section 1 of the Insurance Activity Act insurance company may demand that the insured or a person, on behalf of whom an insurance contract is to be concluded, undergoes medical examinations or diagnostic examinations with a minimal risk, with the exclusion of genetic examinations, in order to assess the insurance risk, determine the right to a benefit and the amount of this benefit. The costs of the examinations are covered by the insurance company.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

The main duty of insurer at pre-contractual stage is to provide application for insurance with detailed questions. It was also mentioned, that the insurance company suffers the consequences of lack of appropriate question or imprecise question. But it is also worth of noticing, that the insurance company does not suffer the consequences when the policyholder conceals some information nor provides false information. In the judgment of Supreme Court of 28 March 2000 (II CKN 895/98), the Supreme Court said that receiving by the insurance company false information provided from the policyholder, do not spoil the policyholder’s duty to provide true information.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

The obligation to provide information is a rule connected with the insurer’s duty of performing risk assessment regarding accepting the risk. However, the insurer can avoid asking questions as part of risk assessment and according to Article 815 § 1 sentence 3 “If the insurer has concluded the contract of insurance in spite of a lack of the answer to particular questions, the omitted facts shall be considered inessential.” In the light of this, the insurer would take responsibility of accepting particular insurance risk, if he had not excluded it before. In fact, group insurance contracts (contracts for a third party account), where simplified risk assessment occurs, are very common in Polish market.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

As above.
III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

Pursuant to Article 818 § 1 of the Civil Code insurance contract or general terms and conditions of insurance may provide that the insured shall have a duty to notify the insurer of an accident within a specified time limit. Duty to inform the insurer about the accident must arise from the general conditions of insurance or insurance contract. General terms and conditions of insurance or insurance contract should indicate the date on which the insured is obliged to notify the insurer of the accident. This term should be specified.

On the basis of Article 818 § 3 of the Civil Code consequence of violation of the duties set out in Article 818 § 1 by intentional fault or gross negligence of the insured, the insurer may reduce the insurance benefit appropriately, if the violation contributed to the increase in the damage or made it impossible for the insurer to establish the circumstances and consequences of the accident. The circumstances of the lack of notification of the accident or the delay in notification may not be a condition for refusal to pay benefits by the insurer.

The consequences of the failure to notify the insurer of an accident shall not come into being if the insurer, within a time limit set for notification, has received information on the circumstances which it has not been informed of.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

All mentioned duties concern both the policyholder, beneficiaries and the insured.

B - For the Insurer

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

If the insurer had asked such information and the insurance taker or insured concealed the information, it is considered as breach of the principle of good faith.

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

On the basis of Article 817 of the Civil Code, the insurer is obliged to pay the benefit within a period of 30 days from day of receipt of notification of an accident.

On the basis of Article 16 section 1 of the Insurance Activity Act, insurer is obliged after receiving the notification about the insurance event of the insured, within 7 days of receipt of this notification, to inform the policyholder or the insured, if they are not the persons making the notification, to take action concerning the determination of the factual state of the event, legitimacy of the reported claims and the amount of the benefit, and also to inform the notifying person what documents are needed to establish the liability of the insurance company or the amount of benefit, if it is necessary for the further conduct of the proceedings.

On the basis of Article 16 section 2 of the Insurance Activity Act, if in term specified in the contract or in the provisions of law the insurer does not pay the benefit, the insured shall notify the notifying person in writing of the reasons for the inability to satisfy the claims in whole or in part, and shall pay the undisputed portion of the benefit.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

The insurer is obliged to make available to third party beneficiaries the relevant information and documents, which had an influence on the determination of the insurer’s liability and the amount of compensation or benefit, if they filed a claim.
Moreover, the insurer is obliged to provide to beneficiary the results of the insured’s examinations, if they impacted full or part refusal of compensation. The insurer is also obliged, at the request of the insured, beneficiaries or entitled from insurance contract or the injured, to provide access to possessed information related to the accident or event being the basis for determination of his/her responsibility and for determining the circumstances of accidents and fortuitous events, and also the amount of compensation or benefit.

Also, it is worth of noticing that all provisions ambiguously formulated in the insurance contract shall be interpreted in favour of the policyholders, insured and beneficiaries.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

N/A

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

In Poland, there is no separate Code of regulations for insurance law, like e.g. the Insurance Code in France. Furthermore, in our system of statutory law, such a Code or Practice or Ethics would rather be of a soft-law nature. Basic regulations regarding insurance, where the rights and obligations of the insurer are set forth, are included under the Civil Code, Insurance Activity Act and the Act of 22 May 2003 on Compulsory Insurance, the Insurance Guarantee Fund and Polish Motor Insurers Bureau. There are also many other Acts and Regulations.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

There is a legal basis in the Polish jurisdiction to disregard a term of a contract, namely Article 385 of the Civil Code, which regards the abusive (prohibited) clauses. The provisions of the agreement concluded with the consumer not agreed individually with him/her do not bind him/her, if they shape his/her rights and obligations in a manner contrary to good morals, grossly affecting his/her interests (unfair contract terms). In case of the insurance contract the abovementioned protection is extended beyond the consumers. Pursuant to Article 805 § 4 of the Civil Code, Articles 385-385 of the Civil Code shall accordingly apply if the policyholder is a natural person concluding a contract directly related to his/her economic or professional activity – policyholders who are natural persons, however who are not consumers, but professionals. Additionally, Article 808 § 5 of the Civil Code regulating the insurance contract to someone else’s account (or in other words the insurance contract on behalf of the third party) extends the applicability of the provisions on unfair contract terms also to insured – a person not party to the insurance contract – if the insurance is not directly related to the economic or professional activity of the insured natural person, respectively, within the scope as to where the agreement relates to the rights and obligations of the insured. However, the regulations on unfair contract terms (abusive clauses) do not include provisions specifying the main performance of the parties, including the price or remuneration, if they have been formulated in an unambiguous manner.

The terms of the contract are controlled in many ways but as to courts, they can be questioned by either common courts (individual control e.g. based on Article 189 of the Code of Civil Procedure) or more frequently and – as it seems – with more severe consequences by a special court – Court of Competition and Consumer Protection (“SOKiK”), established for the pursuit of abstract control i.e. unrelated to any particular situation of anyone bound by the terms, where it is sufficient for the terms to exist in the circuit in the agreements being offered.

As to examples, Article 385 of the Civil Code establishes a presumption of abusiveness of certain terms. These are 23 enumerative examples (the grey list). However, in the Polish jurisdiction, there is also functioning publicly available Register of unfair contract terms. Every clause established by SOKiK as abusive is listed in this Register. As to our best knowledge, a similar Register is also functioning in Spain. In the Polish jurisdiction, an entry to the Register has an extended effectiveness, which extent is controversial, but may mean that any professional acting in the Polish market must not use the prohibited terms listed in the Register (the black list).

It seems that with respect to insurance, the most common and also the most interesting are the clauses: of the presumption of delivery, pre-existing conditions, refund of insurance premiums and liquidation fees.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Courts in Poland are not equipped in any competences to change the nature of invalid or ineffective agreements, but they can declare their invalidity or ineffectiveness.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

N/A.
26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

As there is no duty of utmost good faith as such, there are no sanctions foreseen for its breach. However, the general regulatory sanctions imposed by the Polish Financial Supervision Authority ("KNF") include: (1) the obliging recommendations and decisions, (2) imposing on the members of the Board of the insurance company or commercial proxies financial fines to an amount corresponding to three times the average monthly salary of the last 12 months, (3) suspending the members of the Board with their activities until the motion for their dismissal would be examined at the next meeting of the unit responsible for their dismissal (such a suspension equals to the exclusion from decision-making on behalf of the insurance company), (4) summoning the competent unit of the insurance company or any other authorized party with a request for dismissal of a member of the Board or revoking of the commercial proxy, (5) summoning to convene the general meeting by the insurance company or putting certain issues on the agenda of the general meeting, (6) summoning the insurance company to terminate the contract under which the insurance company commissioned performing of certain insurance activities to another entity, (7) ordering the sale of shares of the insurance company with the prescribed term and if the shares are not sold within the time-limit, KNF may impose a financial fine on the shareholder to the amount of PLN 10 million, establish a compulsory administration or withdraw the licence to conduct insurance activity, (8) imposing financial fines on insurance companies up to 0.5 percent of gross written premiums received by insurance in the previous year (or when the insurance company did not conduct the activity in the previous year or had a collection of written premiums below PLN 20 million – up to PLN 100,000. Those sanctions are basically imposed when KNF considers the insurance company to act in violation of the law, statutes, the insurance contracts it concludes or its business plan or did not provide the required information.

IV - Reinsurance

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

As a rule, there are no specific provisions within the scope of utmost good faith in respect to reinsurance. However, it may be worth to mention the draft Guidelines on good practices in the field of reinsurance / retrocession issued by KNF in 2013. Also, it may be noteworthy to observe that there is one restriction from KNF founded in generally binding law - under Article 186d of the Act of Insurance Activity, namely that KNF may not allow to transfer reinsurance portfolio, if interests of policyholders, insured, beneficiaries or persons entitled under insurance contracts subject to reinsurance are not duly protected.

* * *
Singapore

RAJAH & TANN ASIA

Simon Goh

Preliminary Comments

In the absence of Singapore case authorities, we have referred to English case authorities which are persuasive before Singapore courts.

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

For marine insurance, section 17 of the Marine Insurance Act (Cap. 387) ("MIA") provides that: “A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.”

Whilst there is no equivalent provision for non-marine insurance in the Insurance Act (Cap. 142) ("IA"), the principle of good faith is nonetheless applicable to all types of insurance under common law.¹

The meaning of good faith is not defined in the MIA. It has been said that good faith denotes a measure of honesty and fairness.² However, the substance of the obligation imposed by the principle of good faith depends on the context and can vary according to the stages of the contract life.³

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

For marine insurance, the principle of good faith is a statutory principle under section 17 of the MIA.

For non-marine insurance, the insured’s duty of disclosure is part of the insured’s duty to act in good faith.⁴

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

For marine insurance, the principle of good faith and the insured’s duty of pre-contractual disclosure are separately provided for in section 17 and sections 18 to 20 of the MIA⁵ respectively. It has been suggested that the insured’s duty of pre-contractual duty of disclosure as set out in sections 18 to 20 of the MIA are merely aspects of the overriding duty of good faith as set out in section 17.⁶

4. Does the principle of utmost good faith apply to all types of insurance contracts (life, insurance, general insurance, reinsurance etc.)?

Yes, the principle of good faith applies to all types of insurance contracts. Please see response to Question 1 above.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

The duty of good faith is a continuous duty that applies both pre-contractually and post-contractually.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Yes, the principle of good faith applies to both the insured and the insurer at the pre-contractual stage.

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¹ Peter Eggers et al, Good Faith and Insurance Contracts (Lloyd’s List, 2010), at [1.29]; John Birds et al, MacGillivray on Insurance Law (Sweet&Maxwell, 2012), at [17-002].
³ Peter Eggers et al, Good Faith and Insurance Contracts (Lloyd’s List, 2010), at [1.13]; The Star Sea [2001] UKHL 1, at [7].
⁴ Peter Eggers et al, Good Faith and Insurance Contracts (Lloyd’s List, 2010), at [4.12].
⁵ See Appendix below.
⁶ Jonathan Gilman et al, Arnould Law of Marine Insurance and Average (Sweet&Maxwell, 2013), at p593.
A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Whilst sections 17 to 20 of the MIA\(^8\) technically only apply to marine insurance, the principles as set out therein are also recognised to be of general application in the non-marine insurance context.\(^9\)

Accordingly, a non-exhaustive list of the content of the insured’s pre-contractual duty of good faith would be:

(a) A duty to disclose all material facts; and

(b) A duty not to misrepresent material facts to the insurer so as to induce the insurer to enter into the contract of insurance.

An example of the insured’s duty to disclose all material facts would be the Singapore Court of Appeal’s case of Tat Hong Plant Leasing Pte Ltd v Asia Insurance Co Ltd\(^10\). In that case, the insured had leased a crane to a third party on its standard form agreement. However, the insured and the third party executed a side letter which amended the terms of the standard form agreement. The insured thereafter insured the crane with the insurer, with whom the insured had a long-standing insurance relationship. Accordingly, the insurer did not require the insured to fill out any proposal form but merely requested for particulars of the machinery. The insurer thus had no knowledge of the terms of the side letter. The court held that as the insured had failed to make full disclosure of the side letter varying the terms of its standard form agreement, the insurer was entitled to avoid the contract of insurance.

An example of the insured’s duty not to misrepresent material facts would be the English Court of Appeal case of Economides v Commercial Assurance Co Plc.\(^11\) In that case, the insured had filled out a proposal form that the cost of replacing the contents of his flat was £12,000 and that the statement was true and complete to the best of his knowledge and belief. The insurer thereafter issued a household contents policy.

The insured renewed the policy year on year, on each occasion signing a similar form. The insured’s parents moved win with the insured, bringing with them their possessions including jewelry and silver. On the advice of his father, the insured increased his cover by about £4,000. The insured’s flat was subsequently burgled and it transpired that the full replacement cost of the items burgled was in excess of £30,000.

The insurer tried to avoid the policy on the ground of, inter alia, misrepresentation. The Court of Appeal held that in the insurance context, unlike other contracts, a statement of belief does not carry with it an implied representation that the maker of the statement had reasonable grounds for holding the or belief and such a statement need only be honestly made. The court went on to hold that the insured had acted honestly and the insurer’s defence on the grounds of misrepresentation failed.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

The insurer’s duty of disclosure is part of the insured’s duty to act in good faith. Please see answer to Question 3 above.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

NA. Please see answer to Question 8 above.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

For marine insurance, sections 18 and 20 of the MIA\(^12\) (which are merely aspects of the general duty of good faith as set out in section 17)\(^13\) expressly provide that an insured’s breach of the disclosure obligations as set out therein entitles the insurer to avoid the contract of insurance.

For non-marine insurance, the insured’s breach of its analogous obligations under common law also entitles the insurer to avoid the contract of insurance.

Whilst an insured’s breach of its non-disclosure obligation simpliciter does not give the insurer a right

\(^8\) See Appendix below.


\(^10\) [1993] SGCA 33.


\(^12\) See Appendix below.

\(^13\) Jonathan Gilman et al, Arnould Law of Marine Insurance and Average (Sweet&Maxwell, 2013), at p593.
to damages, the insurer may be able to recover damages for a misrepresentation if made fraudulently, negligently or otherwise under the Misrepresentation Act (Cap. 390).

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

NA. Please see answer to Question 8 above.

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

The same duty of good faith binds both the insured and the insurer. Notably, in the marine insurance context, section 17 of the MIA applies equally to both the insured and the insurer.

Accordingly, a non-exhaustive list of the insurer’s pre-contractual duty of good faith would be analogous to that of the insured and is as follows:

(a) A duty to disclose all material facts; and

(b) A duty not to misrepresent material facts to the insured.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

**Response**

An example of the insurer’s duty to disclose all material facts was given by Lord Mansfield in the seminal case of *Carter v Boehm*. In that case, Lord Mansfield suggested that it would be a breach of good faith for an insurer to insure a ship on her voyage, which the insurer privately knew to have arrived at its intended destination.

An example of the insurer’s duty not to misrepresent material facts will be the English case of *Duffell v Wilson*. In that case, the insurer, in insuring the insured against being conscripted into the militia until a specified expiry date, represented that the statute which regulated such conscription would cease to have effect on the expiry date. In fact, the operation of the statute extended to three months after the expiry date and insured was conscripted after the expiry date. The court held that the insured was entitled to avoid the contract of insurance and was entitled to the return of the premium paid.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

No. The duty of good faith does not go so far as to require that the insurer explains to the insured what the insured’s obligations under the contract of insurance are. This should apply *mutatis mutandis* to the insured’s pre-contractual duty of disclosure.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

The remedies for an insured for an insurer’s breach of its duty of good faith mirror those as set out in the answers to Question 10 above.

The insurer’s breach of its obligations of disclosure under section 19 of the MIA or under common law, as the case may be, entitles the insured to avoid the contract and seek a return of the premiums paid as money had and received.

Whilst an insurer’s breach of its non-disclosure obligation simpliciter does not give the insurer a right to damages, the insured may be able to recover damages for a misrepresentation if made fraudulently, negligently or otherwise under the Misrepresentation Act (Cap. 390).

**III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)**

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

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14 John Birds et al, MacGillivray on Insurance Law (Sweet&Maxwell, 2012), at [17-030].


16 See Appendix below.

17 However, the MIA does not expressly set out the specific duties of disclosure for the insurer like it did for the insured at sections 18 to 20. Nonetheless, the MIA is only intended to be a partial codification of the common law. Accordingly, it is open for the court to hold that the insurer owes common law duties that are analogous to that expressly provided in sections 18 to 20 of the MIA.

18 (1766) 3 Burr 1905.

19 [1908] 1 KB 545.

20 Peter Eggers et al, Good Faith and Insurance Contracts (Lloyd’s List, 2010), at [12.37].

21 See Appendix below.

22 John Birds et al, MacGillivray on Insurance Law (Sweet&Maxwell, 2012), at [17-093].
16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

The insured’s duty of good faith in presenting a claim is no wider than a duty not to present a fraudulent claim.23

A third party (such as a loss payee or a beneficiary) does not owe any duty of good faith to the insurer, save in so far that there may be a “duty” not to cause loss to the insurer under general law (e.g. under the tort of deceit).24

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

An example of the insured’s duty as set out in the answer to Question 16 above is the Singapore High Court case of *Sumpiles Investment Pte Ltd v AXA Insurance Singapore Pte Ltd*.25 In that case, the boom of a floating crane barge fell causing considerable damage. The insured sought to recover the cost of repairs from the insurer under a marine insurance policy. The insurer alleged, *inter alia*, that the insured had breached its duty of good faith because it had caused or pressurised the crew into making false statements to the surveyor investigating the casualty.

The court held that the insured’s duty of good faith under section 17 of the MIA only required that the insured should not: (i) present a fraudulent claim; or (ii) make use of fraudulent devices in presenting a claim or during the course of the insurer’s investigation into the claim. On the facts, the court held that the insurer had failed to show that the insured had acted fraudulently. However, the insured’s claim was dismissed on other grounds.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

The insured’s duty of good faith requires that the insured disclose his/her criminal activities insofar that such activities are material to the insurer’s acceptance of risk under the life policy and/or suggest a moral hazard.26

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

It has been said that as the insured’s duty requires him to abstain from fraud in the presentation of his claim (please see answer to Question 16 above), and as the duty is mutual, the insurer should not be regarded as in breach of his duty of good faith, unless he has been fraudulent in his treatment of the claim or of the contract as a whole.27

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

The insurer does not owe a duty of good faith to any third party, except an assignee of the entire contract, even though that third party may be entitled to enforce terms of the insurance contract pursuant to the Contract (Rights of Third Parties) Act (Cap. 53B).28

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The nature of an insurer’s duty of good faith in relation to claims was discussed in the English High Court case of *Insurance Corporation of the Channel Islands Ltd v McHugh*.29 In that case, the insured alleged that the insurer was engaged in an unlawful conspiracy so as to defeat or reduce the insured’s rights and/or delay payment under the relevant policies. The insured relied upon, *inter alia*, breaches of the duty of good faith as the unlawful means for the purposes of the claim in unlawful conspiracy.

The court rejected the insured’s submission that the duty of good faith requires that the insurers act conscientiously, fairly and reasonably when dealing with claims and observed that “[c]ourts have shown reluctance to apply the doctrine of good faith in a claims context other than in cases of deliberate falsehood”.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

The General Insurance Association of Singapore’s General Insurance Code of Practice (the “Code of Practice”) sets out a recommended claims handling procedure. Aside from setting timelines for the insurer’s response to a claim, the insurer is also

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23 *The Star Sea* [2001] UKHL 1, cited with approval in *Sumpiles Investments Pte Ltd v AXA Insurance Singapore Pte Ltd* [2006] SGHC 65, at [90].

24 Peter Eggers et al, Good Faith and Insurance Contracts (Lloyd’s List, 2010), at [13.03].


26 *Brotherton v Aseguradora Colseguros SA* [2003] EWCA Civ 705.

27 Peter Eggers et al, Good Faith and Insurance Contracts (Lloyd’s List, 2010), at [12.47].

28 Peter Eggers et al, Good Faith and Insurance Contracts (Lloyd’s List, 2010), at [13.03].

29 [1997] 1 LRLR 94.
required to provide the insured with sufficient guidance as to how to make a claim under the relevant policy.

However, the Code of Practice is non-binding code and in any case there is little or no overlap between the guidelines as set out therein and the general duty of good faith in claims handling as discussed in the answers to Questions 19 to 21 above.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

It is unlikely the courts can disregard a term of the contract of insurance even if it would be a breach of the duty of good faith for the insurer to rely on the said term. The remedy for a breach of good faith is rescission, which cannot be effected partially to avoid only a part of the contract or to carry out any form of contractual reconstruction.\(^\text{30}\)

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

This issue has not come up for consideration in the Singapore courts. However, it has been suggested in English case authorities that it may be possible that an insurer may lose its right to avoid a policy if it failed to act in good faith.

For example in the English Court of Appeal case of *Drake Insurance plc v Provident Insurance plc*\(^\text{31}\), the insured had failed to misdescribe an earlier accident as a “fault” accident when it had in fact been a “no fault” accident. The court held that the insurer was not entitled to avoid the policy as the policy could not have been made on terms other than the terms on which it was in fact made.

However, the court went on to state in *orbiter dicta* that if the insurer knew or turned a blind eye to the fact that the earlier accident was a “no fault” accident at the time that it purported to avoid the policy, the insurer would not be acting in good faith and may thereby lose any right to avoid the policy.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes. Section 17 of the MIA gives the innocent party the right to avoid the contract of insurance in the event that the other party is in breach of its duty of good faith.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Technically, there are no regulatory sanctions against the insurer for breach of its duty of good faith.

However, section 12 of the IA gives the Monetary Authority of Singapore ("MAS") wide powers to cancel the licence of an insurer or impose such further conditions as it deems fit, *inter alia*, in the event that: (i) the insurer is carrying on its business in a manner likely to be detrimental to the interests of its policy owners; or (ii) it is in the public interest to cancel the licence.

**IV - Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

The principles as applied in the insurance context are also generally applicable in the reinsurance context.\(^\text{32}\)

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**Appendix**

(Sections 17 to 21 of the Marine Insurance Act (Cap. 387))

Insurance is uberrimae fidei

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.

**Disclosure by assured**

18.—(1) Subject to this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him; and if the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing

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30 *De Molestina v Ponton* [2002] 1 All ER (Comm) 587.

31 [2003] EWCA Civ 1834.

32 See Chapter 6 of PT O’Neill et al, *The Law of Reinsurance in England and Bermuda* (Sweet & Maxwell, 2010) where insurance cases are cited when discussing the duty of good faith in the reinsurance context.
the premium or determining whether he will take the risk.

(3) In the absence of inquiry, the following circumstances need not be disclosed:

(a) any circumstance which diminishes the risk;

(b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) any circumstance as to which information is waived by the insurer;

(d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstances" includes any communication made to, or information received by, the assured.

Disclosure by agent effecting insurance

19. Subject to section 18 as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer —

(a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and
(b) every material circumstance which the assured is bound to disclose, unless it comes to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract

20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true; and if it is untrue, the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

When contract deemed to be concluded

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be 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.

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Good faith is a fundamental principle of Spanish law which pervades the whole legal system. The principle is recognized in several provisions of the Civil Code. Section 7.1 provides that rights must be exercised in accordance with good faith. In the specific matter of contracts, section 1258 provides that the parties are bound by the terms of the contract and by all the consequences that according to the nature of the contract should be in agreement with good faith, usage and the law.

Uberrima bona fidei is the highest standard of good faith which is predicated of certain contracts, one of which is insurance. It is defined by case law as follows: “The principle of good faith should be taken into account, not only to supplement or complete the covenants of the parties but also to regulate the effects that during the life of the contract may and should be produced by certain events and by the reaction of the parties to them... it is the most important principle ... and it is contradicted or breached whenever one of the parties, with the intention of obtaining a benefit not derived from the straight application and purpose of the agreement, pretends ignorance about facts he is perfectly aware of, conceals the truth from the party that could not know it, performs an equivocal action to benefit from its doubtful meaning ...” (Decision of the Supreme Court of 29 January 1965, RJ 1965/262).

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

As said above, the principle is codified.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

The insurance laws do not specifically provide for the principle of utmost good faith since it is embedded in the general civil law principles which apply to all contracts. There is a separate duty of disclosure for the policyholder/insured subject to certain peculiarities. The policyholder/insured do not have to volunteer information but solely they have to answer truthfully the questions posed by the insurer.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

It is a continuous duty from the pre-contractual stage through the underwriting and the making and handling of claims.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Yes, to both but there is a special emphasis on the insured.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The policyholder/insured must answer truthfully the questions posed by the insurer such that the insurer will be able to have a fair understanding and view of the risk (section 10 of the Insurance Contract Act, ICA).

Examples: there are many, but D&O insurance offers many cases of questionnaires and information that did not reflect the real entity of the risk.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

Well, it is not exactly equivalent. The duty of disclosure is subject to the principle of good faith or in other words the duty of disclosure must be complied with in good faith. In fact they are complementary and indivisible.
9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

Please see our answer to Question 8.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

The remedies are substantially the same as follows: Under section 10 of ICA, in the event of “inaccuracies” (misrepresentations) or “reservations” (concealment or non-disclosure) by the policyholder of all relevant information as requested by the insurer in the questionnaire/proposal form, the insurer can either rescind the policy in one month time since the moment he finds out provided the loss has not occurred. In this event, the insurer may keep the premium for the period in course, save that he acted in bad faith or with gross negligence. If the loss occurs before the rescission is notified or if the misrepresentation or non-disclosure is discovered after the loss takes place, the insurer will no longer be entitled to rescind the contract but solely to reduce the indemnity in the same proportion to that existing between the premium actually collected and the premium that would have been collected had the real risk been disclosed to him. However, if the policyholder acted in bad faith or with gross negligence with the aim to deceive the insurer, then the insurer would be released from his obligation to indemnify (which is to be proved by the insurer), the insurer will be released from his obligation to indemnify.

In addition, it should be borne in mind that according to section 4 of ICA the insurance contract shall be void if upon its conclusion there is no risk or the loss has already occurred.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

They are two faces of the same coin.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

Actually, the main weight lies on the policyholder/insured. But the insurer is also subject to the principle of good faith. For example, the insurer cannot keep the premium paid by the insured in the event of rescission of the contract if he acted in bad faith.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

For example, questions included in the questionnaire cannot be too vague or general.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

It could be, namely in consumers risks. The questionnaire usually incorporates a number of warnings.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The general statutory remedies: damages.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

The insured has the duty to act honestly when making a claim.

The insured has the duty to provide all sorts of information on the circumstances and consequences of the loss. The breach of this duty due to bad faith or gross negligence on the part of the insured would release the insurer from its obligation to indemnify (section 16 of ICA).

The foregoing provision is connected with the general duty of salvage in all casualty insurances, which is to be understood as the duty to diminish or minimise the loss (section 17 of ICA). The consequences of the breach of this duty can go from the reduction of the indemnity depending on the importance of the damages sustained by the breach and the degree of fault of the insured, to the release of the insurer if the breach is due to the manifest intent of damaging or deceiving the insurer.

As a general rule, section 19 of ICA excludes from cover losses caused by the insured acting in bad faith. This is also the first standard exclusion in all insurance policies. Case law has ruled that the fraud/bad faith exclusion in an insurance policy cannot be raised against an injured third party. In such a case, the insurance company is left to recover the losses from the insured. It appears that this approach will change following a future major overhaul of ICA.
16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

As stated above (see answer 1), good faith is a fundamental principle of Spanish law which pervades the whole legal system. Furthermore, as a general rule, the Spanish procedural laws require the parties to any proceedings to abide by the rules of good faith. Consequently, third party beneficiaries are also subject to the principle of good faith.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

According to the 2013 Report on Fraud in Spanish Insurance 2013, elaborated by ICEA (Investigación Cooperativa entre Entidades Aseguradoras y Fondos de Pensiones), an association for the study and research of insurance-related topics and issues, the annual attempts of fraud were in the amount of 573 million euros, but insurance companies only paid 161 million, so they have saved 412 million, which is 71.9% of the suspicious amount claimed. The statistical data are obtained from cases where the author’s bad faith and his or her attempt to deceive the insurer have been proved.

Most of the attempts of fraud took place in motor insurance and the most frequent cases were: simulated or false theft; claims where there is no loss; intentional losses reported as accidental; transfer of liability (e.g. from the driver to the passenger).

In the framework of life insurance, the most frequent cases were: undeclared preexisting illnesses; withholding of information related to the circumstances of death; and, intentional death declared as accidental.

Apart from the insured’s post-contractual duty of good faith when making a claim, during the course of the contract, the policyholder/insurer have the duty to communicate to the insurer, as soon as possible, all circumstances that aggravate the risk and which have such nature that had them been known to him the insurer would not have covered the risk or would have done so under more onerous conditions (section 11 of ICA). If the loss occurs before the aggravation is notified, the insurer is released from any and all obligations under the policy if the policyholder acted in bad faith. In any other event, the indemnity shall be reduced in the same proportion to that existing between the premium actually collected and the premium that would have been collected had the real risk been disclosed to him (section 12 of ICA).

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Yes, provided the terms envisaged in section 10 of ICA are met. According to section 10, the policyholder (i.e., the buyer of cover) must answer truthfully the questions posed by the insurer prior to the conclusion of the contract. The policyholder will be relieved from said duty if the insurer does not submit a questionnaire or, submitting it, there are circumstances that may be relevant for the evaluation of the risk but are not covered in the questionnaire.

It follows that the policyholder is not under the proactive duty to disclose all material facts that may have a bearing on the evaluation of the risk, but only those he or she is asked about by the insurer. Under this system knowledge of sensitive and even prejudicial information to the insurer is not necessarily subject to disclosure to the extent the relevant questions are not asked in the questionnaire. Furthermore if the loss has occurred, the insurer will be only released from his obligation to indemnify if he proves that the policyholder acted in bad faith or with gross negligence. Otherwise he will have to indemnify on a reduced basis. Clearly, this rule is intended for the protection of the insureds. See our answer to Question 10, for further information on remedies for breach of declaration of risk.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

The insurer must handle the claim in a professional, business-like manner. It should not delay the adjustment and payment of the claim without sound and justified reasons. The consequences of an unjustified delay in settling the claim may be very onerous for the insurer.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

Yes.

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

It is usually applied in the context of adjustment and settlement of claims. Bad faith denials of insurance claims or frivolous litigation by the insurer against the insured’s claims can have serious consequences.

In the first case, failure to pay or the negligent delay in paying will result in the insurer paying a special interest which is punitive in nature since it is unrelated to the actual market cost of money. The amount will be calculated at the annual legal interest rate increased by 50 percent for each of the first two years payment is in arrears and at no less than 20% per cent thereafter. To be released from the punitive interest, the insurer must prove that there were justified causes that prevented it from settling the insured’s claim earlier. Case law has set out very stringent requirements which are very difficult to meet.
In the second case, there is a decision where the Supreme Court required the insurer to pay the claim exceeding the policy limit. Indeed, the Decision of the Supreme Court of May 2, 1988 (RJ 1998 3463) found that the insurer had unfairly hindered and delayed litigation and thus payment of the indemnity, while damages to the property had aggravated. Consequently, the insurer was ordered to pay the full indemnity beyond the limits of the policy.

It should be noted that these are contractual actions, not tort actions.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no general Code of Practice. Some insurance companies have their own Code. UNESPA (the Spanish insurer and reinsurer association) has developed guides of good practices for different types of policies (i.e. health, third party motor insurance, casualty) in order to ensure appropriate understanding by consumers of insurance policies (e.g. the coverage and exclusions of the contract, its prices, understanding of the importance of appropriately filling out the questionnaires), amongst other issues. Insurance companies may voluntary adhere to these guides as they are not mandatory.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

Yes. For example:

(a) As the conditions of the insurance must be written in a clear and precise way, the insurer cannot challenge the interpretation of the contract where doubts have arisen as a consequence of its own failure to write the contract in precise and clear terms; and,

(b) Clauses that limit or restrict the rights of the insureds must be highlighted and written in bold letters, and accepted explicitly by the policyholder or insured (section 3 of ICA). Otherwise, the clause may be null and void or simply inapplicable.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Yes, they do.

25. **To the extent that an insurer's breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Yes. The breach of the duty of utmost good faith may constitute an administrative infraction which can be classified as very serious, serious and slight depending on whether the breach is reiterated or not (sections 40.3.n, 40.4.h and 40.5.b of the Consolidated Text of the Law for the Regulation and Supervision of Private Insurances 2004, as amended).

**Sanctions**

(a) Very serious infractions can entail any one of the following sanctions:

- Revocation of the administrative license;
- Suspension of the administrative license to operate in one or more lines for a period not exceeding 10 years nor less than 5 years;
- Public advertising of the infraction;
- Fine for 1% of its capital (or between € 150,000 and 300,000 if 1% of capital is less than € 150,000).

(b) Serious infractions can entail any one of the following sanctions:

- Suspension of the administrative license to operate in one or more lines for up to 5 years,
- Public advertising of the infraction;
- Fine between € 30,000 and 150,000.

In both types of infractions (very serious and serious) the public advertising of the infraction is compatible with any of the sanctions imposed.

(c) Slight infractions

- Fine for up to € 30,000, or private reprimand.
IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

In essence they are the same. However, the emphasis is greater in treaty reinsurance, for example.

* * * *
Sweden

MANNHEIMER SWARTLING

Anette Ivri Nordin and Jon Lindgren

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

No, there is no direct equivalent to the principle under Swedish law. Nevertheless, general references to uberrimae fidei or utmost good faith are made in Swedish insurance law literature and imply an extended duty of loyalty between the parties. Although expressed as being mutually applicable to the parties, uberrimae fidei is mainly referred to in connection with the policyholder’s/insured’s obligations/duties towards the insurer which are mainly manifested in the insured’s pre-contractual and post-contractual duties of disclosure stipulated in the Swedish Insurance Contracts Act ((Sw. försäkringsavtalslagen), the “ICA”). However, the insurer’s obligation to provide information under the ICA may also be regarded as an expression of the parties’ extended duty to act loyal towards each other.

In addition to the ICA, general contractual principles apply to a contractual party’s unethical behaviour, such as actions in conflict with good faith etc.

Thus, although there is no direct equivalent to the principle of utmost good faith under Swedish law, the questions below will be answered with reference to the ICA and to general contractual law.

At times references are made to utmost good faith in insurance and reinsurance terms and conditions, due to the international nature of many insurance contracts. When such a condition provides no definition of utmost good faith, an interpretation would be dependent upon e.g. foreign law.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

N/A (please see Section 1 above).

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

N/A (please see Section 1 above).

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

N/A. However, the ICA applies to most insurance contracts, with the exception of reinsurance contracts. The provisions on the insured’s duty of disclosure and the duty for the insurer to provide information differ depending on whether the relevant insurance is a consumer insurance (Sw. konsumentförsäkring), a business insurance (Sw. företagsförsäkring) or a personal insurance (Sw. personförsäkring) as defined in the ICA (personal insurance will below be referred to as “life insurance”).

General contract law applies to reinsurance contracts, although some provisions of the ICA may be analogically applied to such contracts (please see Section 27 below).

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

N/A. However both insured’s duty of disclosure and the insurer’s duty to provide information apply both pre-contractually and post-contractually (see Sections 6, 7, 12, 16 and 19 below).

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

The duty of disclosure under the ICA applies to the policyholder (in relation to consumer insurance, business insurance and life insurance) and the insured (in relation to life insurance) but not to the

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1 Below the term insured refers to both policyholder and insured, unless otherwise specified.

2 Please note that the ICA contains further provisions on disclosure and the duty to provide information in relation to group insurance that will not be accounted for in this questionnaire.

3 Please note that insured refers only to the insured in this context and not to both insured and policyholder (see footnote 1 above). Under the ICA, an insured in conjunction with life insurance is a person whose life or health the insurance shall apply to.
insurer. Nonetheless, under the ICA, the insurer has a duty to provide the insured with information about the insurance and its coverage during the pre-contractual stage.

A - For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Under the ICA, a potential policyholder seeking consumer insurance has a duty to disclose information, upon request of the insurer, which may be material to the insurer’s decision to issue the insurance. The duty includes providing true and complete answers to the insurer’s questions. The aforesaid is also applicable to life insurance, but the duty of disclosure also applies to the insurer.

A prospective business insurance policyholder shall, in addition to the aforesaid, provide information which is of material significance for the insurer’s risk assessment notwithstanding the absence of inquiry by the insurer.

A Swedish Supreme Court ruling that is often referred to in Swedish legal literature is NJA 1940 s. 280 II, where the policyholder had, upon request of the insurer, incorrectly stated that there were four mechanically driven machines in the insured building. However, there were in fact five machines in the building. The building was later destroyed in a fire and the insured claimed compensation. The insurer contested the claim, stating that the policyholder had not provided the insurer with correct information and that the insurer would not have issued insurance if the policyholder had provided correct information (because, as it may be understood, the risk of fire increased with the number of mechanically driven machines). The Supreme Court held that the insurer would not have issued the insurance had the policyholder disclosed the information to the insurer. The insurer was released from its liability to indemnify the insured.

In a case from the Göta Court of Appeal, RH 1995:3, that concerned an insured’s duty of disclosure when entering into a life insurance contract, the insured had, upon request of the insurer, provided incorrect information about his health condition. When later claiming insurance indemnification, the insurer contested the claim arguing that it would have issued the insurance on different terms and conditions had the insured provided correct information. The Göta Court of Appeal held that if the insurer had received correct information about the insured’s state of health, the disease which actually had affected the insured and thus formed the basis of the claim for compensation, would have been excluded from the insurance coverage. The insured’s claim was therefore dismissed.

The Supreme Court case NJA 1949 s 786 concerned a business insurance policyholder’s failure to provide the insurer with information of material significance for the insurer’s risk assessment. The policyholder had insured two barges but had not disclosed to the insurer that the insured barges in fact consisted of parts from a wrecked barge, why the insured barges’ seaworthiness could be questioned. The barges sank and the insured claimed indemnification under the insurance. The Supreme Court stated that it could be assumed that the insurer would not have issued any insurance, or, at least, that the insurance would have been issued on different terms and conditions had the policyholder disclosed the information about the barges’ seaworthiness. Moreover, that the policyholder should have realized that the withheld information was relevant to the insurer’s risk assessment and that it was negligent not to provide the insurer with this information. The insurer was therefore released from its liability to indemnify the insured.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

N/A (see Sections 1 and 7 above).

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

N/A (see Sections 1 and 7 above).

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The remedies for a breach of the duty of disclosure differ depending on whether the insurance is a consumer insurance, a life insurance or a business insurance.

If a policyholder of a consumer insurance has intentionally or negligently disregarded the duty of

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4 Please note that insured refers only to the insured in this context and not to both insured and policyholder (see footnote 1 above).

5 It should be noted that this case concerned business insurance. If the case would have concerned consumer insurance, it is likely that the outcome would have been different (please see Section 10 below where the remedies for breach of the duty of disclosure are further explored).
disclosure, the insurance indemnification may be reduced in respect of each insured in accordance with what is reasonable taking into account: the significance which the fact would have had for the insurer’s risk assessment, whether such disregard was intentional or negligent, and other circumstances.

If a policyholder or an insured of a life insurance has intentionally or negligently provided incorrect or incomplete information of significance for assessment of the risk, and any negligence was not insignificant, the insurer shall be released from liability for all insured events where the insurer can show that it would not have issued the insurance had the duty of disclosure been fulfilled. Where the insurer can show that the insurance would have been issued for a higher premium or would have otherwise been issued on other terms and conditions than those contracted to, its liability shall be limited to the amount reflected by the premium (pro rata) and other terms and conditions agreed to. The insurer’s liability may also be adjusted if the insurer has not acquired reinsurance which otherwise would have been acquired. However, the aforesaid described in this paragraph shall not apply to the extent that it would lead to an unreasonable result in respect of the policyholder or his successor in interest.

What is described in relation to life insurance in the paragraph above, applies also to the policyholder of a business insurance. However, the exception for unreasonable results does not apply to business insurance. Moreover, insurance terms and conditions may in certain situations stipulated in the ICA, provide that the insurer shall be liable only to the extent that it is shown that the incorrectly described circumstance was insignificant in respect of the occurrence of the insured event or scope of the damage.

The insurer’s liability in relation to the aforementioned types of insurance, shall not be limited pursuant to the above if the insurer knew or should have known, at the time that the duty of disclosure was disregarded, that the information provided was incorrect or incomplete. The aforesaid applies also where the incorrect or incomplete information lacked significance or subsequently ceased to be of significance to the contents of the agreement.

If a policyholder has acted fraudulently or contrary to good faith in conjunction with fulfillment of the duty of disclosure, the insurance contract (regardless whether it concerns a consumer insurance, life insurance or business insurance) is void pursuant to the provisions of the Swedish Contracts Act (Sw. avtalslagen), and the insurer shall be released from liability for insured events which occur thereafter.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

N/A (see Sections 1 and 7 above).

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

Under the ICA, an insurer shall, prior to the issuance of a consumer insurance policy or a life insurance policy, provide information which facilitates the insured’s assessment of the need for, and choice of, insurance. The information shall reproduce, in a simple manner, the primary content of the applicable insurance terms and conditions of which the insured needs to be aware in order to assess the cost and scope of the insurance policy. Important limitations of the insurance coverage shall be emphasised separately.

The insurer’s duty to provide information also applies to business insurance. However, the duty does not apply if the potential policyholder of a business insurance may be deemed to have no need of the information.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

To the best of our knowledge, there are no relevant Swedish court cases concerning this issue. However, the Swedish National Board for Consumer Disputes (Sw. Allmänna reklamationsnämnden), a governmental board that issues non-binding recommendations in consumer related disputes, has in a matter (2006-3407) held that an insurer, in connection with the issuance of a travel insurance, had not clearly emphasised an important limitation of the insurance coverage, whereby, with reference to general principle of contract law, the limitation was disregarded (see Section 15 below regarding the insurer’s duty to provide information).

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

N/A (see Section 1, 6 and 12 above).

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

Under the ICA, if an insurer of a consumer insurance policy or a life insurance policy has failed to
separately emphasise important limitations of the coverage – either before or after execution of the contract – such limitations may not be relied upon by the insurer. Moreover, if an insurer fails to comply with the duty to provide information, the insurer may be sanctioned and/or required to disclose the information in accordance with the Swedish Marketing Act (Sw. Marknadsföringslagen); this also applies to business insurance.

Please note that all types of insurance contracts may also be challenged with reference to general principles under Swedish contract law.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

Under the ICA, the insured of a consumer insurance has a duty to comply with any terms and conditions of the insurance policy regarding the obligation to report insured events to the insurer within a specific time. Also, the insured shall comply with terms and conditions or instructions from the insurer pursuant thereto regarding the obligation to participate in the investigation of the insured event or the investigation of the insurer’s liability. Failure to comply with the abovementioned obligations may entail that the indemnification that would otherwise have been paid to the insured may be reduced in accordance with what is reasonable under the circumstances if such failure has caused loss to the insurer. Under third party liability insurance, the compensation to the injured third party may not be reduced by the insurer even if the insured has acted in breach of the abovementioned obligations. Instead, the insurer has a right to recourse against the insured a reasonable amount of which the insurer has paid to the injured third party.

Further, under the ICA, if an insured or a third party seeking indemnification from an insurer following an insured event, intentionally or recklessly provides or keeps secret or conceals information of significance for the assessment of the right to insurance indemnification, the indemnification which otherwise would have been paid to him may be reduced in accordance with what is reasonable under the circumstances.

The above also applies to life insurance, with the exception for what is stated in relation to liability insurance.

What is stated above regarding consumer insurance also applies to business insurance. However, please note that the ICA stipulates that if a claimant fails to comply with a term of a contract of a business insurance stipulating that an insured event must be reported to the insurer within a certain period of time, not less than six months from the date on which the claimant acquired knowledge of its claim, the claimant may lose its right to indemnification.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

As mentioned in Section 16 above, a third party beneficiary seeking insurance indemnification must not provide incorrect information or keep significant information secret or concealed during the claim stage – otherwise the indemnification may be reduced.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

To the best of our knowledge, there is no relevant Swedish case-law concerning this issue.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Under the ICA, an insured completing a proposal for a life insurance policy shall, upon request of the insurer, disclose information which may be of significance as to whether the policy shall be issued. This entails that if the insured is asked by the insurer whether he/she is or has been engaged in criminal activities and such information is deemed relevant for the insurer’s risk assessment, a concealment of such activities would be a breach against the duty of disclosure under the ICA, which would allow the insurer to cancel the policy or amend it, either by charging a higher premium or change the terms and conditions of the policy. However, the insured has no obligation to inform about his/her criminal activities if he/she has not been asked to disclose such information by the insurer.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

N/A. However, under the ICA, an insurer has duties when dealing with a claim that may be regarded as an expression of the parties’ extended duty to act loyal towards each other.

Under the ICA, an insurer that has been advised of an insured event under a consumer insurance policy shall, without delay, take the measures necessary to settle the claim. Settlement of claims shall take place quickly and in observance of the legitimate interests

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7 It may be noted that from 1 January 2015, this period of time will be extended to one year.
of the insured and other affected parties. After an insured event has been reported, the insurer shall inform the claimant about which information the insurer needs to settle the claim. Generally, insurance indemnification shall be paid within a month after the claimant has provided the insurer with all the information required to settle the claim. If payment is not made in a timely manner, the insurer shall pay penalty interest.

The above applies also to business insurance unless the contracting parties agree otherwise.

Under the ICA, an insurer which has been notified of an insured event under a life insurance policy shall, without delay, take the necessary measures to pay insurance indemnification. The payment shall be made quickly and in observance of the interests of the party entitled to compensation.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

The duty described under Section 19 applies also to third party beneficiaries of cover.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

To the best of our knowledge, there are no relevant Swedish court cases concerning this issue. However, the Swedish Financial Supervisory Authority (the “SFSA”) has in a matter (reference number 7445-99-301), where the insurer was issued a remark, pointed out that active claims handling is part of what constitutes good insurance standard (see Section 22 below).

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

Under the Swedish Insurance Business Act (Sw. försäkringsrörelselagen), Swedish insurers are obliged to conduct their business in accordance with good insurance standard. Good insurance standard covers all aspects of the insurer’s business, including the duty to provide pre-contractual and contractual information as well as post-contractual claims handling. The content of good insurance standard can be found in inter alia regulations issued by the SFSA and also in supervisory decisions by the SFSA (see Section 21 above). Few regulations and supervisory decisions deal with the insurers’ duty to inform and/or handle claims, since these rules are quite clearly set out in the ICA. Nonetheless, SFSA regulation FFFS 2011:39, “Regulations and general guidelines regarding information about insurance and occupational pensions”, stipulates e.g. how insurers should inform the insured how complaints can be brought forward to the insurer and where the insured should turn in case there is a dispute over cover between the insured and the insurer. In addition, the industry organisation for insurers, Insurance Sweden (Sw. Svensk Försäkring), has issued a recommendation concerning pre-contractual information. Both the SFSA regulation and the Insurance Sweden recommendation should be considered part of what constitute good insurance standard.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

Yes, a court can disregard a term of an insurance contract in line with what is set out in Section 15 above. This entails that if an insured has e.g. breached an important security provision under a consumer or life insurance in a way that would make an insurance claim invalid, but the court finds that the insurer did not emphasise this specific security provision in connection with the issuance of the insurance contract (leaving the insured unaware of the security provision), a court may disregard the security provision and rule in favour of the claimant, despite the wording of the contract.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer did not emphasise this security provision in connection with the issuance of the insurance contract?**

No, a court can disregard a term of a contract of insurance if it would be

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

N/A (see Section 1 above).

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

If an insurer is deemed to be in breach of good insurance standard, as described in Section 22 above, the SFSA may issue a remark or warning combined with regulatory fines. In extreme cases, the SFSA may revoke the insurer’s licence to conduct insurance business.

**IV - Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**
Under Swedish law there is no specific legislation concerning reinsurance contracts and issues regarding reinsurance contracts are thus governed by general Swedish contract law. When it comes to incorrect pre-contractual information, a contract can be deemed invalid pursuant to general Swedish contract law, if a party to a contract has been induced to enter into the agreement through fraudulent deception by the other party. A contract can also be deemed invalid if the circumstances in which the contract arose were such that, having knowledge of such circumstances, it would be inequitable to enforce the contract.

Even if the ICA is not directly applicable to reinsurance contracts, when circumstances are similar to those applicable to direct insurance and there is no other legal hindrance (such as the explicit wording of the contract), the provisions of the ICA could arguably be analogically applied to the relevant reinsurance contract. When it comes to errors in pre-contractual information, a reinsurer would typically be in the same situation as an insurer. In both cases, the party that will assume the risk under the contract will typically have a legitimate interest of being correctly informed about the risk before entering into the contract. Therefore, the principle set out in the ICA on the insured’s duty of disclosure, which is set out in Section 7 above, would most likely be analogically applicable to a reinsured. The same will most likely apply at the claim stage. Please note that to the best of our knowledge there is no case-law from Swedish courts where such analogical application has been used. However, in an arbitration case from 1998 that was made partially public through challenge proceedings in the Swedish Supreme Court, the arbitral tribunal used analogical application of the ICA when settling a dispute over a reinsurance contract (Svenska Kreditförsäkrings AB v. Munich Re, Swiss Re and other reinsurers - Swedish Supreme Court case T 2270/00).

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Direct Insurance Contracts

At its most stringent, the principle of utmost good faith imposes on the parties to a contract a duty to disclose any and all material facts on their own motion.\(^3\) Such general, comprehensive principle of utmost good faith is not provided for in Swiss law on direct insurance contracts.\(^2\)

However, the Swiss Federal Act on Insurance Contracts ("ICA") imposes certain duties of information and disclosure ("Information Duties") on the parties to an insurance contract, which are, to a certain extent, similar to the duties deriving from the principle of utmost good faith (for details cf. questions 7 and 12 below):

For example, “before concluding the insurance contract, the insurer is obliged to inform the insured about its identity and the essential elements of the insurance contract in a comprehensible way [...]” ("Duty to Inform"; art. 3 para. 1 ICA). In return, the offeror (i.e., in the meaning of the ICA, the insured) must, “based on a questionnaire or other written questions, [...] disclose to the insurer in writing all facts which are important for the assessment of the risk and which are known or must be known to the offeror when concluding the contract” ("Duty to Disclose"; art. 4 para. 1 ICA).

Further, the general statutory civil law principle of good faith, stating that “every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations” (art. 2 of the Swiss Civil Code ["CC"])) applies to insurance contracts as well.\(^3\) The principle of good faith can be a basis for deriving, through contract interpretation, implied covenants such as, e.g., duties to inform or advise the other party to a contract of certain facts, in cases where such duties are not otherwise applicable based on the law or the contract itself, but where the other party could in good faith rely on their application.

In light of the above, our answers to the questions below will address the parties’ Information Duties under Swiss statutory law rather than the duty of utmost good faith in the narrow sense (which has not been implemented in Swiss law).

Reinsurance Contracts

Reinsurance contracts are, in contrast to direct insurance contracts, not governed by the specific legislation of the ICA (cf. art. 101 para. 1 no. 1 ICA). Rather, reinsurance contracts are subject to the general contract rules of the Swiss Code of Obligations ("CO") (cf. art. 101 para. 2 ICA) and to the general principle of good faith as embodied in art. 2 CC.\(^6\) However, the CO does neither impose any duties similar to the duties deriving from the principle of utmost good faith on the parties, nor does it specifically address reinsurance contracts. Moreover, many provisions of the CO are of a non-mandatory nature only (dispositives Recht). The parties may therefore contractually modify or waive such provisions of statutory law. Consequently, the parties to a reinsurance contract can in general freely agree upon their duties as well as upon possible remedies in case of a breach of such duties.

It is largely undisputed among Swiss scholars that even in the case where the parties did not specifically negotiate or agree on them, certain disclosure duties apply in the context of reinsurance contracts.\(^7\)

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3. Please note that the statutory duties mentioned apply to the policyholder rather than to the insured/beneficiary of an insurance contract. However, for the sake of consistency with the questions we will refer to the insured instead of the policyholder (where not mentioned otherwise).

4. BSK VVG-Nebel, art. 100 no. 8; Graber/Lang/Kunszt, p. 280.


However, the legal basis and scope of such duties remains unclear.

Although certain authors consider the principle of utmost good faith as such to be applicable on reinsurance contracts, there is no definition of such principle, neither in Swiss statutory law nor based on case law of Swiss courts.

2. **Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?**

**Direct Insurance Contracts**

As outlined above, for **direct insurance contracts**, Swiss law does not provide for a principle of utmost good faith per se, but rather imposes Information Duties on the parties to an insurance contract. These Information Duties qualify as statutory law principles under the ICA.³

**Reinsurance Contracts**

The source of a duty of utmost good faith / duty to disclose for **reinsurance contracts** is unclear. Swiss legal authors take different views, considering the duty to disclose a civil law principle derived from the broader statutory principle of good faith or basing such principle on an analogous application of the statutory Duty to Disclose provided for in art. 4 of the ICA. Other authors consider such duty to stem from international principles governing reinsurance contracts.¹²

3. **Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?**

**Direct Insurance Contracts**

A general principle of utmost good faith does not exist for **direct insurance contracts**. However, direct insurance contracts are governed by the Duty to Disclose (based on a questionnaire or other written questions) pursuant to art. 4 ICA.

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³ Cf. art. 3 et seqq. ICA.

⁴ MORSCHER, p. 123.

⁵ Cf. in particular art. 4 para. 1 ICA; BSK VVG-NEBEL, Art. 101 no. 35; GRABER, p. 21; GRABER/LANG/KUNSZT, p. 281.

⁶ BSK VVG-NEBEL, art. 101 no. 31; LÖRTSCHER, p. 371.

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**Reinsurance Contracts**

For **reinsurance contracts**, the statutory Duty to Disclose of the ICA does not apply directly because reinsurance contracts are exempted from the scope of application of the ICA (art. 101 para. 1 no. 1 ICA). It is controversial among Swiss legal scholars whether the Duty to Disclose applies by analogy, whether a similar duty deriving from the principle of good faith applies or whether the principle of utmost good faith is applicable by virtue of general international reinsurance practice. However, we would expect that such concepts would each apply exclusively.

4. **Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?**

**Direct Insurance Contracts**

In general, **direct insurance contracts** (including life insurance contracts)¹³ are, to the extent the ICA is applicable, governed by the statutory Information Duties of the ICA. Certain types of insurance contracts are subject to specific legislation such as e.g. the compulsory accident insurance, the social health insurance or the occupational pension insurance scheme.¹⁴ While the Information Duties apply by analogy to compulsory accident insurance,¹⁵ they do not extent to the compulsory social health insurance and occupational pension insurance schemes in general, but only to the respective voluntary (additional) insurance schemes.¹⁶

**Reinsurance Contracts**

Reinsurance contracts are exempted from the scope of the ICA (art. 101 para. 1 no. 1 ICA). Whether or not the principle of utmost good faith applies is controversial amongst scholars. However, it appears to be undisputed that there are similar pre-contractual duties to disclose certain information which apply between the insurer and the reinsurer.¹⁷
5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

The Information Duties as described above (cf. question 1) apply at the pre-contractual stage only. However, with regard to the insured, the ICA contains further obligations concerning the providing of information which only become relevant at a post-contractual stage.  

**II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage**

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

Under art. 3 and 4 of the ICA, both the insurer and the insured are bound by specific pre-contractual Information Duties aiming to balance the respective information deficits.  

**A - For the Insured**

7. **What is the content of the duty of utmost good faith for the insured?**

Based on its Duty to Disclose, the insured has to disclose to the insurer upon written request all significant facts which are relevant for the assessment of the risk to be insured that the insured is or must be aware of at the point in time of conclusion of the contract (art. 4 para. 1 ICA). Significant risk factors are risk factors that may influence the insurer’s decision to conclude the contract at all or to conclude it based on the agreed terms (art. 4 para. 2 ICA).

In case a representative concludes the insurance contract for the insured, the Duty to Disclose extends to the knowledge of the represented person as well as to the knowledge of the representative (art. 5 para. 1 ICA). If a contract is entered into for the account of a third party, the significant risk factors known by this third party have to be disclosed by the policy holder as well, unless the contract is concluded without the knowledge of this third party or a timely transmission of the third party’s information to the policy holder is not possible (art. 5 para. 2 ICA).

It has to be noted that the insured’s Duty to Disclose only encompasses facts for which the insurer has asked in writing and in a sufficiently clear and unambiguous manner. For example, the Swiss Federal Supreme Court (“SFSC”) has decided that an insured cannot be expected to understand relatively unknown medical terminology such as “Lumbago” for aches in the lower back.

The insured has to answer the questions raised by the insurer completely and truthfully. The insured has to provide the answers to the insurer in writing (art. 4 para. 1 ICA).

The relevant point in time with regard to the Duty to Disclose is the conclusion of the contract and not e.g. the date of the application of the prospective insured or the date of the completion of the questionnaire.

As the contract is regularly concluded after the declaration of risks by the prospective insured, the prospective insured has an additional duty to update its disclosure until conclusion of the contract in case the risk factors change or new risk factors arise.

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The most illustrative cases with regard to the insured’s Duty to Disclose deal with the scope and the interpretation of the questions asked by the insurer and the expected level of detail of the insured’s answers to such questions:

- An insured who was in hospital for three days after a suicide attempt may not negate the question whether he has been in hospital for therapy without violating its Duty to Disclose (SCD 110 II 499, 503).

- Regular persons can be expected to recall the consultation of a medical doctor which has occurred in the previous four or five years. Related facts must therefore be disclosed in response to the respective question. Omission of such facts, deliberately or negligently, constitutes a violation of the insured’s Duty to Disclose (SCD 109 II 60, 64).

- Upon request whether the insured has filed an application for life insurance with another insurance company, the insured must, if

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18 Cf. art. 28 et seqq., 28 and 39 ICA.


20 BSK VVG-NEF, art. 4 no. 44 et seqq.; FUHRER, no. 6.134 et seq.

21 Swiss Federal Supreme Court Decision (“SCD”) 101 II 339, 343.


23 Cf. the wording of art. 4 and 6 ICA; NEF/VON ZEDTWITZ, in: Honsell/Vogt/Schnyder/Grolimund (eds.), Basler Kommentar Versicherungsvertragsgesetz Nachführung, Basel/Zurich 2012, art. 4 ad no. 7 (citation: Addendum BSK VVG-AUTHOR); FUHRER, no. 6.117 et seqq.

It is controversial in Swiss legal literature whether the insured must be notified within these four weeks or whether it is sufficient for the insurer to issue the notification within the four-week period. The SFSC has, under the former version of art. 6 oldICA, in two instances relied on the date of issuance of the notice of termination. However, in a recent decision, the SFSC indicated that the termination notice has to be served to the insured within the four-week prescription period. In any case, the termination becomes effective only once the notice has been served on the insured (art. 6 para. 1 last sentence ICA).

In general, the termination has effect for the future. However, if an insured event has already occurred, the insurer is exempted from its obligation to indemnify the insured if i) the insured made use of its right of termination pursuant to art. 6 para. 1 ICA and ii) the omitted or incorrect disclosure of the significant risk factor has influenced the occurrence or extent of the damages in question. If the insurer has already indemnified the insurer for such damages, he is entitled to restitution (art. 6 para. 3 ICA).

The insurer may not terminate an insurance contract upon a violation of the insured’s Duty to Disclose if (art. 8 ICA):

i) the non-disclosed or incorrectly notified fact had ceased to exist before the insured event occurred;

ii) the insurer provoked the violation of the obligation to disclose;

iii) the insurer knew or must have known the non-disclosed fact;

iv) the insurer correctly knew or must have known the incorrectly disclosed fact,

v) the insurer waived the right to terminate the contract; or

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29 SCD 5C.5/2005, no. 3.3 et seq.; SCD 129 III 713, 714.

30 SCD 4A_112/2013, no. 2.

31 Pouget-Hänsele, p. 29; Gauch, p. 367.

32 Fuhrer, no. 6.153 et seq.
vi) the person who had the duty to disclose did not answer one of the questions asked and the insurer nevertheless concluded the contract, unless based on other information of the person the question must have been considered as to be answered in a certain way that amounts to an incorrect or non-disclosure of a significant risk factor which the person knew or must have known.

The remedy in case of the insured’s violation of the Duty to Disclose is unilaterally mandatory. Modifications to the detriment of the insured are therefore not possible (art. 98 para. 1 ICA).

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

N/A. Please see questions 8 and 9 above.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

Based on its Duty to Inform, the insurer must inform the insured in writing prior to the conclusion of the insurance contract in a comprehensive way (e.g. in non-technical language) about the essential elements of the insurance contract, such as (art. 3 para. 1 ICA):

i) the insurer’s identity;
ii) the insured risks;
iii) the insurance coverage;
iv) the premiums due and the other obligations of the insured;
v) the term and termination of the insurance contract;
vi) the methods, principles and bases for calculating and distributing surplus profits;
vii) the surrender and transformation values; and
viii) the handling of personal data, including purpose and type of data collections as well as data recipients and data storage.

Further, the information regarding the personal data and the general conditions of insurance must be in possession of the insured at the time of conclusion of the contract (art. 3 para. 2 ICA).

In addition to the statutory Duty to Inform the insured, the SFSC acknowledges a limited duty of the insurer or his agent to advise the prospective insured in case the insured evidently needs such advice.\(^\text{33}\)

Further, not only the insurer, but also an insurance intermediary, as the case may be, has a duty to inform the insured. An insurance intermediary must inform the insured at least about (art. 45 of the Swiss Federal Act on Insurance Supervision \("\text{ISA}\")):

i) its identity and address;
ii) whether the insurance coverage offered by the intermediary in a particular line of insurance is provided only by one or by several insurers, and which insurers are involved;
iii) its contractual relationship with the insurers on whose behalf they act and the name of these insurers;
iv) the person who can be held liable for negligence, mistakes or incorrect information in connection with the intermediary’s activity; and
v) the processing of personal data, in particular the purpose, scope and recipients of data, as well as the storage of data.

The referred information must be delivered to the insured upon first contact on a durable and accessible medium (art. 45 para. 2 ISA).

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The current version of art. 3 and art. 3a ICA have been in force since January 2007 only. Consequently, the insurer’s Duty to Inform as described above does not apply to contracts concluded before 1 January 2007. No Supreme Court decisions are yet available on these provisions. Under the former art. 3 oldICA\(^\text{34}\), the insurer only had to provide the insured with an excerpt of its general conditions of insurance as opposed to the Information Duties described under question 12 above. The respective case law is therefore outdated.


\[\text{34}\] Cf. AS 24 719.
14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

Based on art. 3 para. 1 lit. c ICA, the insurer must inform the insured about its duty to pay the premium and about the insured’s further duties under the insurance contracts. This includes the insured’s duty to notify the insurer of any aggravation of risks and the duty to immediately inform the insurer in case of occurrence of an insured event.\(^{35}\) However, under the current legislation in the ICA, there is no obligation to notify the prospective insured of the consequences of any pre-contractual omission of information, misrepresentation or similar. Consequently, the insurer’s omission to inform the prospective insured about its Duty to Disclose does not constitute a breach of the insurers Duty to Inform the insured. This applies for the actual Duty to Disclose as well as for the duty to update such information until conclusion of the contract.

Such an obligation to inform the insured about its Duty to Disclose was included in the draft bill of the total revision of the Insurance Contract Act,\(^{36}\) which has been rejected by the Swiss parliament in 2013 with the instruction to the Federal Council to prepare a partial revision on certain defined issues. Whether an obligation of the insurer to notify the insured of the consequences of any misrepresentation will form part of this partial revision is unknown at this stage, since it is not listed as an issue which the Federal Council was instructed to address in the partial revision. A draft for the partial revision is not yet available.

In any case, under the current legislation it is not a breach of the insurers Duty to Inform not to notify the prospective insured of the nature and extent of its Duty to Disclose.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

If the insurer violated its Duty to Inform, the insured is entitled to terminate the insurance contract by written notice (art. 3a para. 1 ICA). The termination right expires four weeks after the insured becomes aware of the insurer’s breach, but in any case no later than a year after the breach of the Duty to Inform (art. 3a para. 2 ICA). Similar to the termination right of the insurer in case of a violation of the insured’s Duty to Disclose, it is unclear whether the notice of termination has to be issued within the four weeks prescription period or whether the notice has to be served to the insurer within such period.\(^{37}\)

Until the termination notice is served to the insurer, the insurance contract remains in force and the insured is obliged to pay the insurance premium.

The insurer’s Duty to Inform (art. 3 ICA) as well as the right to terminate the contract in case of breach of such Duty to Inform (art. 3a ICA) are unilaterally mandatory law (art. 98 para. 1 ICA). These provisions cannot be contractually modified to the detriment of the insured.\(^{38}\)

If the insurer breaches its ancillary duty to advise the insured, the insured may not avoid the contract, but is entitled to damages.\(^{39}\)

If an insurance intermediary violates its information duty towards the insured (see question 12 in fine), the insured may potentially claim damages, but cannot avoid the contract.\(^{40}\)

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\(^{35}\) Addendum BSK VVG-KUHN/GEIGER-STEINER, art. 3 no. 11 et seq.


\(^{37}\) Cf. question 10 above.

\(^{38}\) SÜS SKIND, p. 25.

\(^{39}\) MAURER, p. 259.

\(^{40}\) DU PASQUIER/MENOUID, in: Stupp/Hsu (eds.), Basler Kommentar Versicherungsaufsichtsgesetz, Zurich 2013, art. 46 no. 53 et seqq. (citation: BSK VAG-AUTHOR); FÜHRER, no. 6.65.

\(^{41}\) BSK VVG-U. NEF, art. 4 no. 7.
Aggravation of risk

Regarding the aggravation of risk, the respective notification to the insurer and the insurer's remedies, the law distinguishes between the aggravation of risk caused by acts of the insured (art. 28 ICA) and aggravation of risk without acts of the insured (art. 30 ICA). The consequences of such aggravation of risk in both cases depend on whether or not the insured has notified the insurer of the aggravation of risk. However, while the insured is under an obligation to notify the insurer in case of an aggravation of risk not caused by the insured (in such a case, the insurer may basically not terminate the contract; see below), such an obligation does not exist if the insured has caused the aggravation of risk (in such a case, the insurer may terminate the contract).  

Prerequisite for the application of the rules on the aggravation of risk is the substantial aggravation of a significant risk factor after conclusion of the contract. An aggravation of risk is deemed to be substantial, if it i) had influenced the insurer's decision to conclude the contract at all or on the basis of the terms agreed (material substantiality) and if ii) the scope of this specific risk has been determined by the parties at the conclusion of the contract (formal substantiality) (art. 28 para. 2 ICA).  

In case of an aggravation of risk caused by acts of the insured, i.e. if the insured has set an adequate cause for such aggravation, the insurer is no longer bound by the contract (art. 28 para. 1 ICA) and therefore basically has the right, during an indefinite period, to terminate the contract by notice to the insured. In contrast to the termination in case of the violation of the pre-contractual Duty to Disclose, this notice is not subject to any formal requirements. Since this comes with an immense legal uncertainty for the insured, he may notify the insurer in writing of the aggravation of the risk, with the consequence that the insurer's right to terminate the contract expires 14 days after receipt of such notification (art. 32 no. 4 ICA).  

In addition, the consequences of an aggravation of risk do not apply if:

i) the aggravation neither influenced the occurrence nor the extent of the insured event (art. 32 no. 1 ICA);  

ii) the aggravation was undertaken with the intention to protect the insurer's interest (art. 32 no. 2 ICA);  

iii) the aggravation was caused due to an act of humanity (art. 32 no. 3 ICA); or  

iv) the insurer expressly or tacitly renounced the right to terminate the contract (art. 32 no. 4 ICA).

Nevertheless, unless otherwise agreed (art. 28 para. 2 ICA), the insured has no duty to notify the insurer of such aggravation of risk.  

If the aggravation of risk was not caused by the insured, the insured is under a duty to notify the insurer in writing of such aggravation within due time, after it came to his knowledge. In such a case, the insurer is, unless contractually otherwise agreed upon, bound by the insurance contract and its terms, despite of the aggravated risk (art. 30 para. 2 ICA). If the insurer terminates the contract based on a contractually stipulated right to terminate in case of an aggravation of risk, the termination becomes effective 14 days after notification of the insured (art. 30 para. 3 ICA).  

If the insured breaches its duty to notify the insurer, the remedies are the same as in case of an aggravation of risk caused by the insured himself (art. 30 para. 2 ICA). In addition, the insured may become liable for damages based on its violation of the duty to notify the insurer.  

The articles regarding the aggravation of risk are unilaterally mandatory law (art. 98 para. 1 ICA). Consequently, the prerequisites may only be heightened and the remedies alloyed for the benefit of the insured.  

Notification in case of the occurrence of an insured event

The beneficiary of an insurance has a statutory duty to notify the insurer in case of the occurrence of an insured event, as soon as he has learned about the...
event and about the resulting insurance claims (art. 38 ICA). Unless otherwise agreed upon, the notice need not be made in writing (art. 38 para. 1 ICA). If such a notification of claims is by fault of the beneficiary not made within due time, the insurer may deduct the amount from the indemnification by which the indemnification would have been reduced in case of a notice on time (art. 38 para. 2 ICA). If the beneficiary omitted the immediate notification with the intention to prevent the insurer from establishing the circumstances of the insured event on time, the insurer is no longer bound by the contract (art. 38 para. 3 ICA). In such a case, the insurer need not indemnify the insured for the damages of the event in question and has the right to terminate the contract with effect for the future.56

The parties can contractually alter the provisions of art. 38 ICA.55 However, by virtue of art. 45 para. 1 ICA, restrictions to the detriment of the beneficiary are valid only in case the beneficiary has violated its duty to notify the insurer by fault.56

Justification of the insurance claim

Upon request of the insurer, the beneficiary is obliged to provide any information known to him, which may help the insurer to establish the circumstances under which the insured event occurred (e.g. place, time and course of the insured event) or the consequences of such event (e.g. affected items and persons and medical reports) (art. 39 para. 1 ICA). As long as the beneficiary does not provide such information to the insurer, the insurance claim does not become due (art. 41 para. 1 ICA).57 If the beneficiary notifies the insurer incorrectly or conceals facts which would exclude or reduce the insurer’s obligation to indemnify the insured, or if a notification pursuant to art. 39 ICA was, for the purpose of deception, given too late or not at all, the insurer is not bound by the contract vis-à-vis the beneficiary (art. 40 ICA).

This duty to substantiate the initial notification following the occurrence of an insured event should enable the insurer to regulate the damages. Further, this information may also be helpful in order to reveal a potential violation of the insured’s pre-contractual Duty to Disclose. However, the beneficiary must only answer questions, which are connected to the regulation of the damages. He is not obliged to answer questions that only aim at revealing a breach of the pre-contractual Duty to Disclose.58

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

The duty to notify the insurer in case of an aggravation of risk applies to the insured only.59 A third party beneficiary is neither under an obligation to notify any aggravation of risk, nor is the insured accountable for the knowledge of the third party beneficiary.60

In contrast, as outlined above, the duty to report the occurrence of an insured event and the justification of a claim lies with the beneficiary of the insurance rather than with the insured.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Aggravation of risk

• A change of profession may constitute an aggravation of the risk related to an accident insurance in case the accident risk related to the new profession has to be classified as substantially higher than the risk related to the former profession. For example, the SFSC held in its decision SCD 122 III 458 that the occupational change from an assistant nurse to a prostitute qualifies as an aggravation of risk pursuant to art 28 ICA, which allows the insurer to terminate the insurance contract.

Notification in case of the occurrence of an insured event

• If the insured informs the insurer about a insured event only after the damages have been repaired and the description of the circumstances of the accident appears to be unreliable, the insurer need not indemnify the insured based on the insured’s violation of his duty to notify the insurer in case of an insured event, especially because the notification only after the damages have been repaired make a verification of the accident impossible (Decision of the cantonal court of Nidwalden of 13 October 1993).

Justification of the insurance claim

• Art. 39 para. 1 ICA only obliges the insured to provide information regarding the insured event. Questions of the insurer in respect of a potential violation of the insured’s Duty to

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54 BSK VVG-J. NEF, art. 38 no. 25.
55 BSK VVG-J. NEF, art. 38 no. 17; cf. art. 98 et seq. ICA.
56 BSK VVG-J. NEF, art. 38 no. 17.
57 BSK VVG-J. NEF, art. 39 no. 15 et seq.
58 FUHRER, no. 11.55 et seq.
59 BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 86.
60 BSK VVG-FUHRER, preliminary remarks to art. 28-32 no. 83.
Disclose pursuant to art. 4 ICA need not be answered by the insured (SCD 129 III 510, 512 et seq.).

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

Under Swiss insurance law, there is no exception from the Duty to Disclose regarding criminal activities. Therefore, if a current or former criminal activity forms a significant risk factor and if the insurer has asked a question that objectively triggered the Duty to Disclose regarding such criminal activity, the concealment of this activity would constitute a breach of the insurer’s Duty to Disclose.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

At a post-contractual stage, there are no specific information duties for the insurer. However, when dealing with a claim, the insurer is bound by the general principle of good faith pursuant to art. 2 CC.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

No, we do not see such duty to be applicable between the insurer and the beneficiary.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

We are not aware of any cases in this regard.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

No, there is no insurers’ code of practice in Switzerland.

There are general insurance conditions templates published by the Swiss Insurance Association (SVV), which contain provisions typically included into general insurance conditions that modify the duties described above. For example, they provide for a duty to notify the insurer in case of an aggravation of risk caused by the insured himself or the right of the insurer to terminate the insurance contract also in case of an aggravation of risk not caused by the insured. However, these exemplary conditions are not binding on insurers and therefore merely provide guidance regarding the general practice.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

If a term of the contract were e.g. opposed to the insurer’s mandatory Duty to Inform, such a term would be void and therefore would have to be disregarded by the courts.61

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

We are not aware of any decision of Swiss courts on this issue. However, we expect that a court might disregard an avoidance in accordance with art. 2 CC, if such avoidance runs contrary to the principle of good faith or is otherwise abusive.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

If and to the extent the Duty to Disclose as contained in the ICA is breached, such breach constitutes a breach of the statute (i.e. the ICA).

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

The Swiss Federal Act on Insurance Supervision does not directly address the insurer’s breach of its Duty to Inform the insured. However, the Swiss Financial Market Supervisory Authority FINMA may intervene in case of systematic violation of the Duty to Inform based on art. 46 para. 1 lit. f ISA.62 Consequences of such systematic misconduct are determined according to art. 24 et seqq. of the Federal Act on the Swiss Financial Market Supervisory Authority ("FINMASA"). The available sanctions comprise, depending on the severity of the violation, a reprimand (art. 32 FINMASA), specific orders to restore compliance with the law (art. 31 FINMASA), prohibition against individuals from practicing their profession (art. 33 FINMASA) and ultimately, in severe cases, the revocation of the insurer license (art. 37 FINMASA).

Further, an insurer, as well as the persons responsible for the management, supervision, control and the conduct of the business must enjoy a good reputation and provide assurance for the proper application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy.

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61 Addendum BSK VVG-KUHN/GEIGER-STEINER, art. 3a no. 13.
62 BSK VAG-DO PASQUIER/MENOUD, art. 46 no. 45; ŠUSSKIND, p. 25.
63 BSK VAG-DO PASQUIER/MENOUD, art. 46 no. 72; cf. art. 2 para. 1 FINMASA.
conduct of business (art. 14 para. 1 ISA). This provision has to be complied with on an ongoing basis. Therefore, if FINMA considers e.g. the assurance of proper business conduct to no longer be given after a severe or repeated breach of the Duty to Inform, it can impose sanctions on an insurer or the concerned persons as outlined above (e.g. revocation of the license / prohibition against an individual from practicing its profession).

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

As stated above, reinsurance contracts are not governed by specific legislation and are therefore primarily characterized by the parties’ contractual agreement. To the extent the parties did not agree on specific duties and remedies, the question arises whether the ICA should be applied by way of analogy or whether a duty of utmost good faith can be applied as a term implied in the nature of reinsurance contracts or as a duty based on international principles of reinsurance. Swiss case law is silent on such matters as in general, reinsurance disputes are settled via negotiations between the insurer and the reinsurer or by arbitration proceedings rather than by proceedings in front of state court judges. Consequently, the legal sources on such issues are scarce.

Amongst scholars, it seems to be undisputed that the relationship between insurer and reinsurer is governed by specific duties to disclose the relevant information. In contrast to the Duty to Disclose of the insured in a regular direct insurance contract, the prevailing view seems to be that the insurer, party to a reinsurance contract as cedent, has to disclose the relevant risk factors on its own motion.

Regarding the post-contractual duty to notify an aggravation of risk to the reinsurer, an analogous application of the right to terminate the contract in case of an aggravation of the risk is not regarded as applicable. However, the duty to notify the reinsurer of an aggravation of risk seems to be generally accepted among Swiss legal authors.

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64 BSK VAG-DU PASQUIER/MENOUD, art. 46 no. 7.
65 FÜHRER, no. 18.36; GRABER, p. 21 et seq.
66 BSK VVG-NEBEL, art. 101, no. 35; LÖRTSCHER, p. 374; FÜHRER, no. 18.30.
67 BSK VVG-NEBEL, art. 101, no. 35.
68 BSK VGG-NEBEL, art. 101, no. 35; FÜHRER, no. 18.30.
Thailand

TILLEKE & GIBBINS

Michael Turnbull, Aaron Le Marquer, Ittirote Klinbon and Rom Phastanapichai

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

The principle of utmost good faith is not specifically defined in the Thai Civil and Commercial Code, which governs contracts, including insurance. However, there are general provisions that regulate how the law should be applied, which is simply put in terms of such having to be conducted in “good faith”, Section 5 of the Civil and Commercial Code, “Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith”; and further pursuant Section 6, “Every person is presumed to be acting in good faith.”

All contracts in Thailand are therefore subject to a general duty of good faith, and there is no higher standard applicable to insurance contracts.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The general principle of “good faith” is a civil law principle, which lays the foundation for the interpretation of the law through the Thai Civil and Commercial Code, as mentioned in Section 5.

The Non-Life Insurance Act 1992 (as amended 2008), which governs insurance contracts in Thailand, does not impose any higher or different standard, and the principle set out in the Civil and Commercial Code therefore applies.

The Consumer Case Procedure Act 2008, which governs all consumer contracts including insurance contracts, also provides that business operators shall act in good faith in performing their obligations; however, again this does not impose any higher standard of care than that set out in the Civil and Commercial Code.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

The two principles of good faith and duty of disclosure are indistinguishable, as the latter concept is subsumed by the former principle, as appears in Section 865 of the Thai Civil and Commercial Code, which reads: “If at the time of making the contract, the assured or in case of insurance on life, the person upon whose life or death the payment of the sum payable depends, knowingly omits to disclose facts which would have induced the insurer to raise the premium or to refuse to enter into the contract or knowingly makes false statements in regard to such facts, the contract is voidable. If such right of avoidance is not exercised within one month from the time when the insurer has knowledge of the ground of avoidance or within five years from the date of the contract, such right is extinguished.”

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Insurance contracts are considered under Thai Civil and commercial code. The areas of General Insurance; Insurance against Loss, including Special Rules for Insurance on Carriage and Guarantee Insurance; and Insurance on Life come within the general principles of good faith, as stated under Section 368 of the Thai Civil and Commercial Code, which reads: “contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.” No distinction is made between life, non-life, or reinsurance contracts.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

Given its being phrased in general terms, the duty of conducting business in good faith is continuous from the pre-contractual stage to the post-contractual stage. However, as described above, the Civil and Commercial Code imposes an express duty of disclosure at the pre-contractual stage.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Under Section 6 of the Thai Civil and Commercial Code, every individual is presumed to be acting in good faith; thus, the duty is therefore on both the insured and the insurer.
A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

An example of the concept of good faith is found in the Thai Supreme Court judgment No.1218/2519 wherein the proposer on a life policy failed to disclose a pre-existing medical condition of hypertension contrary to the principle of good faith rendering the policy voidable at the insurer’s option.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

As the duty of good faith under Section 5 of the Thai Civil and Commercial Code is a provisional duty that must be applied to all Sections, the concept of good faith does not differ from the duty of disclosure. This is because in carrying out disclosure under Section 865, it must be done so according to Section 5, which is in good faith.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

The two principles in Thai law are not distinct, as when an individual commits to disclosure, he is under a duty, under Section 5 of the Thai Civil and Commercial Code, to carry out his obligations in good faith.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

According to Section 865 of the Thai Civil and Commercial Code, if the insured omits to disclose facts or intentionally makes a false statement, the contract is voidable. As such, the insurer is not obligated to pay the compensation to the insured. However, as described above, the insurer must exercise its right of avoidance within the specified time period, or such right will be lost.

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

The two concepts are indistinguishable; therefore, neither one has precedence over the other.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

The Thai Civil Law does not specifically refer to pre-contractual situations for insurers; however, Section 6 of the Civil and Commercial Code is interpreted to presume that insurers will carry out their pre-contractual obligations in good faith.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

There is no case law to hand that outlines the pre-contractual duty of good faith of insurers; however, there are numerous issues developing involving Thai bank assurance. For example, in order for an individual to take a housing loan from a bank, they also have to purchase a homeowner’s insurance as well as a life insurance. The premium is calculated for them by the bank. There is no transparency in arriving at the figure and there have been times that when a loss occurs, the bank has refused to compensate for the full amount. As a result of this the Office of Insurance Commission is developing regulations that would specify the duty of good faith for insurers in the pre-contractual stage and apart from the post-contractual obligation.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

There is no specific duty for insurers to notify the prospective insureds of their disclosure obligations; however, there are usually standard terms on the insurance disclosure forms that highlight the extent of the disclosure.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The insured would be entitled to claim for damages against the insurer under Section 420 of CCC due to its breach of duty of utmost of good faith.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

The duty of good faith for the insured in the post-contractual stage depends on the nature of the
contract. However, as Section 6 of the Thai Civil and Commercial Code presumes that every person is acting in good faith, that includes third party beneficiaries as well.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

According to the Thai Supreme Court Judgment No. 68/2516, if the insured commits to disclosure, whereby the facts he provided changes, he is obligated to inform the insurer of those changes. The duty of good faith continues operating during the post contractual stage.

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

As Section 5 of the Thai Civil and Commercial Code stresses the need to act in good faith, if the insured were to intentionally conceal his criminal activities, it would appear that the insured is acting in bad faith. To be more specific the terms and conditions in the contract would have to be examined in order to see the impact of the breach; however, Section 879 of the Thai Civil and Commercial Code which applies to non life insurance contracts only provides that if the insured or the beneficiary had been intentionally acting in bad faith or acting with gross negligence, the insurer is relinquished from the liabilities specified in the contract.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

By acting in good faith, under Section 877 of the Thai Civil and Commercial Code, the insurer is bound to compensate for the actual amount of loss; the insured property that was damaged; or to cover all reasonable costs that will keep the property from being damaged.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

The extent of the duty that the insurer would owe depends on the nature of the contract. However, there are a set of ethical regulations that an insurer should go by, which is laid out by the Office of Insurance Commission (OIC) in the Code of Ethics of the OIC 2012.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

Specifically, under Section 895 of the Thai Civil and Commercial Code, the insurer is bound to pay following a death of a person under all circumstances, unless the cause of death was suicide or the death was caused by the beneficiary.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no general Code of Practice for insurers, as they are specific to the type of insurance the insurer provides, such as the Life and Non-Life Insurance Acts of 1992, the provisions of which will be read in light of Section 5 of the Thai Civil and Commercial code as that is the general foundation of all civil matters.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

In the past, the courts have disregarded a term of a contract if they find that it puts the insured at a disadvantaged. An example of such is found in the Thai Supreme Court Judgment No. 400/2532, where the insurer had included a compromise agreement within the contract, which would have otherwise discharged the insurer of further liability. However, the judged found for the insured.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

The courts do have the power to disregard the application of a policy and allow custom to dictate, as stated under Section 4 of the Thai Civil and Commercial Code. However it should be noted that : Section 4 of Para 2 of CCC, it will only apply when there is no any specific provision of law to be applicable to the case and as such the case would be decided according to the local custom. If the Court found that there is any avoidance of the application of policy on the breach of the duty of utmost faith made by the insurer, the Court would likely consider that such avoidance is against the public order or good moral, and this would be void as prescribed under Section 150 of CCC.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

According to Section 12 of the Consumer Case Procedure Act 2008, a breach of good faith is a statutory breach.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**
Sanctions may be brought on insurers by the Office of Insurance Commission under the Casualty Insurance Act 2008. For example, a license may be revoked under Section 59 of the Act.

In addition, a breach of good faith by the insurer can lead to awards of punitive damages pursuant to Section 42 of the Consumer Case Procedure Act 2008.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

The same principle of good faith prevails over reinsurance at all stages, as generalized under Section 5 of the Thai Civil and Commercial Code.

There are no specific laws governing reinsurance in Thailand, and the same general principles of good faith described above apply equally to reinsurance contracts (with the exception of the references to the Consumer Case Procedure Act, which is not generally viewed as applicable to reinsurance contracts).
Turkey

MEHMET GÜN & PARTNERS

Pelin Baysal and Alisya Danisman

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Article 2 and 3 of the Turkish Civil Code regulates the principle of good faith which prevails in all contracts including insurance. From the insured’s perspective, application of this principle is mostly related to the disclosure duty whereas it is related to the insurer’s duty of informing the insured about the technical aspects of the policy as well as its rights and obligations.

Although there is no specific definition of the principle of good faith, the Court of Appeals and the Insurance Arbitration Board relied on such principle in their various decisions.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

It is a civil law principle provided under Article 2 and 3 of the Turkish Civil Code. The courts also use the same principle during the interpretation of the ambiguous provisions of the insurance contracts.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Although there is no statutory principle of utmost good faith for the insured, the duty of disclosure for the insured is provided separately under the Turkish Commercial Code ("TCC").

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes, the principle of utmost good faith applies to all types of insurance contracts without making a distinction.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

It is a continuous duty applying to the pre-contractual and post-contractual stages, as well as during the term of the contract.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

Under Turkish law, duty of disclosure is mainly imposed on policy holder considering the fact that parties to an insurance contract are the policy holder and the insurer. Insured and the policy holder may be different parties or they may be identical. Indeed, if the policy holder and the insured are different parties, the duty of disclosure shall be mainly evaluated in terms of the policy holder.

Since insurance and reinsurance contracts are contracts of utmost good faith, one of the statutory duties of the policy holder is the duty of disclosure and not to misrepresent facts known or reasonably expected to be known to him before the conclusion of the contract. On the pre-contractual stage, according to the TCC, the policy holder has a duty of disclosure of all the relevant information inquired by the insurer; whereas, the insurer is under the obligation of informing the policy holder of all the information related to the insurance contract. In addition, as per the Regulation on Informing in Insurance Contracts, the insurer has the duty to provide information to the policy holder and to those that will be party to the insurance agreement. This obligation starts at the pre-contractual stage.

1 Numbered 4721 and accepted on November 22, 2001.

2 Insurance Arbitration Board Decision dated 17.07.2012, numbered K-2012/803 states that the duty of utmost good faith requires both parties of the insurance agreement to give all information to the other party, whether required or not, that can play a role in the parties accepting the agreement. Similarly, in its decision no. E. 2013/7847 K. 2013/13676 dated 28.06.2013, the 11th Chamber of the Court of Appeal emphasized that the principle of utmost good faith requires the insurer to duly inform the policy holder of essential components of the insurance contract as well as the scope of cover, deductibles and exceptions.

3 Numbered 6102 and accepted on January 13, 2011.

4 Published in the Official Gazette dated 28.10.2007 and numbered 26684.
contractual phase and continues during the term of the insurance contract.

Apart from the above, Article 32(2) of the Insurance Code also provides for a duty of good faith in terms of insurance and reinsurance companies, intermediaries and insurance experts. Accordingly, the listed companies and people shall “avoid acts that could endanger the rights and benefits of the insured, carry out business pursuant to the legislation and the management plan and act according to the requirements of insurance and principles of good faith.”

A - For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The policy holder’s pre-contractual duty of utmost good faith is provided under Article 1435 of the TCC as the obligation to give information. Accordingly, at the conclusion of the insurance contract, the policy holder shall notify the insurer of all the important aspects that they know or need to know. If the issues that are not notified to the insurer, as well as those that are notified imperfectly or wrongly, are of a nature that would require the contract not to be made or to be made under different conditions, are deemed as important issues. There is also a legal presumption that the issues demanded by the insurer in written or oral form are important issues, unless the contrary is proved.

In case the insurer has given a list of questions to the policy holder, the policy holder cannot be held responsible with respect to the issues outside the scope of the questions provided. The only exception to this rule is when the policy holder has concealed issues in bad faith.

As per Article 1412 of the TCC, regarding the provisions related to the knowledge and behavior of the policy holder, the knowledge and behavior of the insured (provided that the insured is informed of the insurance), the representative, if there is any, and of the beneficiary in life insurances, shall be also taken into account.

The judgments of the Insurance Arbitration Board emphasize the fact that insurance contracts are agreements based on the principle of utmost good faith. The establishment of these contracts is based on the declarations of the policy holder, since the risks that will be covered by the insurance as well as the pricing of the premium depend on the answers that the policy holder gives to the questions asked in the application form.

The Insurance Arbitration Board has stated in the decision dated 15.05.2012, numbered K-2012/551, that the insured not explaining his medical history in the application form does not comply with the principle of good faith. In the mentioned decision, the insured’s arguments to the affect that if the insurer had requested the insured’s medical history from the hospital, they could have obtained it did not prove useful. The Board has underlined the fact that the law has not given a research duty to the insurer; it has given a duty of disclosure to the policy holder/insured.

Regarding the duty of disclosure, the decision of the Court of Appeal dated 05.07.2004\(^7\), has determined that the policy holder not notifying the insurer of the insured’s illness, has acted against the principle of good faith.

The decision of the Court of Appeal dated 08.06.2004\(^7\) is about a fire insurance, where the policy holder has declared the immovable subject to the insurance as a domicile, instead it was a warehouse. The Court of Appeal has stated that as per Article 1435 of the TCC, the policy holder has the obligation to notify the actual situation and that if the insurer had known that the subject of the insurance contract were a warehouse, they might have chosen not to provide fire insurance or might have stipulated the contract under different terms (i.e. with a higher premium).

A similar precedent is the decision of the Court of Appeal dated 03.03.2005\(^8\), where the subject of the automobile insurance was declared as an automobile for personal use, yet it was used in a rent a car service. The Court of Appeal has stated that there is a breach of the policy holder’s duty of disclosure.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

The duty of good faith is a general principle that is applicable to all kinds of contracts. The reflection of this general principle in the field of insurance law is the duty of disclosure. Pre-contractually, this duty of disclosure and the duty of utmost good faith are almost the same.

\(^5\) Numbered 5684 and accepted on June 3, 2007.

\(^6\) Merits number 2003/13469, Decision number 2004/7482

\(^7\) Merits number 2003/12696, Decision number 2004/6552.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

N/A

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

Since the duty of utmost good faith has not been explicitly and specifically regulated under insurance laws, the below mentioned statutory remedies are valid for the pre-contractual breach of the duty of disclosure by the policy holder.

According to Article 1439 of the TCC, if an issue that is important for the insurer has not been notified or has been falsely notified, the insurer can, within 10 days as of this breach, revoke the insurance contract or can demand premium difference. If the policy holder does not accept the premium difference that is requested, it will be deemed that the insurer has revoked the contract.

Article 1441 of the TCC provides that, if the insurer revokes the insurance contract and the policy holder has willfully breached their duty of disclosure, the insurer becomes entitled to the premiums belonging to the period during which the risk was on the insurer.

On the other hand, the insurer cannot revoke the insurance contract, if the insurer has (i) renounced the use of the right of revocation either explicitly or implicitly; (ii) caused the breach leading to revocation; (iii) executed the contract even though the policy holder has left some of the questions unanswered.

It should be noted that if the issue that has not been notified or has been notified falsely is known by the insurer, the insurer cannot revoke the contract by claiming that the insured has breached the duty of disclosure. In this case, the burden of proof (that this issue was known by the insurer) is on the policy holder.

In this regard, there is a special provision about compulsory liability insurances. As per Article 1484 of the TCC, even if the insurer is released wholly or partially of his obligations towards the policy holder, his obligation towards the injured party continues to the period during which the risk was on the insurer.

On the other hand, the insurer cannot revoke the insurance contract, if the insurer has (i) renounced the use of the right of revocation either explicitly or implicitly; (ii) caused the breach leading to revocation; (iii) executed the contract even though the policy holder has left some of the questions unanswered.

It should be noted that if the issue that has not been notified or has been notified falsely is known by the insurer, the insurer cannot revoke the contract by claiming that the insured has breached the duty of disclosure. In this case, the burden of proof (that this issue was known by the insurer) is on the policy holder.

In regard to, there is a special provision about compulsory liability insurances. As per Article 1484 of the TCC, even if the insurer is released wholly or partially of his obligations towards the policy holder, his obligation towards the injured party continues to the amount of the compulsory insurance. In other words, even if the insurer used the right of revocation explained above and the insurance contract is revoked (therefore the insurer no longer has a contractual obligation towards the policy holder), the insurer’s obligations towards third parties, who have suffered loss, continue until the insurance amount.

11. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure does one have precedence over the other?**

N/A

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

The pre-contractual duty of utmost good faith for the insurer is the duty of disclosure prescribed under Article 1423 of the TCC. Before the conclusion of the insurance contract, the insurer or its agent shall inform the policy holder in written form, of all information related to the insurance contract, the rights of the policy holder, the provisions to which the policy holder shall pay special attention, and the duties of notification connected to the developments. This duty of disclosure shall be made in due time, providing the policy holder a sufficient review period.

Article 5 of the Regulation on Informing in Insurance Contracts regulates the general principles of the insurer’s duty to provide information. Accordingly, the insurer shall carry out the obligation of informing towards the policy holder and towards those that want to be party to the insurance contract, both in oral and written form. As principle, information shall be provided in written form. However, in some cases such as sales through telemarketing or via the internet the obligation of written information can be disregarded. The scope of the insurer’s obligation is quite wide as during the negotiation, execution and continuance of the contract, the insurer shall, within the principles of good faith, help the policy holder in written form. However, in some cases such as sales through telemarketing or via the internet the obligation of written information can be disregarded. The scope of the insurer’s obligation is quite wide as during the negotiation, execution and continuance of the contract, the insurer shall, within the principles of good faith, help the policy holder in writing.

Moreover, Article 32 of the Insurance Code provides that insurance companies and intermediaries shall not prepare their brochures, prospectus, other documents, announcement and advertising in a way to cause a perception beyond the scope of the rights and interests that they would provide to the insured.

The duty of utmost good faith for the insurer is also provided under Article 32(2) in a general way, including both the pre- and post-contractual duties. Accordingly, the insurer shall “avoid acts that could endanger the rights and benefits of the insured, carry out business pursuant to the legislation and the management plan and act according to the requirements of insurance and principles of good faith.”
13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

According to the decision of the Court of Appeal dated 28.06.2013\(^9\), due to the insurance contract being an utmost good faith agreement, the insurer has the obligation to give information about the essential components of the insurance agreement, the scope of the insurance coverage, deductibles and exceptions.

The Insurance Arbitration Board’s decision dated 17.07.2012, numbered K-2012/803 has stated that if the insurer stipulates an insurance agreement and is collecting premiums from the policy holder, despite knowing that the risk will never take place, or is using ambiguous expressions in the policy on purpose, this constitutes a breach of the insurer’s duty of utmost good faith.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

Yes. Notifying the policy holder of the duty of disclosure is part of the duty of utmost good faith of the insurer. This is evident in Article 5 of the Regulation on Informing in Insurance Contracts, where it has been underlined the insurer shall provide the insured with all sorts of necessary information about the details of the insurance transactions and the functioning of the insurance. The duty of disclosure is an essential component of insurance; thus, notifying the policy holder of this duty is deemed as a part of the insurer’s duty of utmost good faith.

Article 10 of the Regulation on the Determination, Notification, Record of Insurance Malpractices and the Procedure and Principles of Fighting with these Malpractices\(^10\) also provides for this duty. Accordingly, insurance and reinsurance companies shall inform the policy holder, insured/beneficiary and right holders about the consequences of giving false information on issues that would affect the insurance indemnity.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

As per Article 1423(2) of the TCC, if the insurer has not duly informed the policy holder as per the same article (regarding all information related to the insurance contract, the rights of the policy holder, the provisions to which the policy holder shall pay special attention, and the duties of notification connected to the developments) and the policy holder has not objected within 14 days of the conclusion of the contract, the contract is deemed to be made with the conditions written in the policy. In this case the insurer shall prove that they have provided the necessary disclosure.

Moreover, Article 7 of the Regulation on Informing in Insurance Contracts states that if there is a breach of the insurer’s duty of providing information and this has affected the decision of the policy holder, the policy holder can terminate the insurance agreement and can also request the compensation of the damage they have suffered. The breach of the duty of providing information according to Article 7 includes the insurer’s failure to duly carry out this duty of informing, the insurer providing misleading information, not delivering the Disclosure Form or preparing the Disclosure Form with false statements. These cover both pre- and post-contractual phases (during the negotiation, execution and continuation of the contract).

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

The content of the post-contractual duty of utmost good faith for the insured can be examined under two categories: (i) the duty of utmost good faith during the term of the contract; (ii) the duty of utmost good faith when the risk has occurred.

In respect of the policy holder’s duty of utmost good faith during the term of the contract; the TCC provides for the duty of immediate notification of the increase of the risk and provides that the insured and the policy holder must refrain from acts that would increase the amount of insurance indemnity by way of increasing the risk or current conditions. When the increase has been learned subsequently, the policy holder must notify the insurer within 10 days of learning at the latest.

The insurer has the right to terminate the policy or request premium difference within one month of becoming aware of the increase in the risk. When the non-disclosure was willful, the insurer will keep the paid premium. When payment of the premium difference has not been accepted within 10 days, the policy will be deemed terminated.

When the increase has been learned of after the occurrence of the risk, the insurance indemnity will be reduced according to the gravity of negligence in the failure to disclose, provided that the non-disclosure is of such gravity that it may affect the amount of the insurance indemnity or the occurrence of the risk.

When the policy holder was intentional in its non-

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\(^9\) Merits number 2013/7847, Decision number 2013/13676

\(^10\) Published in the Official Gazette dated 30.04.2011 and numbered 27920.
disclosure, the insurer has the right to terminate the policy, provided that there is a connection between the increase in the risk and the occurrence of the insured event. In such case, the insurer will not pay any indemnity and not return the paid premium. When there is no connection, however, the insurer must pay the indemnity, taking into consideration the proportion of the paid premium and the premium that should have been paid.

When the risk has occurred before the right of termination has taken effect or within the period for use of the right of termination, insurance indemnity must be paid taking into consideration the ratio between the paid premium and the premium which should have been paid, provided that there is a link between the increase and the occurrence of the risk.

The policy holder also has a duty of disclosure at the occurrence of the risk that relates to the disclosure of the facts affecting the occurrence of the loss.

In the case of liability insurances, the TCC provides that the policy holder has a duty to immediately notify the insurer upon learning of the occurrence of the risk, and in the case of property insurance, the policy holder must notify the insurer without delay. As regards third-party liability policies, the TCC introduced a new duty on the insured to also notify events that may give rise to his or her liability within 10 days of learning. When the notification of occurrence of the risk has not been made or the policy holder was late in his or her notification, a reduction will be made in the indemnity according to the degree of negligence in the failure to disclose, provided that the failure caused an increase in the insurance indemnity.

A general duty of the policy holder with respect to the prevention and mitigation of loss has been provided under Article 1448 of the TCC. Such provision imposes a duty on the policy holder to take measures not only upon occurrence of the risk but also in cases where the likelihood of occurrence is high. It is also explicitly provided that the policy holder shall to the extent possible take measures for the protection of the insurers’ rights of recourse to third parties.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Yes, the duty of utmost good faith extends to the insured, as well as to the third party beneficiaries. Article 1412 of the TCC provides a special paragraph in this regard. According to this article, regarding the provisions related to the knowledge and behavior of the policy holder, the knowledge and behavior of the insured (provided that the insured is informed of the insurance), the representative, if there is any, and of the beneficiary in life insurances, shall be also taken into account. In other words, third party beneficiaries of cover also have a duty of utmost good faith.

The Preamble of Article 1412 of the TCC states that “insurance contracts are based on the principle of utmost good faith and this principle applies both to the insurer and the policy holder. In order for the insurer to make a correct calculation of the premium, in other words, to be able to calculate the risk, they should wholly and correctly know the real aspects related to the contract. […] This article has been provided as a general provision, within the framework of the explanations given above. […] Since the aim is that the insurer has full access to the reality, there is no difference between the knowledge of the beneficiary and of the representative and that of the insured.”

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

There are numerous Court of Appeal decisions and Insurance Arbitration Board judgments which emphasize that when the risk takes place, the policy holder has the obligation to give truthful notice to the insurer. If the policy holder notifies an issue that is outside the scope of the insurance coverage against the principle of good faith, as if it is within the coverage, the burden of proof shifts from the insurer to the policy holder. In this case it will be the policy holder that has to prove that the risk that has taken place is within the insurance coverage.

Another example regarding the duty of taking precautions in order to prevent or minimize the damage can be given as the Court of Appeal decision dated 22.09.2005. In the event subject to the mentioned decision, damage has occurred on the grain elevators due to the storm and heavy rain. The Court of Appeal has stated that the policy holder not intervening in any way, not checking the elevators and not taking precautions that would prevent the leakage and minimize the risk constituted a violation of the policy holder’s obligations.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Since criminal activities can be perceived as an “important issue” that needs to be notified pursuant to Article 1435 of the TCC (about the fact that at the conclusion of the insurance contract, the policy holder shall notify the insurer of all the important aspects that they know or need to know), the intentional concealment of this constitutes a breach of the duty of utmost good faith.

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11 Merits number 2004/10967, Decision number 2005/8530
B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

Besides the general principle set in Article 32(2) of the Insurance Code (see Question 1 for details), the most important aspect of the post-contractual duty of utmost good faith for the insurer is related to the insurance indemnity payment. Pursuant to Article 32(3) of the Insurance Code, insurance companies shall not postpone the payment of the insurance indemnity, against the rules of good faith.

With respect to the determination of the maturity date for the payment of the indemnity, Article 1427 of the TCC provides that the insurer’s obligation to pay the insurance indemnity shall fall due as soon as the insurer has completed its investigation upon receipt of the documents related to the risk and in any event within forty five days from the date of the policy holder’s notification of the risk (as stated above, the policy holder is obliged to notify the insurer without any delay upon becoming aware of the occurrence of the risk). If the investigation was delayed because of a reason not attributable to the insurer’s fault, the period of 45 days shall not begin to run. Since the application of these provisions in the TCC is very recent, there is lack of court precedents as to which circumstances would qualify as “circumstances not attributable to the insurer’s fault” is not yet clear.

It should be noted that when the payment falls due in accordance with the above stated provisions, the insurer shall automatically go into default without any further notification required (this is of course provided that and to the extent insurers are ultimately found liable). The TCC provides that these provisions are semi-mandatory which cannot be amended contrary to the interests of the insured and/or the policy holder.

There is also a provision in the new TCC to the effect that if the insurer’s investigation was not finalised within three months from the date of notification of the occurrence of the risk, the insurer is entitled to ask for an advance payment corresponding to at least fifty percent of the amount of the loss, to be determined by mutual agreement or by a pre-expertise to be promptly conducted upon application to the court.

Lastly, Article 1426 of the TCC requires the insurer to pay reasonable expenses made by the insured or the policy holder for the purpose of determination of the extent of the risk or the insurance indemnity, even if these expenses have not proven useful. The Preamble of the TCC discusses the scope of the “reasonable expenses” where it stated that the tests for “good faith” would apply for the determination of the scope in a concrete case. In other words, if the expenses are made with good faith by the insured/policy holder and provided that they are reasonable, then there will be no room for the insurer to deny payment in respect thereof.

The TCC with Article 1448 also extends liability of the insurer to pay for reasonable costs for measures taken by the policy holder for prevention or mitigation of the loss. The insurer shall make an advance payment in relation to all these costs by request of the policy holder. These provisions as to the insurer’s duty of paying reasonable expenses and making an advance payment as required are also semi-mandatory which cannot be contracted out or otherwise.

In respect of liability insurances, within five days of the notification of an incident requiring insured’s liability or a claim raised against the insured , the insurer is obliged to notify the insured about whether they will carry out the necessary legal transactions related to the claims of the injured party and whether they will undertake to help with the defense. If the insurer does not make such notification, it would have to pay the insurance indemnity.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

With regard to liability insurances, the TCC provides that third parties are entitled to direct their claims to the third party liability insurer of the person liable for the loss. In this case, insurer’s duty of utmost good faith will be applicable against the injured third party. In compulsory liability insurances, as per Article 1484 of the TCC, even if the insurer is released wholly or partially of his obligations towards the insured, his obligation towards the injured party continues to the amount of the compulsory insurance. In other words, even if the insurance contract has been revoked, the insurer’s obligations towards third parties, who have suffered from damage, continue until the insurance amount.

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The Court of Appeal decisions dated 08.11.198212, 30.11.197913 and 16.04.200314 focus on the insurer’s duty of not delaying the insurance indemnity payment. These decisions state that if the insurer stalls the insured by not paying the indemnity, therefore forcing the insured to file a lawsuit in order to obtain the payment, the insurer can no longer object to the case based on prescription, since such a defense would be in bad faith. The Insurance Arbitration Board’s decision dated 17.07.2012, numbered K-2012/803 has underlined that the duty of utmost good faith of

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12 Merits number 1982/4597, Decision number 1982/4475
13 Merits number 1979/3501, Decision number 1979/5473
14 Merits number 2004/1820, Decision number 2004/4014
the insurer is the payment of the insurance indemnity in a short time period.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

The Insurance Ethical Principles of the Insurance Association of Turkey can be regarded as a code of practice for insurers. Integrity (honesty) and transparency are listed amongst the general principles. Transparency is defined as the insurance, reinsurance and pension companies adhering to simplicity and lucidity in informing their clients and upholding the maximum possible level of transparency in their activities. Moreover, informing clients is an essential part of the part on the relations with customers. This principle provides that the companies shall provide timely and accurate information concerning their products and services and avoid any misleading or inadequate information. They shall also recommend the most suitable products that meet customer needs and provide information to the customers on the advantages and disadvantages of these products in comparison with other products. All of these are closely related to, in fact constitute an integral part of, the duty of utmost good faith.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

First of all it must be stated that the insurance provisions of the TCC are mainly classified as i) mandatory provisions and ii) semi-mandatory provisions. Accordingly, it is not possible for contracting otherwise of the mandatory provisions, whereas semi-mandatory provisions are the ones which cannot be amended contrary to the interest of the policy holder and/or the insured in an insurance contract. In other words, a contractual provision contrary to a mandatory provision of the TCC would be rendered invalid and accordingly be disregarded by the courts. Similarly, contractual provisions amending the semi-mandatory provisions in the TCC in a way contrary to the interest of the insured and/or policy holder (for example which aggravates an obligation of the policy holder or the insured) would be rendered invalid either. The courts instead would apply the standard version of such provision which is in favour of the insured and/or the policy holder.

In this respect, almost all of the provisions referred above in respect of duty of disclosure of the insurer and the policy holder and accordingly their duty of utmost good faith are either of a semi-mandatory or a mandatory nature. Therefore, the courts would disregard any contractual term to be established contrary to these provisions.

On the other hand, as insurance contracts are accepted as contracts bearing many standard terms, this issue must also be evaluated in respect of the standard term contracts regulated under the Turkish Code of Obligations. Pursuant to Article 21 of the Turkish Code of Obligations, the standard terms are valid, only if the drafting party explicitly informs the other party of the existence of these terms and provides the other party the opportunity to become aware of the content and the other party accepts these terms. Otherwise, those standard terms will be deemed unwritten; thus, shall have no legal effect. The same rule applies to terms that are unusual for a contract type or transaction. When certain terms of the contract are deemed unwritten, the rest of the contract continues to be valid. Accordingly, the insurer would not be able to rely on the terms of the insurance contract, about which they have not fulfilled their duty of disclosure. Such terms that the policy holder are not informed of would be deemed unwritten and would therefore be disregarded by the courts.

Lastly, it should also be mentioned that the new Consumer Act entered into force as of May 28, 2014 has put an end to controversy as to whether insurance contracts are deemed as consumer contracts. Namely, it is explicitly stated in the new Consumer Act that the insurance contracts -in addition to the insurance contract provisions of the TCC (and certain provisions of the Insurance Act)- would be subject to the Consumer Act to the extent the policy is obtained for other than commercial or professional purposes (i.e. where the policy holder can be deemed as a “consumer” which is defined as a natural or legal person who receives, uses or benefits from services or goods not with a commercial or professional purpose). Accordingly, in parallel with the above referred principles in the Code of Obligations in respect of standard terms, the Consumer Act provides that the unlawful terms in the consumer contracts which are included to the contracts solely by one of the parties without being negotiated with the counter party and contrary to the principle of honesty, which creates a disadvantageous position for the consumer in respect of its rights and obligations under the contract would be definitely invalid.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

The Court of Appeal, in its various decisions rendered at the time of previous Commercial Code disregarded the avoidance of the application of the policy in certain cases. In the said decisions, the court evaluated that the insurer would breach its duty of the utmost good faith, if the insurer, after the occurrence of the risk, revokes the insurance contract based on the policy holder’s failure on its disclosure duty. Indeed the Court of Appeal prevented the insurer to revoke the insurance contract after the risk occurred. The main rationale behind these decisions was that
such a revoke would be contrary to the good faith principle. Additionally, there are also some high court decisions\textsuperscript{15} where it is stated that the insurer can no longer avoid the application of the insurance by claiming prescription; if the insurer itself caused the prescription period to pass with its acts against good faith.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Yes, it is a breach of the statute.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

Article 35(27) of the Insurance Code provides a judicial fine no less than 300 days\textsuperscript{16} in case of the breach of the general principle of utmost good faith set under Article 32(2) or the violation of the duty of utmost good faith as per Article 32(3) by delaying the insurance indemnity payment.

Moreover, the license of the insurance companies that have breached the duty of utmost good faith might also be canceled. According to Article 7 of the Insurance Code, if it is understood that the rights and benefits of the parties related to the insurance contract are in danger due to practices violating the insurance legislation, the license of the insurance company can be suspended by the Treasury.

**IV - Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

There is no enactment on reinsurance contracts (save for regulatory provisions) under Turkish law. This means that principles of contract law would apply to reinsurance contracts in addition to insurance contract law provisions in the TCC where relevant by analogy. There is however no authority on the extent and way of application of insurance law to reinsurance issues.

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\textsuperscript{15} Decision dated 30.11.1979 with merits number 1979/3501, decision number 1979/5473.

\textsuperscript{16} Between TRY 6,000 and TRY 30,000.
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Preliminary Comments

It is important to note that a fundamental revision of English insurance contract law, including the parameters of the duty of utmost good faith, is currently under consideration, and an Insurance Bill was introduced to Parliament in July 2014. The principle of utmost good faith is therefore in a state of flux. A brief note setting out the main provisions of the Bill and its potential impact is included by way of separate appendix to these answers.

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Insurance contracts under English law are considered contracts of ‘utmost good faith’. Accordingly, a business buying insurance owes a duty to the insurer both to disclose all material facts and to refrain from making any material misrepresentations.

The reasoning which underpins this doctrine is that an insurance contract, unlike most other commercial contracts, is essentially a contract of speculation for one party, the insurer. Historically, the assured was in possession of all the information material to the risk to be covered by the insurance. To be able to assess the risk properly, including the pricing of the insurance, the insurer relies upon the disclosure of all facts that will impact the likelihood of a loss occurring and the extent of that loss.

The principle of utmost good faith first arose through common law in the mid eighteenth century (as expressed by Lord Mansfield in Carter v Boehm) and is partially codified through sections 17-20 of the Marine Insurance Act 1906. Despite its name, the courts have held that the application of the MIA 1906 is not restricted to marine insurance contracts alone but is relevant to all forms of insurance (e.g. marine, non-marine, life, aviation and reinsurance).

S17 MIA 1906 states that:

“A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.”

S18 goes on to create the duty of disclosure:

“...the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract...”

The question as to whether any particular circumstance is material or not is, in each case, a question of fact. The test for materiality has both an objective limb (whether the “prudent underwriter” would have taken the circumstance into account) and a subjective limb (whether the actual underwriter was induced by the non-disclosure to write the risk on the agreed terms).

S20 of the MIA 1906 adds a further requirement that every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If a representation is not true the insurer may avoid the contract.

Although issues of misrepresentation by the insured are often very closely related to issues of non-disclosure (as misrepresentations can be viewed as positive but incorrect disclosure), the provisions of the Misrepresentation Act 1967 (“MA 1967”) can make things more complicated especially given that “in practice the line between misrepresentation and non-disclosure is often imperceptible”.

Frequently the distinction between misrepresentation and non-disclosure is irrelevant since in either case the insurer is seeking to avoid the contract and the remedy is the same. However, in some instances it may matter.

Under s2(2) MA 1967 a court may refuse the remedy of avoidance when to do so would be disproportionate. Instead, the court can declare a

1 The Consumer Insurance (Disclosure and Representations) Act 2012, addressed further at Question 4 below, has moderated the duty of utmost good faith for consumers and the remedies available for insurers in the event of breach.

2 Carter v Boehm (1766) 3 Burr 1905

contact valid and award damages in lieu of rescission. The relationship between an insurer’s right to avoid a contract for misrepresentation (as enshrined in section 20 of the MIA 1906) and the lesser remedy of damages under s2(2) MA 1967 is relatively unexplored. That said, the likely approach of the courts was anticipated by Steyn J in Highlands v Continental4 when he said “Where a contract of reinsurance has been validly avoided on the grounds of material misrepresentation, it is difficult to conceive of circumstances in which it would be equitable within the meaning of section 2(2) [of the Misrepresentation Act 1967] to grant relief from such avoidance. Avoidance is the appropriate remedy for material misrepresentation in relation to marine and non-marine contracts of insurance.”

Finally, it is important to note that the duty of utmost good faith goes further than the statutory definition under MIA 1906. More broadly it can be seen as a duty supporting the implication of contractual terms in the insurance context when required to achieve the goal of fair dealing between the parties.5

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

As set out in question 1 above, the law relating to insurance contracts derives from the common law and was partially codified under the MIA 1906. Further case law has developed and continues to delineate the full extent of the duty as also set out above.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Under English law, the assured is under a duty to disclose to its insurer all material facts which are (a) known or deemed to be known by the assured (b) not known nor deemed to be known by the insurer when entering into an insurance contract. This duty of disclosure is part of the duty of utmost good faith, as described in response to Question 1.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

It has been established beyond doubt that the duty of utmost good faith, including the duty of disclosure, applies to all types of insurance contracts.6 This, however, does not necessarily mean that the scope and application of the duty are identical in every type of insurance.7 The duty will depend upon the circumstances of each case. By way of example, the courts have tended to lessen the burden of disclosure on assureds in contexts where an insurer has greater independent knowledge of the material facts.

It is also important to note that in the commercial insurance context (i.e. the non-consumer context) the parties are free to agree to contract out of the duty of utmost good faith so that a material non-disclosure at the pre-contractual stage does not lead to avoidance. It is obviously quite rare for insurers to agree to do this.

In the context of consumer insurance, the Consumer Insurance (Disclosure and Representations) Act 2012 has modified the duty of utmost good faith for consumer insurance contracts with effect from 6 April 2013. The objective of the legislation was to protect consumers by diluting the duty of utmost good faith and restricting the remedies available to insurers upon there being a non-disclosure or misrepresentation. The duty now on consumers is to take reasonable care not to make a misrepresentation during pre-contractual negotiations. Insurance renewals are also covered by this duty.

As set out in the Appendix, there is a draft insurance contracts bill currently being debated which would alter the existing duty of utmost good faith in commercial insurance contracts as well.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

The duty of utmost good faith applies both at the pre-contractual stage and during the performance of the contract.

At common law, there is no general duty to disclose material facts which occur during the period of insurance, although of course the duty will arise again upon renewal.

However, in the leading case of Manifest Shipping Co Ltd v Uni Polaris Shipping Co Ltd (The Star Sea),8 Lord Hobhouse confirmed that “utmost good faith is a principle of fair dealing which does not come to an end when the contract has been made”, although he did say that the “content of the obligation to observe

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5 Goshawk v Tyser [2006] a All E.R. (Comm) 501 at 514
6 See originally Lindenau v Desborough (1828) 8 B. & C. 586 and for a more recent example Godfrey v Britannic Assurance co [1963] 2 Lloyds Rep 5151 at 528
7 London Assurance v Mansel (1879) 11 Ch. D. 363 at 367
8 Manifest Shipping Co Ltd v Uni Polaris Shipping Co Ltd (The Star Sea) [2001] UKHL 1
good faith has a different application and content in different situations".

The content of the duty at the post-contractual stage is explained further below.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

Yes, the duty is mutual.

However, in practice, the duty is significantly more onerous for the insured than for the insurer. This is because the information relevant to the assessment of a risk has most commonly been in the knowledge of the insured. Furthermore, matters involving the insurer’s duty of disclosure are rarely litigated because the remedy available to the insured for non-disclosure, avoidance of the insurance contract, is rarely of benefit to the insured.

A - For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

At the pre-contractual stage the principle of utmost good faith creates duties owed by the assured (and by his agent effecting the insurance) to disclose all material facts and to refrain from making untrue statements when negotiating the insurance as explained above.

The law is partly codified in ss. 18-20 of the MIA 1906, which apply to all classes of insurance.

These sections are not, however, exhaustive of the concept of utmost good faith and its duty of disclosure, both of which are refined and further explained by common law.


8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

The duty of disclosure arises out of and as part of the duty of utmost good faith, which applies to contracts of insurance.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

N/A.

The duty of disclosure operates as a part of the duty of utmost good faith. The duty of disclosure is set out in s18 MIA 1906 as described above in answer to Question 1.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The remedy for a pre-contractual breach of the duty of utmost good faith by the insured, including non-disclosure of a material fact, is that the insurer can avoid the contract *ab initio*.

Where the insurer elects to avoid the policy, he has no further liability to meet claims made by the insured, but must return to the insured the premium which he has paid. Avoidance *ab initio* should return the contracting parties to the position they would have been in should the contract never have come into existence.

The contract can be avoided either before or after a loss has occurred. The contract cannot therefore be said to be automatically avoided by non-disclosure; it remains in force until avoided by the insurer.

As the assured’s duty of disclosure is part of the duty of utmost good faith, there is no difference in remedy.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

N/A. See above.

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

The duty of disclosure is mutual.

Failure to disclose material facts by the insurer prior to the conclusion of the insurance contract entitles the assured to avoid the contract, although instances are likely to be rare. As stated above, the duty of utmost good faith is in practice much more onerous on the insured than the insurer.
13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd9 the Court of Appeal held that,

“...the duty falling upon the insurer must at least extend to disclosing all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.”

The House of Lords10 subsequently approved the above statement of the insurer’s duty, also stating that the duty does not extend to giving the insured the benefit of the insurer’s market experience. This market experience may include, for instance, that the same risk could be covered for a lower premium either by another insurer or by the same insurer under a different type of insurance contract.11

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

No.

There is regulatory guidance however in the Insurance: Conduct of Business Rules (“ICOBs”) that insurers should explain to their potential insurers at the pre-contractual stage the duty to disclose all material facts and the consequences of not doing so. In the consumer context, the guidelines go on to say that insurers should explain to consumers their responsibility to take reasonable care not to make misrepresentations.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

The remedy for breach by the insurer of its duty of utmost good faith is avoidance of the contract ab initio.

In practice, this is rarely an attractive option for the assured.

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

Following formation of the contract, the content and effect of the duty is flexible and varies according to the circumstances of each individual case. Both parties are required to act in good faith towards each other in the performance of the contract, although there are few instances in which the court has been asked to consider the nature of the duty (and even fewer cases where the duty has been held to have been breached by the insured - see Question 17 below)

In effect, the duty goes little further than the insured having to act in good faith (by refraining from dishonesty) in the presentation of a claim.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Third parties

As a general rule of English law, and in the absence of insolvency, the doctrine of privity of contract prevents a third party from enforcing a term of a contract, even if the contract benefits that third party.

The Contracts (Rights of Third Parties) Act 1999 (the “1999 Act”) has qualified this doctrine to some extent by providing that a third party can bring an action under a contract made for the third party’s benefit if:

(i) the contract expressly provides for this; or
(ii) the contract confers a benefit on the third party.

Under s3(2) of the 1999 Act, claims brought by third parties are subject to all defences that arise in connection with the contract and would have been available to the insurer as a defence to a claim by the named assured. These defences would include avoidance for breach of duty of utmost good faith by the assured.

In practice, the 1999 Act is often specifically excluded by agreement in insurance policies.

Loss payee

Insurance policies on mortgaged property often contain “loss payable” clauses. The policy may stipulate that the money from any or all claims be paid to a third party –i.e. a person other than the insured(s) named on the policy (the “loss payee”).

The loss payee does not have a duty of utmost good faith. However, unless the point is specifically catered for in the policy, the loss payee is not able to enforce the policy since, for the reason specified above, they are not privy to the policy. Moreover, a loss payee is

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9 Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd[1990] 1 Q.B. 665 at 772
10 Ibid. at 268
11 Ibid. at 772
always subject to any defences that the insurer has
as against the insured (including where the insured
has breached its own continuing duty of utmost good
faith).

Assignment

Rights under insurance policies are also capable of
assignment to third parties. If there is an assignment
of the entire contract of insurance to a third party, the
assignee becomes an insured under the contract and
the assignor drops out – this is in effect a novation
where one insured has been substituted for another.
The former third party – the new insured – will have a
duty of utmost good faith.

The proceeds of an insurance policy i.e. the right to
recover following a successful claim, is also a right
capable of assignment (a legal assignment or
equitable assignment). An assignment of the
proceeds does not give rise to a new contract of
insurance between insurer and assignee. The
assignor remains the insured under the policy and the
insured retains his title to sue the insurer for breach of
contract.

With both legal and equitable assignment, the
assignment is made "subject to equities".

A legal assignee is able to sue the insurer in its own
name whereas an equitable assignee can only sue
the insurer in the name of or through the assignor.
Whilst the assignee is permitted, directly or indirectly,
to sue the insurer, the insurer retains against the
assignee all rights that it had against the assignor at
the date of assignment.

Most significantly, any defence available to the insurer
against the original assured will also prevail against
the assignee. This includes rights to terminate claims
in case of fraud and to avoid the contract for material
misrepresentation and non-disclosure. Such a claim
or defence is good against the assignee, even though
the assignee took the insurance in good faith and
without knowledge of the facts giving rise to the claim
or defence. The assignee's rights are derivative and
therefore it can be in no better position than the
assignor.

Where the assignment is of the proceeds, the
assignor remains a party to the contract and the
assignee takes subject not only to defences arising
before assignment but also to defences arising after
assignment; for example, any failure by the assignor
to comply with a condition precedent in relation to the
making of a claim, could jeopardise the claim such
that the assignee may receive significantly diminished
benefit or no benefit at all.

17. Describe the insured’s post-contractual
duty of utmost good faith by providing
examples of the best known cases in
which it has been applied.

The exact nature of this continuing duty of utmost
good faith is one of the most debated issues in
English insurance law.

The most important application of s. 17 MIA 1906 for
the insured will be either where an express term of
the insurance to supply information is breached or
where the insured makes a fraudulent claim (although
the interaction between fraud, the duty of utmost good
faith and avoidance under s. 17 of MIA 1906 is
complicated by the separate common law principle
that an assured who makes a fraudulent claim forfeits
the benefits of his policy).

One example of the insured’s post-contractual duty of
utmost good faith is when a term of the insurance
requires the insured to provide the insurer with
information in particular circumstances. It is said
that in such instances each party in question must act
in good faith with regards to the interests of the other
party.

What is not in doubt is that the basic duty to disclose
material facts is cast upon the proposer or insured
only before the contract or a renewal is concluded.

In common law, there is no general duty to disclose
material facts which occur during the period of
insurance, although of course the duty will arise again
upon renewal. Manifest Shipping Co Ltd v Uni
Polaris Shipping Co Ltd (The Star Sea) confirmed the
basic common law principle and stated that, in
regards to the duty in sections 18 to 20 MIA 1906:
"it is not necessary to disclose facts occurring, or
discovered, since the original risk was accepted
material to the acceptance and rating of that risk.
Logic would suggest that such new information might
be valuable to the underwriter … But it need not be
disclosed."

The post-contractual duty therefore fluctuates
according to the stage of the contract. At the claims
stage, the parties have in effect contrary interests and
so the duty can be said to be nothing more than a
duty to refrain from acting fraudulently as described in
The Star Sea and The Mercandian Continent. By way
of an example from these cases, Lord Scott stated in
The Star Sea “I would limit the duty owed by an
insured in relation to a claim to a duty of honesty”.

18. Is the insured’s intentional concealment
of his/her criminal activities when
completing a proposal for life policies a
breach of the duty of utmost good faith?

Case law on this point suggests that, in summary, any
crime relevant to the insurance sought will be
regarded as material unless it is both trivial and old.
An irrelevant conviction that is not directly related to

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13 Pim v Reid (1843) 6 M&G 1
the risk may also be disclosable when it is serious. As to what exactly constitutes “serious” it is unclear however, case law would seem to suggest a conviction is serious where it has been punished by imprisonment or a substantial fine.

However, regardless of the above, an applicant for insurance is never bound to disclose a conviction which has become spent under the terms of the Rehabilitation of Offenders Act 1974. A conviction will become spent after a specific period according to the seriousness of the crime and the sanction imposed. Most importantly, a conviction resulting in a sentence of two and a half years’ imprisonment or more can never become spent. For all other convictions periods range from 10 years for custodial sentences of between six months and two and a half years done to six months for absolute discharges.

Whilst there may be a lack of complete clarity on this issue in the case law, the general direction the courts have headed is to require the disclosure of most (unspent) convictions. Erring on the side of caution and disclosing any unspent conviction would seem to be the best way forward for those seeking insurance cover.

B - For the Insurer

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

In the post-contractual stage, the duty of utmost good faith for the insurer is much the same as for the insured, although the scenarios in which it may arise are different.

In essence, the duty is restricted to an expectation that the insurer acts in good faith with regards to the interests of the other party.

In the consumer insurance context, the government has introduced regulatory protection for individual consumers. Under the claims handling guidelines of the Insurance: Conduct of Business Rules (“ICOBs”) an insurer must not unreasonably reject a claim. An insurer’s rejection of a claim is deemed to be unreasonable if it is for:

(a) non-disclosure of a material fact which the policyholder could not reasonably be expected to have disclosed;

(b) non-negligent misrepresentation of a material fact;

(c) for policies entered into after 5 April 2013, for misrepresentation unless:

(i) the consumer did not take reasonable care not to make the misrepresentation; and

(ii) the insurer shows that without the misrepresentation he would not have entered into the contract at all

or would have done so only on different terms.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

See the answers to Question 16 and Question 19 above.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

An example of the insurer’s post-contractual duty of utmost good faith is when a liability insurer exercises his right to conduct his insured’s defence to a claim made by a third party as was the case in The Mercandian Continent.¹⁴

In this instance it was ruled that post-contract, “interests of the insured and the insurers may not be the same but they will be required to act in good faith towards each other”.

This same case goes on to give another example that could demonstrate the insurer’s duty of utmost good faith in saying that:

“If for example the limit of indemnity includes sums awarded by way of damages, interest and costs, insurers may be tempted to run up costs and exceed the policy limit to the detriment of the insured. The insured’s protection lies in the duty which the law imposes on the insurer to exercise his power to conduct the defence in good faith.”¹⁵

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no Code of Practice for insurers of universal application; there are a number of discrete codes in relation to specific classes of business (for example, the Association of British Insurers (“ABI”) Code on “Support for Customers with Road Traffic Injuries” or the ABI Code on Long Term Protection Insurance). Insurance companies (including Lloyd’s entitles) are subject to “dual regulation” and are heavily regulated.

This means that they are authorised and prudentially regulated and supervised by the Prudential Regulation Authority (PRA) and separately authorised and regulated for conduct purposes by the Financial Conduct Authority (FCA). The PRA and FCA have a statutory duty to co-operate together and co-ordinate their activities.

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¹⁴ The Mercandian Continent [2001] 2 Lloyd’s Rep 563 at 571-572

¹⁵ Ibid.
In addition to an extensive set of detailed rules, FCA and PRA-authorised firms are required to conduct their affairs in accordance with the 11 Principles for Businesses. These Principles, in particular, require a firm to:

- Conduct its business with integrity and with due skill, care and diligence.
- Take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Maintain adequate financial resources.
- Pay due regard to the interests of customers and treat them fairly.
- Deal with the regulators in an open and cooperative way.

The penalties for breach of the regulations range from public censure, to fines, to suspension of, to complete withdrawal of, PRA/FCA authorisation.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

N/A

At the pre-contractual stage (and at renewal) in commercial insurance and reinsurance contracts, the parties can expressly agree to contract out of the duty of utmost good faith (although, insurers are obviously rarely keen to do so as avoidance is such an attractive remedy).

During the performance of the contract, the duty of utmost good faith is little more than a duty not to act in a dishonest manner.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

A right to avoid or rescind is not traditionally limited by any requirement of acting in good faith. The argument on the other hand turns on the fact that, recent case-law has developed a continuing duty of good faith on both parties and there is no reason to deny the role of a doctrine of unconscionability in this situation.

Recent case law shows a difference of opinion on this and it is unclear as to whether the courts can disregard an avoidance if avoiding the contract in question would constitute a breach of the duty of utmost good faith.

The question was first brought before the courts and a clear view expressed in Strive Shipping Corp v Hellenic Mutual War Risks Association. The issue arose again in Brotherton v Aseguradora Colsegueros SA (No 2).

In both these cases the insureds had failed to disclose to their insurers that, at the time of taking out the insurance, they were under investigation for alleged fraudulent activity. Subsequently, all the allegations were proven to be false. Nevertheless, it was held that the investigations were material. The insureds argued that in exercising the remedy of avoidance in this situation the insurers were in breach of their duty of utmost good faith. In Strive Shipping, the court’s view was that the right of avoidance could be refused where it would be unconscionable, but the argument was rejected by the Court of Appeal in Brotherton. It was held that the intelligence possessed by the insured and not disclosed to the insurer was, at the time of insuring, material, thereby allowing the insurer to avoid.

The Court of Appeal took a different view in Drake Insurance plc v Provident Insurance plc. The case concerned a pre-contractual non-disclosure that actually benefited the insurer. Whilst accepting that there was no binding authority on the point and making clear its caution, the court said that in its opinion an insurer seeking to avoid the contract could not blindly rely upon the remedy of avoidance under s. 17 MIA 1906 but must show a good objective reason for doing so. On the facts, it was decided that the insurer was acting in bad faith by seeking to avoid. It has to be pointed out that the reasoning is by no means clear and is in direct conflict with decision in Brotherton.

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

A breach of the duty of good faith by the insurer would a breach of s17 MIA 1906.

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16 Strive Shipping Corp v Hellenic Mutual War Risks Association [2002] EWHC 203 (Comm)
17 Brotherton v Aseguradora Colsegueros SA (No 2) [2003] EWCA Civ 705
18 Strive Shipping Corp v Hellenic Mutual War Risks Association [2002] EWHC 203 (Comm)
19 Drake Insurance plc v Provident Insurance plc [2003] EWCA Civ 1834
20 See especially Brotherton v Aseguradora Colsegueros SA (No 2) [2003] Lloyd’s Rep IR 758 at paras 29 to 34
26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

There are no regulations that specifically and directly impose or support the insurer’s duty of good faith and, as described above, the insurer’s duty of good faith is relatively narrow. Accordingly, breach of the insurer’s duty of good faith is not likely to attract regulatory intervention. Having said that, insurers are subject to the FCA conduct principle requiring them to “treat customers fairly”. So, it is certainly possible that any insurer breaching their duty of good faith to the policyholder could be susceptible to regulatory action by the FCA if such breach also amounted to a failure to treat the policyholder fairly.

Additionally, in relation to consumer insurance only, aggrieved policyholders may pursue remedies through the Financial Ombudsman Service. Consumer Insurance is subject to the jurisdiction of the Financial Ombudsman Service, an informal, quasi-judicial process which is not required to strictly adhere to the application of law and regulation but which is entitled to render decisions based on what is fair and reasonable in the circumstances.

**IV - Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

In English law there is no distinction made between insurance and reinsurance as to the duty of utmost good faith. The above answers given in relation to insurance apply equally to and should be regarded as referring also to contracts of reinsurance.

The duty of good faith applies to reinsurance contracts because a reinsurance is in the nature of a contract of insurance and because the reinsurer has available to him the same defences to liability as are available to the reinsured in his capacity of primary insurer.21 The duties of the reinsured to the reinsurer ought to be measured by the same standard as expected of the original insurer.22 The duty is therefore based upon the same rules as those applying to original insurance, but its application takes account of features peculiar to reinsurance contracts, particularly reinsurance treaties.

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21 *China Traders’ Insurance Co v Royal Exchange Assurance Corp* [1898] 2 Q.B. 187

22 *Equitable Life Assurance Society v General Accident Assurance Corp* (1904) 12 S.L.T. 348 at 349

**APPENDIX**

**THE INSURANCE BILL**

On 17 June 2014 the Law Commission published a draft Insurance Contracts Bill thus launching a fresh round of consultation to see if the bill had enough backing to be fast-tracked into law. One month later on 17 July 2014 the bill was introduced to the House of Lords as the Insurance Bill.

This bill is part of a review of insurance contract law being undertaken by the Law Commission in conjunction with the Scottish Law Commission. The project began in 2006 and led to the implementation of the Consumer Insurance (Disclosure and Representations) Act 2012 and the subsequent review of insurance contract law relating to commercial insurance as demonstrated by this new bill.

This bill qualifies for an accelerated passage into law under a procedure introduced in 2006 for Law Commission Bills and if the bill successfully passes through both Houses it may be enacted before next year’s General Election (7 May 2015).

The main provisions of the draft bill are set out below.

**Clause 3 – The Duty of Fair Presentation**

This clause, according to the Law Commission’s explanatory notes, is central to the proposed reforms. It requires the insured to make to the insurer, a “fair representation of the risk” before the contract is entered into.

This duty will be made up of three elements.

- Firstly, the insured is required to disclose “every material circumstance” which they “know or ought to know”. This replaces the disclosure duty in the Marine Insurance Act 1906.

- Secondly, if the first leg is not strictly satisfied, there will be no breach if the insured gives enough information to put a prudent insurer on notice that it should make further enquiries which would reveal material circumstances which the insured know or ought to know.

- Thirdly, this clause creates a duty not to make misrepresentations. As with the existing law, where a material representation concerns a matter of fact it must be “substantially correct”. Where it concerns a matter of expectation or belief it must be made “in good faith”.

**Clause 8 – Remedies for Breach**

This clause sets out the circumstances in which an insurer will be entitled to a remedy for an insured’s breach of the duty of fair presentation. As with the current law position the insurer will need to show that
the breach induced them into the contract, however unlike in contracts of consumer insurance, a breach does not have to be deliberate or reckless in order to be actionable. An innocent breach may also be actionable but different remedies will apply.

The extent of the remedies available is set out in Schedule 1 of the Bill.

(a) If the breach of the duty of fair presentation is deliberate or reckless then the insurer may avoid the contract and refuse all claims and need not return any of the premiums paid.

(b) If the breach is neither deliberate nor reckless and the insurer would not have entered into the contract if aware of all of the information then the insurer may avoid the contract and repay all premiums paid.

(c) If the breach is neither deliberate nor reckless and the insurer would have entered into the contract but on different terms then the payment may be reduced in proportion to the difference between the premiums paid and the premiums that would have been payable.

Clause 9 – Warranties and Representations

This clause abolishes “basis of the contract” clauses in non-consumer insurance as they were abolished in consumer insurance by the Consumer Insurance (Disclosure and Representations) Act 2012.

Clause 10 – Breach of Warranty

Under current law, an insurer’s liability is completely discharged from the point of breach of a warranty. This is repealed by this clause 10 and instead the breach of a warranty suspends an insurer’s liability from the time of the breach until the time that the breach is remedied.

Clause 11 – Remedies for Fraudulent Claims

This clause codifies the current common law position. Where the insured commits a fraud against the insurer, the insurer is not liable to pay the insurance claim to which the fraud relates.

The clause also gives the insurer a further remedy; the ability to treat the contract as if it had been terminated at the time of the “fraudulent act” once the insurer has given notice of this intention to the insured.

Clause 13 – Good Faith

This clause removes avoidance as a remedy for breach of the duty of utmost good faith as it will be replaced by the duty of fair presentation

Clause 14 and 15 – Contracting Out

Clause 14 makes it clear that in consumer insurance contracts, insurers are prevented from contracting out of any of the provisions in the bill to the detriment of the consumer. A policy term that puts the consumer in a worse position than under the draft bill will be rendered void.

Clause 15 relates however to non-consumer insurance and allows parties to contract out of terms of the draft bill. There is only one exception to this rule: the prohibition on “basis of contract” provisions.


* * *
I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

In general, insurance laws within the United States recognize the principle of utmost good faith only in limited circumstances: (i) marine insurance (which generally is governed by United States federal law), where the doctrine has been applied in the context of a policyholder’s responsibility to disclose material facts to an insurer in connection with the purchase of an insurance policy, and (ii) reinsurance relationships, where the doctrine generally follows English common law and applies to both a cedent and a reinsurer. A small number of states have held that the principle of utmost good faith also may apply in insurance relationships other than marine insurance, again in the context of a policyholder’s responsibility to disclose material facts to an insurer in connection with the purchase of an insurance policy.

* * *
USA (California)

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Under California law, the principle of utmost good faith, or “uberrimae fidei,” applies in the reinsurance and maritime context only. In the context of reinsurance contracts, Cal. Ins. Code § 622 states that “where an insurer obtains reinsurance, he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk.” Cal. Ins. Code § 622; see also Hampshire Ins. Co. v. Philadelphia Re Ins. Corp., No. C-88-378, Slip Op. at 18 (N.D. Cal. March 1990). The principle of uberrimae fidei is also codified in California’s maritime law at Cal. Ins. Code § 1900(b), which provides that an applicant for marine insurance has an affirmative duty to state all material facts which are known to him, and to communicate every material fact within his knowledge that is not known or presumed by the insurer. A marine insurance policy can be voided by the insurer for any material concealment, omission, or misrepresentation, whether that concealment or omission is innocently or fraudulently made. Reliance Ins. Co. v. McGrath, Inc. 671 F. Supp. 2d 669, 676 (N.D. Cal. 1987).

California has also addressed the principle of ordinary good faith in insurance contracts through both legislation and case law. California courts have consistently recognized that the common law obligation of good faith and fair dealing is inherent in every insurance contract. Freeman v. Allstate Life Insurance Co., 253 F.3d 533 (9th Cir. 2001); Crisci v. Security Ins. Co. of New Haven, Connecticut, 58 Cal. R. 13 (1967) (discussing an insurer’s breach of the implied covenant of good faith and fair dealing). The courts recognize in every insurance contract an implied promise that neither party will do anything to injure the right of the other party to receive the full benefits of the contract. Egan v. Mutual of Ohama Ins. Co., 620 P.2d 141 (Cal. 1979).

In 1959, California adopted its Unfair Claims Practices Act, Cal. Ins. Code §§ 790 et seq. As discussed further below, the statutory scheme, created by the California Insurance Code §§ 332 and 662, codifies the reciprocal duties of ordinary good faith. The Unfair Practices Act specifically sets forth various types of bad faith conduct which are prohibited.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise? See discussion in Question #1. The principle of utmost good faith is a statutory and common law principle under California law. The principle of ordinary good faith is found in California’s statutory law and common law, as well.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured? In maritime law and reinsurance contracts, the principle of utmost good faith is essentially a standard that governs disclosure. Although the principle of utmost good faith is largely a standard that governs disclosure, in the context of general insurance, the principle of ordinary good faith applies to both the performance and the enforcement of the contract. Good faith is defined as honesty in fact in the conduct or transaction concerned. Cal. Com. Code §1201(19). It can apply to action as well as inaction, such as an insurer’s duty not to unreasonably withhold payments due under a policy of insurance.

Cal. Ins. Code § 332 creates a separate duty of disclosure in general insurance contracts by requiring that each party to an insurance contract communicate to the other, in good faith, all material facts within its knowledge.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life, insurance, general insurance, reinsurance etc.)? As discussed in Question #1 above, under California law, utmost good faith applies in the reinsurance and maritime context only. California has also addressed the principle of ordinary good faith in insurance contracts through both legislation and common law.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually? In maritime law and reinsurance contracts, the duty of utmost good faith applies both pre-contractually and post-contractually. The duty of ordinary good faith applies pre-contractually and post-contractually, as well.
II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

The insured and insurer both owe certain pre-contractual duties of utmost and ordinary good faith. Insurance Code § 1900, for example, requires each party to a marine insurance contract to disclose all the information each has regarding the risk, creating a pre-contractual duty to avoid non-disclosure and misrepresentation of information, regardless of whether made innocently or with fraudulent intent, with the purpose to prevent fraud, and to encourage good faith.

With respect to an insurer’s duty of ordinary good faith, California law obligates the insurer to refrain from doing anything to injure the rights of the insured to receive the benefits of the insurance contract. Gruenberg v. Aetna Ins. Co., 9 Cal.3d 566, 573 (1973), citing Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 658 (1958). Regarding the insured, the covenant of good faith and fair dealing implied in every contract of insurance requires an insured to answer honestly all questions on an application for insurance. Freeman v. Allstate Life Insurance Co., 253 F.3d 533 (9th Cir. 2001). If the insured learns of a change in circumstance before the policy is issued, the insured has a duty to inform the insurer of the change. Id. Failure to do so will provide the insurer with grounds to void the policy. Id.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The applicant for maritime insurance is under a duty “to reveal every fact within his knowledge that is material to the risk.” Cigna Property & Cas. Ins. v. Polaris Pictures 159 F.3d 412, 420 (9th Cir. 1998). In New Hampshire Ins. Co. v. C'est Moi, Inc., 519 F.3d 937 (9th Cir. 2007), the insured violated the doctrine of uberrimae fidei when he responded incorrectly to a question on the insurance application.

In Ashoff v. Essentia Ins. Co., (Not Reported) Cal.Rptr.3d, 2013 WL 1912788 (Cal.App. 4 Dist., 2013), the court concluded that the doctrine of uberrimae fidei and California Insurance Code § 1900 required the insured, who had purchased a marine insurance policy, “to communicate all material information in his possession regarding the risk and the whole truth in relation to all matters relating to the claim.”

In the context of a reinsurance contract, under the principle of uberrimae fidei, an insured is required to communicate all the representations of the original insured, as well as all of the knowledge and information he possesses, whether previously or subsequently acquired, that are material to the risk to the reinsurer. Cal. Ins. Code § 622.

8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

Under California law, the doctrine of uberrimae fidei encompasses an insured’s duty to disclose all material facts. Cigna Property & Cas. Ins. v. Polaris Pictures, 159 F.3d 412 (9th Cir. 1998). However, the doctrine of uberrimae fidei is separate and distinct from the statutory right of an insurer to rescind an insurance policy if the insured conceals or misrepresents a material fact. See Cal. Ins. Code § 1904.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

In maritime law and reinsurance contracts, the principle of utmost good faith is essentially a standard that governs disclosure. Under the principle of ordinary good faith, the obligations of the insured and the insurer extend beyond disclosure. As discussed in Question #3 above, the principle of ordinary good faith applies to both the performance and the enforcement of the contract. It can apply to action as well as inaction, such as an insurer’s duty to refrain from unreasonably withholding payments due under a policy of insurance.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

Insurers can recover from insureds only in contract, and not in tort, in a reverse bad faith action arising from the insured’s pre-contractual breach of its duty of good faith. Slaney v. Ranger Ins. Co., 115 Cal. App. 4th 306 (2004). Material misrepresentation or concealment of facts on an insurance policy application are grounds for rescission, and actual intent to deceive need not be shown. Imperial Casualty & Indem. Co. v. Sogomonian, 198 Cal. App. 3d 169 (1988); see also Cal. Ins. Code § 1904 (concealment in a maritime insurance contract gives the insurer the right to rescind the contract).
11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

An insurer’s right to rescind an insurance policy under Cal. Ins. Code §§ 331, 662 or § 1900 does not require any intentional misrepresentation by the insured. Negligent or inadvertent misrepresentation can be the basis of a rescission claim. See, e.g., *Mitchell v. United Nat’l Ins. Co.*, 25 Cal.Rptr. 3d 627, 633-34 (Ct. App. 2d Dist. 2005). Under California law, the duty of disclosure does not appear to have precedence over the duty of utmost good faith.

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

Under California Law, the duty of ordinary good faith and fair dealing obligates the insurer to refrain from taking any action that impairs the right of the insured to receive the benefits of the insurance contract. The implied covenant of good faith has three basic tenets. First, neither party may take any action that injures the right of the other to receive the benefits of the agreement. *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 573 (1973), citing *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 658 (1958). Second, an insurer cannot “put its own interests before those of the insured.” *Miller v. Elite Ins. Co.*, 100 Cal.App.3d 739, 758 (1980). Finally, an insurance carrier must “give at least as much” consideration to the interests of the insured as it does to its own interests. *Egan v. Mutual of Omaha*, 24 Cal.3d 809, 819 (1979). The insurer has a duty to protect the insured’s interests as if those interests were its own. *Mariscal v. Old Republic Life Ins. Co.*, 42 Cal.App.4th 1617, 1623 (1966). Importantly, however, an insurer has no duty to disregard its own interests when they conflict with the insured’s interests. *Henry v. Associated Indem. Corp.*, 217 Cal. App. 3d 1405, 1418-1419 (1990).

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

Under California Insurance Code § 790.03, an insurer may not make any statement “misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby.” In *Hackethal v. Nat’l Casualty Co.*, 234 Cal. Rptr. 853 (Cal. App. 2d Dist. 1987), the insured purchased an income reimbursement insurance policy and later sought coverage for loss of earned income in connection with a hearing before the medical quality assurance board. After the insurer denied coverage for the claim, the insured took the position that the insurer had acted in bad faith because, prior to issuing the policy, the insured had been provided with a brochure that misrepresented the terms of the policy. The court determined that the insurer did not act in bad faith because the representations in the brochure were not in conflict with, nor misleading with regard to, the terms of the policy.

In *Dias v. Nationwide Life Ins. Co.*, 700 F. Supp. 2d 1204, 1208 (E.D. Cal. 2010), the parties’ dispute arose from a variable life insurance policy with death benefits. The insureds took the position that, at the time they applied for the policy, the insurer’s agent advised them that the policy was a good retirement investment and that after a minimal number of annual payments, the policy would pay for itself. When the insured continued to receive premium notices, the insured asserted a claim for bad faith against the insurer. The court found that the insurer could be held liable for its agent’s misrepresentations regarding the premium payments.

**14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

Under California law, the doctrine of *uberrimae fidei* does not appear to impose an obligation on an insurer to notify a prospective insured of the nature and extent of their duty of disclosure.

**15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**


An important exception to the foregoing arises in the context of reinsurance. Under California law, a reinsurer does not owe a fiduciary duty to its cedent, and may not be liable for bad faith or extracontractual liability. *Cal. Joint Powers Ins. Auth. v. Munich Reinsurance Am., Inc.*, No. cv-08-956, 2008 WL 1885754 (C.D. Cal. 2008). California courts do not permit recovery in tort in the reinsurance context. Thus, claims against reinsurers for breach of the covenant of good faith and fair dealing are unsustainable. In *Stonewall Ins. Co. v. Argonaut Ins. Co.*, 75 F.Supp.2d 893 (N.D.III. 1999), the court, analyzing California law, found that “a reinsurer’s breach of the duty of good faith ultimately may seriously affect the reinsured’s ability to provide...
coverage to its other original insureds. . . . Nonetheless, this court does not believe that recognizing the ripple effects of such a breach warrants a finding of public interest comparable to when an original insurer does the same against its original insured. “The court held that there is no fiduciary obligation owed by a reinsurer to its cedent, and that a cedent cannot recover tort damages for the reinsurer’s breach of good faith.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

Under California law, insureds owe a reciprocal duty of good faith to their insurers. Commercial Union Assurance Companies v. Safeway Stores, Inc. 26 Cal 3d 912 (1980). One aspect of the “post-contractual” duty involves the insured’s obligation to provide notice of a claim to the insurer within a reasonable time. Untimely notice of a claim can defeat an insured’s right to recovery of a claim. Safeco Ins. Co. v. Park, 10 Cal. App. 4th 992 (2009).


16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Under California law, the doctrine of uberrimae fidei does not appear to impose any obligations on third-party beneficiaries of insurance coverage. See Jones v. Aetna Casualty & Surety Co., 26 Cal. App. 4th 1717, 1722 (1994) (implied covenant of good faith and fair dealing applies only to parties to the insurance contract).

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In California Casualty Gen. Ins. Co. v. Superior Court 173 Cal.App.3d 274, 283 (1985), the court ruled that the insured’s undue delay in submitting information necessary to process her claim, which contributed to the insurer’s failure to pay the claim, could reduce the insured’s recovery for damages resulting from the insurer’s non-payment. The court found that responsibility and liability for damages were to be allocated between the insurer and the insured in proportion to the amount of bad faith attributable to each party.

In Ram v. Infinity Select Ins., 807 F. Supp. 2d 843 (N.D. Cal. 2011), the insured sought coverage under an automobile insurance policy for the theft of his automobile. During the course of the insurer’s investigation of the claim, the insured was evasive and provided false information to the insurer. The insurer thereafter denied coverage for the theft claim. The court found that because the insured deprived the insurer of the opportunity to fully investigate the claim, the policy was void.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Cal. Ins. Code § 331 states: “Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.” Additionally, § 332 of the Cal. Ins. Code states: “Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means ofascertaining.” Consequently, when an applicant for life insurance is asked for material information about his past criminal activities and does not provide the specific information requested, the insurer is entitled to void the policy. With respect to materiality, the law is unsettled as to whether a misstatement is “material” only where the insurer was prejudiced by actually relying on it, or whether the test is a more objective one, based on an assessment of the type of information a reasonable insurer would have needed to evaluate the claim before it. Compare Royal Indemn. Co. v. Kaiser Aluminum & Chemical Corp., 516 F.2d 1067 (9th Cir. Cal. 1975) (insurer must show actual reliance) with Thompson v. Occidental Life Ins. Co. of California, 513 P.2d 353, 360 (Cal. 1973) (“materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer”); and Mitchell v. United Nat. Ins. Co., 127 Cal.App.4th 457 (2005) (“the materiality of the statement will be determined by the objective standard of its effect upon a reasonable insurer”).

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

The insurer owes a duty to exercise good faith and reasonable discretion in evaluating a claim made against the insurer and in negotiating a settlement of that claim within the policy limits if such a settlement is possible. In Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973), the California Supreme Court stated that:

In the case before us we consider the duty of an insurer to act in good faith in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under
a policy [...] That responsibility is not the requirement mandated by the terms of the policy itself – to defend, settle or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities.

Gruenberg, 510 P.2d at 1037. Insurance companies have a duty to settle third-party liability claims within policy limits in those situations where there is a substantial likelihood of recovery in excess of the limits. See, e.g., Kransco v. American Empire Surplus Lines Ins. Co., 23 Cal.4th 390, 97 Cal.Rptr.2d 151, 2 P.3d 1 (2000).

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

California courts have refused to permit third-party claimants to sue insurers directly for breach of the implied covenant of good faith and fair dealing, which is solely for the benefit of the insured. Murphy v. Allstate Ins. Co., 553 P.2d 584 (Cal. 1976). However, Cal. Civ. Code § 1559 expressly entitles third parties to enforce a contract made for their benefit at any time prior to its rescission. Thus, the third party must show that the policy was procured expressly for its benefit in order to enforce the implied covenant of good faith and fair dealing against the insurer as a third-party beneficiary. Ascherman v. Gen. Reinsurance Corp. 183 Cal. App. 3d 307 (1986).


21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In Reid v. Mercury Ins. Co., 220 Cal. App. 4th 262 (Cal. App. 2d Dist. 2013), the parties’ insurance coverage dispute arose from an automobile collision which caused injury to the claimant and others. Thereafter, the claimant filed suit against the insured, without first responding to the insurer’s prior request for medical records or making a settlement demand. The insurer offered its policy limits to settle the case three months after it received the medical records, but the claimant refused the offer and filed a bad faith suit against the insurer as the insured’s assignee in which it contended that the insurer’s delay and failure to settle the claim constituted bad faith. The court found that under California law, an insurer does not owe a duty to initiate settlement discussions or offer its policy limits immediately after the insured’s liability in excess of policy limits has become clear. Accordingly, the court determined that because the claimant had made no settlement offer, and because there was no evidence that the insurer knew or should have known the claimant was interested in settlement, the insurer was not liable for bad faith failure to settle.

In Maynard v. State Farm Mut. Auto. Ins. Co., 499 F. Supp. 2d 1154 (C.D. Cal. 2007), the insured took the position that the insurer acted in bad faith in investigating and evaluating his claim for underinsured motorist coverage. The insured contended that the insurer ignored the evidence in its claim file, instead focusing only on evidence supporting its denial of the claim. The insurer took the position that the facts known to it at the time it rejected the insured’s settlement offer demonstrated that the parties had a genuine dispute over the claim, and therefore that its handling of the claim was proper. The court found that although the insurer’s actions may not have been the best model of claims handling, the insurer had a reasonable and legitimate basis for questioning the insured’s claim and therefore did not act in bad faith as a matter of law.

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

Although California does not have a “Code of Practice” specifically applicable to insurers, it provides a comprehensive statutory scheme for the regulation of all phases of the insurance business. Cal. Ins. Code Division 1, §§ 100 to 1879.8 form the general rules governing insurance. In addition to the general insurance law, Cal. Ins. Code § 790 to § 790.15, enacted by the California Unfair Claims Practices Act, sets forth specific regulations that proscribe unfair competition and unfair or deceptive acts or practices in the business of insurance. For example, Cal. Ins. Code § 790.03(h) prohibits knowingly committing misrepresentations of “pertinent facts or insurance policy provisions relating to any coverages at issue.” Cal. Ins. Code § 790.03(b) bars an insurer from making any assertion or representation concerning the business of insurance which is untrue, deceptive or misleading. Cal. Ins. Code § 790.03(h) prohibits a number of unfair claim settlement practices.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

California courts have not addressed this scenario. However, some California courts have ruled that even if there is no coverage, the manner in which the claim is handled may expose the insurer to a bad faith claim. In Judah v. State Farm Fire & Casualty Co., 227 Cal. App. 3d 1133, 266 Cal. Rptr. 455 (1990), the California appellate court addressed somewhat egregious conduct in determining whether the insurer could be held liable for bad faith damages in the absence of coverage. Although depublished (268 Cal. Rptr. 541, 281 Cal. Rptr. 766), this opinion has been referenced by other courts following California’s lead on this issue.
24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

Under California law, the implied covenant of good faith and fair dealing requires that the insurer act reasonably when handling its insureds’ claims. This means that the insurer must not unnecessarily withhold or delay payments owed to its insured. *Waller v. Truck Ins. Exch., Inc.* 11 Cal. 4th 1, 36 (1995). These principles would appear to support the contention that where an insurer seeks to avoid application of a policy, a court may “disregard,” or reject, the insurer’s attempt to avoid coverage.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**


26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

The California Unfair Practices Act authorizes the California Insurance Commissioner to levy a variety of administrative sanctions to enforce the provisions of the Act. See Cal. Ins. Code § 790.034. These sanctions include fines not to exceed ($10,000) for each act, license suspension, or license revocation. In addition, in the case of a violation of cease and desist order from the Commissioner, the Commissioner may, after hearing, suspend or revoke the license or certificate of that person for a period not exceeding one year. Cal. Ins. Code § 790.05.

**IV - Reinsurance**

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

As discussed above, California has codified the doctrine of utmost good faith for reinsurance contracts in Cal. Ins. Code § 622, which provides, in relevant part: “[w]here an insurer obtains reinsurance, he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which are material to the risk.” As discussed in Question #15 above, California courts treat reinsurance differently insofar as recovery in tort is not permitted in the reinsurance context. Thus, claims against reinsurers for breach of the covenant of good faith and fair dealing are unsustainable, and a reinsurer may not be held liable for bad faith or extra-contractual liability. *Cal. Joint Powers Ins. Auth. v. Munich Reinsurance Am., Inc.*, No. cv-08-956, 2008 WL 1885754 (C.D. Cal. 2008).

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I - Definition of the Principle of Utmost Good Faith

1. **In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.**

   The Illinois Supreme Court (the highest court in the state of Illinois) has not expressly considered this issue. However, an Illinois appellate court has held that the principle does not apply to insurance relationships between an insured and an insurer. Preferred Risk Mutual Insurance Co. v. Hites, 259 N.E.2d 815 (Ill. Ct. App. 1970). Another Illinois appellate court has held that the principle applies in the reinsurance context, defining it (for purposes of that case) to require a reinsurer to indemnify a cedent for losses that are “even arguably within the scope of the coverage of the reinsured, and not to refuse to pay merely because there may be another reasonable interpretation of the parties’ obligations under which the reinsurer could avoid payment.” Amerisure Mutual Insurance Co. v. Global Reinsurance Corp. of America, 927 N.E.2d 740, 749 (Ill. Ct. App. 2010) (internal quotations omitted).

2. **Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?**

   To the extent recognized by Illinois courts, the principle of utmost good faith is a common law principle that, generally speaking, traces its origin to English common law.

3. **Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?**

   No.

4. **Does the principle of utmost good faith apply to all types of insurance contracts (life, insurance, general insurance, reinsurance etc.)?**

   Under Illinois law, the principle of utmost good faith applies in the reinsurance context only. Illinois courts have not applied the principle to insurance relationships.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

   In the reinsurance context, an Illinois appellate court has applied the principle of utmost good faith “post-contractually.” Illinois courts have not yet formally considered whether the principle applies “pre-contractually,” but likely would follow English common law in this regard.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

   No, under Illinois law, the principle applies to neither the insured nor the insurer in the context of an insurance relationship.

   **A - For the Insured**

7. **What is the content of the duty of utmost good faith for the insured?**

   Not applicable (see response to Question 6).

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

   Not applicable (see response to Question 6).

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

   Not applicable (see response to Question 6).

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

    Not applicable (see response to Question 6).
11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

Not applicable (see response to Question 6).

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

Not applicable (see response to Question 6).

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Not applicable (see response to Question 6).

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

Not applicable (see response to Question 6).

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

Not applicable (see response to Question 6).

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

Not applicable (see response to Question 6).

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

No.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Not applicable (see response to Question 6).

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

Not applicable (see response to Question 6).

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

Not applicable (see response to Question 6).

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

Not applicable (see response to Question 6).

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Not applicable (see response to Question 6).

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

Not applicable (see response to Question 6).

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

Not applicable (see response to Question 6).

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

Not applicable (see response to Question 6).

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

Not applicable (see response to Question 6).

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

Not applicable (see response to Question 6).

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

Although Illinois courts have not applied the principle of utmost good faith to insurance relationships, an Illinois court has recognized that the principle of utmost good applies to the post-contractual handling of a claim by a reinsurer, and has held, under that principle and for purposes of that dispute, that a reinsurer is obligated to indemnify a cedent for losses that are “even arguably within the scope of the
coverage of the reinsured, and not to refuse to pay merely because there may be another reasonable interpretation of the parties’ obligations under which the reinsurer could avoid payment.” Amerisure Mutual Insurance Co. v. Global Reinsurance Corp. of America, 927 N.E.2d 740, 749 (Ill. Ct. App. 2010) (internal quotations omitted); accord Guarantee Trust Life Insurance v. Insurers Administrative Corp., No. 09-5129, 2010 WL 3834026, at *3 (N.D. Ill. Sept. 24, 2010). Illinois courts have not yet specifically addressed whether the principle of utmost good faith applies to reinsurance relationships at the placement/pre-contractual stage and, if so, the meaning of that principle in that context; however, Illinois courts likely would follow English common law in this regard.

* * *
USA (Massachusetts)

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Massachusetts insurance laws apply the principle of uberrimae fidei, or “utmost good faith,” in limited circumstances. Uberrimae fidei requires an insured “to disclose to the insurer all known circumstances that materially affect the insurer’s risk, the default of which . . . renders the insurance contract voidable by the insurer.” Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37-38 (1st Cir. 2006). As discussed below, Massachusetts insurance laws also impose a duty of ordinary good faith, as distinguished from “utmost” good faith, on insurers and insureds in both the pre-contractual and post-contractual context. The duty of ordinary good faith is separate and distinct from the principle of uberrimae fidei.

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?


3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

Under Massachusetts law, the doctrine of uberrimae fidei encompasses an insured’s duty to disclose all material facts. Compagnie de Reassurance d’île de Fr. v. New England Reinsurance Corp., 944 F. Supp. 986, 994 (D. Mass. 1996). Massachusetts does not recognize an independent “duty of disclosure” on the part of the insured. However, Massachusetts statutory law provides that if an insured makes a material misrepresentation or omission in the negotiation of a policy of insurance with the intent to deceive, or if the material misrepresentation or omission increases the risk of loss, the policy is void. See M.G.L. c. 175 § 186 (“No oral or written misrepresentation or warranty made in the negotiation of a policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss.”)

For purposes of M.G.L. c. 175, § 186, a fact is regarded as “material” if “the knowledge or ignorance of [it] would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium.” Employers’ Liab. Assur. Corp. v. Vella, 366 Mass. 651, 655 (1975). The statute is declaratory of long-standing common law principles defining the sort of false representations that can serve to avoid an insurance policy. Barnstable County Ins. Co. v. Gale, 425 Mass. 126, 128 (1997), citing PAHIGIAN v. MANUFACTURERS’ LIFE INS. CO., 349 Mass. 78, 85 (1965).

4. Does the principle of utmost good faith apply to all types of insurance contracts (life, insurance, general insurance, reinsurance etc.)?

No. Although the doctrine of uberrimae fidei originally applied to all insurance contracts, Massachusetts courts apply the doctrine only in limited circumstances today. The doctrine was initially grounded in the supposition that in any insurance relationship, the
insured is in a far better position than the insurer to be aware of the risks associated with a contract of insurance, and should therefore be obliged to reveal such risks to the insurer. See Compagnie de Reassurance d'Ile de Fr., 944 F. Supp. at 993. However, over time, Massachusetts courts recognized that while this assumption may have been accurate in the area of marine insurance (from which the doctrine of uberrimae fidei originated), where the insurer has no practical ability to inspect an insured vessel located in a foreign port or at sea, the assumption does not necessarily hold true for other types of primary insurance, such as fire or life insurance. Id. In the latter cases, because it is feasible for the insurer to inspect the insured property or examine the insured individual before issuing a policy, insurers do not need the protection that uberrimae fidei provides. Today, Massachusetts law recognizes the doctrine of uberrimae fidei only in the context of two types of insurance contracts: (1) maritime insurance contracts; and (2) reinsurance contracts. Id.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

As discussed below, the doctrine of uberrimae fidei applies at both the pre-contractual and post-contractual stage in the context of contracts for marine insurance and reinsurance. In addition, Massachusetts common law and statutory law impose obligations on insureds and insurers in connection with their duty of ordinary good faith at both the pre-contractual and post-contractual stage.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

In the context of contracts for marine insurance and reinsurance, the doctrine of uberrimae fidei applies to insureds at the pre-contractual stage. The insured’s duty of utmost good faith is discussed in Questions 7 through 11 below. As discussed in Question 12 below, there is limited case law in Massachusetts which suggests that an insurer may also owe a duty of utmost good faith at the pre-contractual stage. See Compagnie De Reassurance d’Ile De Fr. v. New Eng. Reinsurance Corp., 57 F.3d at 88-89 (1st Cir. 1995), citing Contractors Realty Co., Inc. v. Insurance Co. of N. Am., 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979) (noting the “reciprocal duty on the part of the insurer to deal fairly, to give the assured fair notice of his obligations, and to furnish openhandedly the benefits of a policy”). As discussed in Questions 12 and 15 below, Massachusetts statutory law also imposes several pre-contractual obligations in connection with an insurer’s duty of ordinary good faith. See M.G.L. c. 175, § 181; M.G.L. c. 176D, §3.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Under the doctrine of uberrimae fidei, an insured is required to “disclose to the insurer all known circumstances that materially affect the insurer’s risk, the default of which . . . renders the insurance contract voidable by the insurer.” Commercial Union Ins. Co. v. Pesante, 459 F.3d at 37-38 (1st Cir. 2006). Although strict, the doctrine does not require disclosure of peripheral, non-risk matters. Reliance Nat’l Ins. Co. (Europe), Ltd. v. Hanover, 246 F. Supp. 2d 126, 136 (D. Mass. 2003). Rather, only material facts must be disclosed. To be material, the fact must be something which would have controlled the underwriter’s decision to accept the risk. Id. The insurer’s failure to disclose a material risk entitles the underwriter to void the policy ab initio. Id.

In Reliance Nat’l Ins. Co. (Europe), Ltd. v. Hanover, 246 F. Supp. 2d 126 (D. Mass. 2003), an insured sought coverage under a marine insurance policy after his yacht caught fire, burned and sank. At the time the insured completed his application for the marine policy, the insurer failed to disclose defects in the vessel’s mast and engine of which he was previously aware. Id. at 137. The insurer took the position that the insured’s failure to disclose these defects rendered the marine policy void ab initio because the insurer would not have issued the policy had the defects been fully disclosed. Id. at 134. The court agreed with the insurer, finding that the marine policy was void due to the insurer’s failure to disclose the alleged defects, which were material. Id. at 137.

In St. Paul Fire and Marine Ins. Co. v. Marine MGA, Inc., 495 F. Supp. 2d 232 (D. Mass. 2007), an insured sought coverage under a marine policy after his commercial fishing vessel sank. At the time the insured completed his application for the marine policy, he did not disclose that the vessel had previously lost buoyancy, causing the engine room to become submerged. Id. at 235. The insurer took the position that the insured’s failure to disclose this incident rendered the marine policy void ab initio under the doctrine of uberrimae fidei. The insurer argued that his failure to disclose the prior incident was due to an ambiguity in the application, and was not committed with any intent to deceive. Id. at 234. The court ruled in favor of the insurer, finding that because the insurer would have been unlikely to issue the policy had the incident been disclosed during the application process, the policy was void ab initio. Id. at 241.
8. Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?

Under Massachusetts law, the doctrine of uberrimae fidei encompasses an insured’s duty to disclose all material facts. Compagnie de Reassurance d’ile de Fr. v. New England Reinsurance Corp., 944 F. Supp. 986, 994 (D. Mass. 1996). However, the doctrine of uberrimae fidei is separate and distinct from the statutory right of an insured to void an insurance policy if the policyholder makes a material misrepresentation or omission with the intent to deceive or that increases the risk of loss. The distinction between these two principles is discussed in Questions 9 through 11 below.

9. If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.

Mass. Gen. Laws c. 175, § 186, which governs the rescission of insurance policies, provides that an insurer may only void an insurance contract if, in the negotiation of the policy, the insured made a material misrepresentation or omission with the intent to deceive, or a material misrepresentation or omission that increased the risk of loss. In contrast, rescission of a policy under the doctrine of uberrimae fidei does not require a misrepresentation on the part of the insured. St. Paul Fire and Marine Ins. Co., 495 F. Supp. 2d at 240 (D. Mass. 2007). Rather, the doctrine operates irrespective of whether the insured omitted the information on the basis of neglect, ignorance or malice. Accordingly, under Massachusetts law, an insured may be found to have violated the doctrine of uberrimae fidei even if the insured’s conduct does not warrant rescission of the insurance policy under M.G.L. c. 175, § 186.

For example, in St. Paul Fire and Marine, discussed in Question 7 above, the insured failed to disclose in his policy application a prior incident during which his commercial fishing vessel had been submerged. St. Paul Fire and Marine Ins. Co., 495 F. Supp. 2d 232. The insured took the position that his failure to disclose the prior incident was due to an ambiguity in the application, and was not committed intentionally. Id. at 234. The court found that no “misrepresentation” had occurred, and that therefore the insurer could not rescind the policy under M.G.L. c. 175, § 186. Id. at 240. However, the court also found that because the doctrine of uberrimae fidei does not require a misrepresentation and operates even where the insured’s omission is due to neglect or ignorance, the insurance policy was nonetheless void ab initio. Id. at 241.

10. What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?

The remedy available to an insurer for a pre-contractual breach of the duty of utmost good faith by the insured is identical to the remedy that is available to an insurer under M.G.L. c. 175, § 186 in circumstances where the insured makes a material misrepresentation or omission in the negotiation of a policy of insurance with the intent to deceive, or a material misrepresentation or omission that increases the risk of loss. In both cases, the insurer may void the policy ab initio. TIG Ins. Co. v. Blacker, 54 Mass. App. Ct. 683, 686 (2002) (M.G.L. c. 175, § 186 sets forth the right of an insurer to rescind a policy based upon a misrepresentation in the insured’s application for insurance); cf. Reliance Nat’l Ins. Co. v. Hanover, 246 F. Supp. 2d at 136 (D. Mass. 2003) (insured’s failure to meet the uberrimae fidei standard entitles the insurer to void the policy ab initio).

11. If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?

In cases involving marine insurance contracts, Massachusetts courts apply state law unless (i) an established maritime rule controls the issue; and (ii) the rule materially differs from state law. St. Paul Fire and Marine Ins. Co., 495 F. Supp. 2d at 237 (D. Mass. 2007). As discussed in Question 9 above, an insurer’s right to rescind an insurance policy under M.G.L. c. 175, § 186 requires a misrepresentation by the insured, but an insurer’s ability to rescind a policy under the doctrine of uberrimae fidei does not. For this reason, the rule of uberrimae fidei “materially differs” from Massachusetts state law, and courts in Massachusetts apply the doctrine of uberrimae fidei to marine insurance contracts.

B - For the Insurer

12. What is the content of the pre-contractual duty of utmost good faith for the insurer?

insurer has a “reciprocal duty . . . to deal fairly, to give the assured fair notice of his obligations, and to furnish openhandedly the benefits of a policy.” Compagnie De Reassurance d’Ile De Fr. v. New Eng. Reinsurance Corp., 57 F.3d at 88-89 (1st Cir. 1995), citing Contractors Realty Co., Inc. v. Insurance Co. of N. Am., 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979).

Massachusetts statutory law also imposes several pre-contractual obligations on an insurer in connection with the insurer’s duty of ordinary good faith. M.G.L. c. 175, § 181 requires an insurer to refrain from making any written or oral statements “misrepresenting the terms of any policy of insurance . . . or the benefits or privileges promised thereunder.” Further, M.G.L. c. 176D, §3(2) prohibits an insurer from making any assertion or representation concerning the business of insurance which is untrue, deceptive or misleading. Finally, M.G.L. c. 176D, §3(7) requires an insurer to refrain from unfairly discriminating between “individuals of the same class and of essentially the same hazard” in the amount of premium, amount of policy benefits, any of the terms or conditions of an insurance policy, or in any other manner.

13. Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

The case of Telles v. Commissioner of Ins., 410 Mass. 560 (1991) involved a challenge to regulations promulgated by the Massachusetts Commissioner of Insurance. The regulations prohibited a life insurer from considering gender-based mortality differences in the underwriting of life insurance, but resulted in higher life insurance premiums for women than men. Id. at 561. The court found that the regulations were in direct conflict with M.G.L. c. 176D, §3(7), which prohibits insurers from treating individuals differently only if they are in the same class of risks. Id. at 563. The commissioner conceded that women are of a different risk classification than men, given their differences in life expectancy. Id. at 564. The court determined that because the regulations conflicted with M.G.L. c. 176D, §3(7), the regulations were void.

In Slingsby v. Metropolitan Ins. Co., 2001 Mass. App. Div. 49 (2001), the insured purchased a life insurance policy that permitted the insured to borrow money up to the value of the policy. The insured alleged that when he borrowed $6,000 from the policy for his daughter’s education, the insurer acted improperly when it failed to advise him that the amount of the loan would reduce the amount of his death benefit. Id. at 51. The court rejected the insured’s argument on the grounds that the policy specifically stated that both the value of the policy and the death benefit would be reduced by the amount of any loan. Id. The court further found that “a party who receives a policy is bound by its terms.” Id.

In Foisy v. Royal Maccabees Life Ins. Co., 241 F. Supp. 2d 65 (2002), the parties’ dispute arose from a life insurance annuity contract. The insured took the position that based on her understanding of the policy, she was entitled to monthly payments until her death. Id. at 67. When the insurer refused to make any further payments under the policy, the insured alleged that the insurer had purposefully made misrepresentations as to the insurance contract’s coverage. Id. Rejecting the insured’s argument, the court found that the insurer had made no such misrepresentations, and the contract was merely ambiguous. Id. at 68-69. The court further determined that the fact that the contract was ambiguous did not indicate that the insurer had purposely “misrepresented” any benefit in violation of its statutory obligations. Id. at 69.

14. Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?

Prior to the issuance of an insurance policy, many insurers require an insured to complete a detailed policy application. However, under Massachusetts law, the doctrine of uberrimae fidei does not impose on an insurer the obligation to notify a prospective insured of the nature and extent of their duty of disclosure.

15. What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?

Massachusetts law does not recognize a private cause of action for an insurer’s violation of M.G.L. c. 176D, §3(2), (7) or (11). Grande v. PFL Ins. Co., 2000 Mass. App. Div. 261, 264 (Mass. App. Div. 2000). With the exception of M.G.L. c. 176D, §3(9), which addresses an insurer’s post-contractual obligations, all provisions of M.G.L. c. 176D are enforceable only by the Massachusetts Commissioner of Insurance. Foisy v. Royal Maccabees Life Ins. Co., 241 F. Supp. 2d 65, 68-69 (D. Mass. 2002), citing Thorpe v. Mut. of Omaha Ins. Co., 984 F.2d 541, 544 n.1 (1st Cir. 1993). If an insurer violates a cease and desist order issued by the Commissioner of Insurance relating to a violation of M.G.L. c. 176D, the insurer will be ordered to pay to the Commonwealth of Massachusetts a sum up to ten thousand dollars for each violation, and may be subject to suspension or revocation of its license. M.G.L. c. 176D, § 10. In addition, the Commissioner may order that restitution be made by an insurer to any claimant who has suffered actual economic damage as a result of an insurer’s unfair or deceptive act or practice. M.G.L. c. 176D, § 7.

Although there is no private cause of action under M.G.L. c. 176D, §3, an insured may nonetheless recover actual damages and attorneys’ fees in circumstances where an insurer has engaged in

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

Once coverage has commenced under a marine insurance policy, the doctrine of uberrimae fidei imposes a continuing obligation on the vessel owner to ensure that the vessel will not, through either bad faith or neglect, knowingly be permitted to sail in an unseaworthy condition. Reliance Nat’l Ins. Co. (Europe), Ltd. v. Hanover, 246 F. Supp. 2d 126, 136 (D. Mass. 2003), citing Windsor Mount Joy Mut. Ins. Co. v. Giragosian, 57 F.3d 50, 54-55 (1st Cir. 1995).

The warranty of seaworthiness is an absolute and non-delegable duty owed by a ship owner to the insurer, and encompasses the integrity of the vessel’s physical structure as well as its equipment and working procedures. Reliance Nat’l Ins. Co. (Europe), Ltd. v. Hanover, 246 F. Supp. 2d at 136 (D. Mass. 2003), citing Underwriters at Lloyd’s v. Labarca, 260 F.3d 3, 7 (1st Cir. 2001).

Under Massachusetts common law, an insured also owes a duty to cooperate in an insurer’s investigation of a claim at the post-contractual stage. See Miles v. Great N. Ins. Co., 656 F. Supp. 2d 218, 222 (D. Mass. 2009) (“[w]hen an insurer investigates a claim of loss, the insured has a duty to cooperate by submitting to an examination under oath and producing documents relevant to the claimed loss”); see also Mello v. Hingham Mut. Fire Ins. Co., 421 Mass. 333, 341 n.6 (1995) (insureds have a general obligation to cooperate with the insurer in the investigation and verification of a claim).

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

Under Massachusetts law, the doctrine of uberrimae fidei does not impose any obligations on third-party beneficiaries of insurance coverage. However, there is limited case law in Massachusetts which suggests that a third-party beneficiary may owe a duty of ordinary good faith, at least in the context of a life insurance policy. See Lucia v. John Hancock Mut. Life Ins. Co., 28 Mass. App. Dec. 166 (1984) (where parents of insured infant answered truthfully questions concerning insured’s physical condition and medical history, and answers were falsely recorded by insurer’s agent so that application indicated that insured was in good health and had never been hospitalized, the fact that the application was subsequently signed by insured’s father precluded his recovery as beneficiary of life policy issued in reliance on application).

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In Mello v. Hingham Mut. Fire Ins. Co., 421 Mass. 333 (1995), the insured sought coverage under a homeowner’s insurance policy for a fire loss at his residence. Pursuant to its investigation of the claim, the insurer requested that the insured submit to an examination under oath. Id. at 335. The insured refused to submit to any such examination, and the insurer denied coverage for the fire loss. Id. The court found that the insured’s refusal to submit to the insurer’s reasonable request for an examination under oath constituted a material breach of the insurance policy. Id. at 337. The court therefore determined that the insurer’s denial of the claim was proper. Id. at 341.

In Rymsha v. Trust Ins. Co., 51 Mass. App. Ct. 414 (2001), the insured filed a claim under a homeowner’s insurance policy for items allegedly stolen from her rental car. During the insurer’s investigation of the claim, it requested that the insured provide it with documents concerning her business income, any available documentation of the stolen items, and any documents from her businesses that indicated a history of insurance claims. Id. at 415. The insured substantially failed to comply with the requests. Id. at 416. The court held that the insured was required to respond to the insurer’s reasonable requests to produce documents pertinent to her claimed loss as a condition precedent to the insurer’s liability. Id. at 417. The court therefore determined that the insurer’s denial of the insured’s claim was proper. Id. at 419.

Miles v. Great N. Ins. Co., 656 F. Supp. 2d 218, 222 (D. Mass. 2009) involved a claim under a fire insurance policy in connection with a fire at the insureds’ residence. In conducting its investigation of the claim, the insurer requested that the insureds provide certain pertinent documents, including tax returns, highway toll receipts and alarm system records. Id. at 220-221. The insureds failed to produce the requested documents in a timely manner, and the insurer denied the claim. Id. at 221. The court found that if the insureds’ failure to produce documents prevented the insurer from completing its investigation, denial of the claim by the insurer would be proper. Id. at 223.
18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

Because the doctrine of *uberrimae fidei* does not apply to life insurance policies under Massachusetts law, an insured’s intentional concealment of his or her criminal activities when completing an application for life insurance would not constitute a breach of the duty of utmost good faith. However, such conduct by the insured may warrant rescission of the policy under Massachusetts statutory law if the requirements of M.G.L. c. 175, § 186 are satisfied. See *Quintiliani v. John Hancock Mut. Life Ins. Co.* 340 Mass 93, 94 (1959) (applying M.G.L. c. 175, § 186 to representations made by insured in application for life insurance policy).

Under M.G.L. c. 175, § 186, an insurer may rescind an insurance policy if an insured makes a material misrepresentation or omission in the negotiation of the policy with an actual intent to deceive, or if the material misrepresentation or omission increases the risk of loss. M.G.L. c. 175 § 186. If an insured intentionally concealed his or her criminal activities when completing an application for life insurance, the insured would likely be found to have had “an actual intent to deceive.” However, even where the insured has an “actual intent to deceive,” the policy is voidable for misrepresentation only if the fact misrepresented is material. *Employers’ Liability Assurance Corp. v. Vella*, 366 Mass. 651, 655 (1975). A fact is “material” if “the knowledge or ignorance of [it] would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium.” *Id.* Certain criminal activities, such as those involving the use of alcohol or controlled substances, may affect the judgment of an underwriter in connection with the issuance of a life insurance policy. If the criminal activities concealed by the insured are “material,” the insured’s misrepresentation would warrant rescission of the policy under M.G.L. c. 175 § 186.

**B - For the Insurer**

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

There is limited case law in Massachusetts which suggests that the doctrine of *uberrimae fidei* applies to insurers at the post-contractual stage in the context of contracts for marine insurance and reinsurance. See *Compagnie De Reassurance d’Ile De Fr. v. New Eng. Reinsurance Corp.*, 57 F.3d 56, 88-89 (1st Cir. 1995) (reinsurers owe a “reciprocal duty utmost good faith”), *citing Contractors Realty Co., Inc. v. Insurance Co. of N. Am.*, 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979) (discussing a marine insurer’s reciprocal duty under the doctrine of *uberrimae fidei*). The case law suggests that when dealing with a claim, an insurer must deal fairly, give the assured fair notice of his obligations, and furnish openhandedly the benefits of a policy. *Id.*

Under Massachusetts common law, the duty of ordinary good faith also imposes two obligations on all insurers at the post-contractual stage: (1) to attempt to settle claims without regard to the policy limit, and (2) to exercise common prudence to discover the facts as to liability and damages upon which an intelligent decision may be based. *Hartford Casualty Ins. Co. v. New Hampshire Ins. Co.*, 417 Mass. 115, 119 (1994). In this regard, an insurer’s duty of ordinary good faith requires that it keep the insured informed of facts material to his exposure, including information relating to coverage and settlement negotiations. *Peckham v. Continental Casualty Ins. Co.*, 895 F.2d 830, 840 (1st Cir. 1990).

Massachusetts statutory law also imposes a number of obligations in connection with an insurer’s duty to act in ordinary good faith with respect to claims handling. Under M.G.L. c. 176D, §3(9), an insurer must: (a) refrain from misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue; (b) acknowledge and act reasonably promptly in response to communications concerning claims; (c) adopt and implement reasonable standards for the prompt investigation of claims; (d) conduct a reasonable investigation based upon all available information before refusing to pay a claim; (e) affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; (f) effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; (g) refrain from compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds; (h) refrain from attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured; (i) refrain from making claims payments to insured or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; (k) refrain from appealing arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements of compromises less than the amount awarded in arbitration; (l) refrain from delaying the investigation or payment of claims by requiring that an insured or claimant submit duplicative information; (m) refrain from failing to settle claims promptly where liability has become reasonably clear under one portion of the insurance policy in order to influence settlements under other portions of the insurance policy coverage; and (n) promptly provide a reasonable explanation for denial.
of a claim or for the offer of a compromise settlement. M.G.L. c. 176D, §3(9).

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

Under Massachusetts law, the doctrine of uberrimae fidei does not impose on insurers a duty of utmost good faith with respect third-party beneficiaries of insurance coverage. However, Massachusetts statutory law recognizes a duty of ordinary good faith owed to third party beneficiaries whose rights are affected by an insurer’s unfair claims settlement practices. See M.G.L. c. 93A §9(1) (providing a cause of action for “any person whose rights are affected by another person violating the provisions of [G. L. c. 176D, § 3(9)])”). Insurers owe a duty to respond promptly to settlement demands by claimants and to effectuate prompt settlement. See, e.g., Clegg v. Butler, 424 Mass. 413, 418-19 (1997) (recognizing that insurers owe third-party claimants a duty of fair dealing with respect to insurer’s settlement practices); Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 675 (1983) (direct claim permitted by patient against physician’s malpractice insurer under M.G.L. c. 93A, § 9 and c. 176D, §3(9) in connection with insurer’s alleged unfair settlement practices); Gore v. Arbeta Mut. Ins. Co., 77 Mass. App. Ct. 518, 527 (2010) (recognizing claimant’s right to recover against tortfeasors’ insurer for insurer’s failure to promptly respond to claimant’s settlement demand where insured’s liability was reasonably clear).

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F. Supp. 2d 49 (D. Mass. 1998), the plaintiff insurer ceded a portion of its insured’s coverage under several policies to the defendant reinsurer under a reinsurance agreement. The insured was later faced with third-party lawsuits and regulatory claims for millions of dollars in environmental cleanup costs. Id. at 51. The insurer paid the insured $2.2 million and billed the defendant reinsurer on its reinsurance agreement. Id. When the reinsurer failed to pay for several years, the reinsured filed a lawsuit against the reinsurer alleging that it had acted in bad faith. Id. at 63. The reinsured argued that the reinsurer made numerous requests for information from the reinsured in an attempt to evade payment of its reinsurance obligations. Id. at 65. The court agreed, and found that the reinsurer’s continued refusal to honor its obligations, combined with its constantly shifting and meritless objections to payment, constituted an egregious breach of its duty of utmost good faith and a violation of M.G.L. c. 93A, § 11.

In Bobick v. United States Fid. & Guar. Co., 439 Mass. 652 (2003), an injured party brought a personal injury action against a transportation company and a rehabilitation center. The tort plaintiff made a policy-limits settlement demand upon the transportation company’s insurer, but the insurer declined to offer the amount demanded because it disagreed as to the extent of the insured’s liability. Id. at 658. The tort plaintiff thereafter initiated litigation against the insurer, alleging that the insurer failed to make a fair and reasonable settlement offer in violation of M.G.L. c. 93A and c. 176D. Id. Rejecting the plaintiff’s argument, the court found that because the degree of the insured’s fault was subject to a good faith disagreement, the insurer did not violate the duties imposed under M.G.L. c. 93A and c. 176D.

In Gore v. Arbeta Mut. Ins. Co., 77 Mass. App. Ct. 518 (2010), the plaintiff suffered injuries as a result of a motor vehicle accident with the insured, and thereafter made a policy-limits settlement demand. At the time it received the plaintiff’s demand, the insurer had concluded that the insured was at fault for the accident, and that the plaintiff’s damages exceeded the policy limits. Id. However, the insurer did not communicate the demand letter to the insured and failed to respond to the settlement demand. Id. at 520. The plaintiff then filed suit against the insurer in connection with the insurer’s allegedly unreasonable failure to settle. Id. at 522. Ruling in favor of the plaintiff, the court found that the insurer’s dilatory response to the settlement demand and failure to notify the insured of the settlement offer violated the duties imposed under M.G.L. c. 93A and c. 176D.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

Although Massachusetts does not have a “Code of Practice” specifically applicable to insurers, it provides a comprehensive statutory scheme for the regulation of all phases of the insurance business. M.G.L. c. 175, § 1 et seq. forms the general insurance law. In addition to the general insurance law, M.G.L. c. 176D sets forth specific regulations that proscribe unfair competition and unfair or deceptive acts or practices in the business of insurance. For example, M.G.L. c. 176D, §3(1) prohibits misrepresentations and false advertising in connection with the benefits, advantages, conditions, or terms of “any insurance policy.” M.G.L. c. 176D, §3(2) bars an insurer from making any assertion or representation concerning the business of insurance which is untrue, deceptive or misleading. M.G.L. c. 176D, §3(9) prohibits a number of unfair claim settlement practices. Finally, M.G.L. c. 176D, §3(7) requires insurers to refrain from unfairly discriminating between individuals of the same class and of essentially the same hazard in the amount of premium, amount of policy benefits, any of the terms or conditions of an insurance policy, or in any other manner.
23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

There is some case law in Massachusetts which suggests that a court may disregard a term of an insurance contract if the insurer’s reliance on the term would violate its duty of ordinary good faith. In Van Dyke v. St. Paul Fire & Marine Ins. Co. 388 Mass. 671 (1983), the plaintiff brought a bad faith action against his physician’s insurer alleging that the insurer failed to make a prompt and reasonable settlement of the plaintiff’s claim against the insured. The insurer took the position that it had no right to settle the claim absent the insured physician’s consent because the policy provided that the insurer “shall make no settlement of a claim or suit covered by [the policy] without the written consent of the Insured.” Id. at 673.

Although the court ultimately determined that the insurer’s conduct did not violate M.G.L. c. 176D, §3, it found that the obligations of an insurer under M.G.L. c. 176D, § 3 may mean that an insurer may not necessarily rely on language in an insurance policy precluding it from settling claims without the insured’s consent. Id. at 676 n.6.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insurer has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

Under Massachusetts law, an insurer must “furnish openhandedly the benefits of a policy” and effect prompt, fair and equitable settlements of claims in which liability has become reasonably clear. Compagnie De Reassurance d’Ile De Fr. v. New Eng. Reinsurance Corp., 57 F.3d at 88-89 (1st Cir. 1995), citing Contractors Realty Co., Inc. v. Insurance Co. of N. Am., 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979); M.G.L. c. 176D, §3(9)(f). These principles would appear to support the contention that where an insurer seeks to avoid application of a policy, a court may “disregard,” or reject, the insurer’s attempt to avoid coverage.

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

In Massachusetts, uberrimae fidei is a common law principle rather than a statutory rule. However, at least one Massachusetts court has found that an insurer’s breach of its duty of utmost good faith also constitutes a violation of the Massachusetts Consumer Protection statute, M.G.L. c. 93A. In Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F. Supp. 2d 49 (D. Mass. 1998), the reinsured alleged that the reinsurer had acted in bad faith when it employed dilatory tactics and failed to promptly issue a payment on its reinsurance agreement. The court found that the reinsurer’s continued refusal to honor its obligations, combined with its constantly shifting and meritless objections to payment, constituted an egregious breach of its duty of utmost good faith. Id. at 70. In so finding, the court found that the reinsurer’s conduct constituted a violation of M.G.L. c. 93A, §11. Id.

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

Massachusetts law does not impose regulatory sanctions in connection with an insurer’s breach of the duty of utmost good faith. However, Massachusetts law provides for several regulatory sanctions in connection with an insurer’s breach of its duty of ordinary good faith under the Massachusetts insurance statutes. The Massachusetts Commissioner of Insurance may issue an order requiring an insurer to cease and desist from engaging in an unlawful act or practice. M.G.L. c. 176D, § 6. If an insurer violates a cease and desist order, the Commissioner may order suspension or revocation of the insurer’s license. M.G.L. c. 176D, § 10. The Commissioner may also order that the insurer pay a sum up to ten thousand dollars for each violation. Id.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

Massachusetts courts apply the doctrine of uberrimae fidei only in the context of reinsurance and marine insurance. The application of uberrimae fidei in the reinsurance context does not differ materially from its application in the context of marine insurance. In both contexts, the insured must “disclose to the insurer all known circumstances that materially affect the insurer’s risk, the default of which . . . renders the insurance contract voidable by the insurer.” Commercial Union Ins. Co. v. Pesante, 459 F.3d at 37-38 (1st Cir. 2006). The insurer, on the other hand, owes a duty to “deal fairly, to give the assured fair notice of his obligations, and to furnish openhandedly the benefits of a policy.” Compagnie De Reassurance D’Ile De Fr. v. New Eng. Reinsurance Corp., 57 F.3d at 88-89 (1st Cir. 1995), citing Contractors Realty Co., Inc. v. Insurance Co. of N. Am., 469 F. Supp. 1287, 1294 (S.D.N.Y. 1979).

* * *
USA (New Jersey)

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.


Most cases applying the doctrine of utmost good faith have dealt with an insurance applicant’s failure to disclose allegedly material facts to the prospective insurer. In New Jersey, insurance applicants must not misrepresent or conceal material information in response to an insurer’s specific requests in an application. Rashabov, 2010 WL 3932899, at *3; Progressive, 719 A.2d at 688-89. If an insurance applicant’s misrepresentation is knowing and the insurer reasonably relied on it, the insurer may rescind the policy. Rashabov, 2010 WL 3932899, at *3, 5. A misrepresentation or concealment in an insurance application is material if a reasonable insurer would have considered the misrepresented or concealed fact relevant to its concerns and important in determining its course of action. Rashabov, 2010 WL 3932899, at *5. Put another way, a material misrepresentation naturally and reasonably influences the judgment of the insurer in agreeing to the policy, in assessing the risk, or in pricing the policy. See Mass. Mut. Life Ins. Co. v. Manzo, 122 N.J. 104, 155 (1991).

In addition to the above, New Jersey courts have discussed generally that insurers owe a duty of utmost good faith to their insureds because insurance policies are contracts of adhesion that insurers must honor as fiduciaries. See Griggs v. Bertram, 88 N.J. 347, 366 (1982). However, New Jersey courts do not appear to treat this duty separately from an insurer’s implied duty of good faith and fair dealing under an insurance policy. E.g., id. at 366-67; Bowler v. Fidelity Cas. Co. of N.Y., 53 N.J. 313, 327 (1969).

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The principle of utmost good faith is a common law principle. See Bowler v. Fidelity Cas. Co. of N.Y., 53 N.J. 313, 327 (1969). However, New Jersey statutes similarly bar knowingly misrepresenting or concealing material information for the purpose of obtaining an insurance policy. N.J. Stat. §§ 17:33A:4.a(4); 17B:24-1.d, -3d.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

No New Jersey case was found that explicitly addresses this point.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes. New Jersey courts have applied the doctrine to the following types of policies. In addition, we did not find any cases refusing to apply the doctrine to any specific type of insurance policy.

5. **Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?**

New Jersey courts have discussed generally that insurers owe a duty of utmost good faith to their insureds because insurance policies are contracts of adhesion that insurers must honor as fiduciaries. See Griggs v. Bertram, 88 N.J. 347, 366 (1982). However, New Jersey courts do not appear to treat this duty separately from an insurer’s implied duty of good faith and fair dealing under an insurance policy. E.g., id. at 366-67; Bowler v. Fidelity Cas. Co. of N.Y., 53 N.J. 313, 327 (1969).

**II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage**

6. **Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?**

No New Jersey case was found that explicitly addresses this point. However, as set forth above, New Jersey courts have discussed generally that insurers owe a duty of utmost good faith to their insureds because insurance policies are contracts of adhesion that insurers must honor as fiduciaries.

**A - For the Insured**

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Most cases applying the doctrine of utmost good faith have dealt with an insurance applicant’s failure to disclose allegedly material facts to the prospective insurer.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

New Jersey does not recognize a separate duty of disclosure.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

Not applicable; New Jersey does not recognize a separate duty of disclosure.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**


11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

Not applicable; New Jersey does not recognize a separate duty of disclosure.

**B - For the Insurer**

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

No New Jersey case was found that explicitly addresses this point. However, as set forth above, New Jersey courts have discussed generally that insurers owe a duty of utmost good faith to their insureds because insurance policies are contracts of adhesion that insurers must honor as fiduciaries.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

See response to Question 12.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

See response to Question 12.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

See response to Question 12.

**III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)**

**A - For the Insured and Third Party Beneficiary of Cover**

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

No New Jersey case was found that explicitly addresses this point.
16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

No New Jersey case was found that explicitly addresses this point.

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

No New Jersey case was found that explicitly addresses this point.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

No New Jersey case was found that explicitly addresses this point.

B - For the Insurer

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

New Jersey courts have discussed generally that insurers owe a duty of utmost good faith to their insureds because insurance policies are contracts of adhesion that insurers must honor as fiduciaries. See Griggs v. Bertram, 88 N.J. 347, 366 (1982). However, New Jersey courts do not appear to treat this duty separately from an insurer’s implied duty of good faith and fair dealing under an insurance policy. E.g., id. at 366-67; Bowler v. Fidelity Cas. Co. of N.Y., 53 N.J. 313, 327 (1969).

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

See response to Question 19.

21. Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

See response to Question 19.

22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

See response to Question 19.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

See response to Question 19.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

See response to Question 19.

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

See response to Question 19.

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

See response to Question 19.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

No New Jersey court appears to have held definitively that a duty of utmost good faith applies between a ceding insurer and its reinsurer. Nonetheless, at least one federal court in New Jersey has suggested that the same standards of good faith apply under New Jersey law as under New York law, which does require utmost good faith in reinsurance contracts. Suter v. Gen. Accident Ins. Co. of Am., 2006 WL 2000881, at *22-23, *23 n.29 (D.N.J. July 17, 2006), vacated pursuant to settlement, 2007 WL 2781935 (D.N.J. May 24, 2007); see also Employers Reinsurance Corp. v. Admiral Ins. Co., 1990 WL 169756 (D.N.J. Oct. 30, 1990) (vacating arbitration award where parties failed to submit the issue regarding whether the ceding insurer’s nondisclosure violated its duty of utmost good faith).

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I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

New York’s highest court, the Court of Appeals, has held that “utmost good faith” is the “core duty accompanying reinsurance contracts” encompassing the “basic obligation of a reinsured to disclose all ‘material facts’ regarding the original risk of loss.”¹

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?

The principle of utmost good faith is a common law principle under New York law.

3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

New York law does not recognize a “duty of disclosure” as distinct from the principle of utmost good faith. The principle of utmost good faith is largely a standard that governs disclosure, so a “duty of disclosure” may be regarded as subsumed within the principle.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Under New York law, utmost good faith applies in the reinsurance context only. It generally does not apply to any primary insurance.

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

The duty of utmost good faith governs a ceding company’s disclosures to the reinsurer in connection with entering into a reinsurance contract. The duty also applies to information arising during the term of the reinsurance contract (such as information regarding incurrence of a loss) which the ceding company is obligated to share with the reinsurer. In this sense, the duty is both “pre-” and “post-” contractual.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

New York cases indicate that the duty applies to both the ceding insurer and the reinsurer at all relevant times. However, in the case of the duty borne by the reinsurer, the scope and meaning of such obligation are not as clear.

A federal District Court, in a case governed by New York law, explained that the duty is reciprocal and that the duty of utmost good faith borne by the reinsurer is to pay losses “that are even arguably within the scope of the coverage reinsured.”² (However, in this case the court ultimately found for the reinsurer, reasoning that the duty of utmost good faith could not be invoked by the ceding company to “create coverage where none exists.”³) The ceding company had asserted certain business interruption claims arising from the 1994 Northridge earthquake. The reinsurer argued that the reinsurance contract should be interpreted to exclude such claims insofar as the contract did not cover the underlying policies’ “extended period of indemnity” endorsements. The ceding company contended that the reinsurer should be barred from asserting such a defense because of its duty of utmost good faith. The court rejected this argument and concluded that utmost good faith does not act as a waiver of a reinsurer’s defense that the reinsurance contract does not provide coverage.⁴

In other cases, the obligation of a reinsurer to pay claims that are arguably within the scope of coverage is considered part of the doctrine of “follow the fortunes” or “follow the settlement”⁵ and not necessarily included within the concept of utmost good faith.

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¹ In the Matter of the Liquidation of Union Indemnity Ins. Co. of NY, 674 N.E. 2d 313 (Ct. of Appl., 1996), 319.
³ Id.
⁴ Id. at 642-43.
A - For the Insured

7. **What is the content of the duty of utmost good faith for the insured?**

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied. A ceding company has an obligation to disclose to potential reinsurers all material facts relating to the original risk of loss. In the Union Indemnity case (cited in footnote 1), a ceding company did not disclose its own insolvency to a prospective reinsurer. The court held that this omission influenced the reinsurer’s underwriting decision and therefore violated the ceding company’s duty of utmost good faith. In a federal case construing New York law, a ceding company failed to disclose to its reinsurer that the ceding company was not retaining any of the risks in a particular portfolio of marine policies being reinsured and thus that the ceded portion of the policies represented 100% of the risks. The court found this to constitute a material omission and a breach of utmost good faith.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

See response to item 3.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

Not applicable. See response to item 3.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

A reinsurance contract can be rescinded or voided ab initio where the reinsurer has been induced to enter into it as a result of the ceding company’s breach of the duty of utmost good faith. See response to item 7. In Union Indemnity, the court permitted the reinsurer to interpose a defense of fraud and to assert the remedy of rescission, whereas in Reliance, the court permitted the reinsurer to void the reinsurance binder altogether.

There is no distinct duty of disclosure. See response to item 3.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

Not applicable. See response to item 3.

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

In the case of the duty of utmost good faith borne by the reinsurer, the scope and meaning of this duty are not clearly articulated in New York law. See response to item 6.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

See response to item 6.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

The New York cases defining the duty of utmost good faith do not hinge on whether or not the reinsurer notified the ceding company of the duty itself. In none of these cases did the ceding company allege that this failure constituted a breach of the duty, and this issue is not specifically addressed in New York reported cases.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

Because New York cases do not develop the specific contours of the reinsurer’s utmost good faith duty, or remedies for breach thereof, there is no specific guidance on this question. In cases that equate the duty of utmost good faith with the “follow the fortunes” obligation, a reinsurer may not deny coverage where the asserted loss is arguably within the scope of the reinsurance contract.

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6 Union Indemnity at 320.


8 Union Indemnity at 320.

9 See ACE at 439.
III. POST-CONTRACTUAL APPLICATION OF THE PRINCIPLE OF UTMOST GOOD FAITH (AT THE CLAIM STAGE)

A. FOR THE INSURED AND THIRD PARTY BENEFICIARY OF COVER

16. What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?

As in the “pre-” contractual stage, a ceding insurer must disclose all material facts in order to obligate the reinsurer to cover a loss. One aspect of the “post-” contractual duty involves the timeliness of notice to the reinsurer following an insurer’s incurrence of a loss for which the insurer claims indemnity. Where the ceding insurer provides late notice to the reinsurer, the reinsurer need not necessarily show prejudice in denying the claim. Late notice alone may void coverage because of the ceding company’s overriding duty of utmost good faith.

16.1 Do third party beneficiaries of cover have a duty of utmost good faith?

The New York cases do not specifically the duty of utmost good faith imposed on “third Party beneficiaries of cover.”

17. Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

In Clearwater, cited in item 16, the ceding company argued that because its late notice to the reinsurer did not result in prejudice to the reinsurer, the ceding company’s claim should not be denied. The court disagreed, holding that the reinsurer is not required to show prejudice and that late notice alone (where caused by gross negligence) could be sufficient to void coverage as a breach of the cedent’s duty of utmost good faith.

Another case held that, under the duty of utmost good faith, once the reinsurer puts the ceding company on notice that a particular fact is material, the reinsurer is not required to (i) subsequently inquire about the specific fact or (ii) indicate, when renewing the coverage six months later, that it still regards the fact as material. The ceding insurer ceded a policy covering physical loss to a warehouse, and the reinsurer conditioned its agreement on the implementation of fire-safety measures, to be recommended by an engineer. The recommendations were made but never implemented. The renewal of the contract did not repeat the condition concerning the recommendations. The warehouse was destroyed by fire during the renewal term, and the ceding company sought coverage from the reinsurer. The reinsurer denied coverage, alleging breach of the duty of utmost good faith. The court found for the reinsurer, citing the reinsured’s post-contractual duty to furnish information that it believes, or reasonably ought to believe, is material to the reinsurer. The reinsurer bears no duty of inquiry concerning such facts.

18. Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?

As discussed supra, the New York doctrine of utmost good faith applies only to reinsurance and generally not to primary insurance. Applications by individuals for life policies are not governed by the duty. Whether an insurer could void a life policy based on the insured’s concealment of criminal activity would depend on other provisions of New York law including Section 3203 of the New York Insurance Law.

B. FOR THE INSURER

19. What is the content of the duty of utmost good faith for the insurer when dealing with a claim?

As discussed supra, New York law does not provide detailed guidance on the scope of the reinsurer’s duty of utmost good faith. In the few cases that do refer to this reciprocal duty, the courts hold that a reinsurer must provide coverage where a claim is arguably within the scope of covered losses under the reinsurance agreement. It should be noted that the reinsurer’s duty of utmost good faith does not form the basis for a tort claim by a cedent alleging bad faith by the reinsurer in handling a claim. The cedent in such a case is limited to its remedies under the reinsurance contract.

20. Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?

The New York cases do not specifically the duty of utmost good faith imposed on insurers toward “third party beneficiaries of cover.”

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11 Id. at 62.

The court did acknowledge that a reinsurer’s indication as to what it considers material could become “stale” at some future point, but that such a conclusion could not “be reached a mere six months after [the reinsurer] had expressed unwillingness to enter the contract without the assurance that all recommendations would be complied with.” Id. at 283.

14 Arkwright at 641.
21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

In Arkwright, as discussed in more detail above, the court held that a reinsurer must indemnify its cedent for losses that are “even arguably within the scope of the coverage reinsured” and not “refuse to pay merely because there may be another reasonable interpretation of the contract under which the reinsurer could avoid payment.”

22. **Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?**

There is no prescribed “Code of Practice” for insurers in New York.

23. **Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.**

A reinsurer’s duty of utmost good faith requires it to pay even where the loss is only arguably within the scope of coverage. The reinsurer does not breach its duty by “relying” on some provision of the contract. The holding in Arkwright supports the principle that a reinsurer may assert a particular interpretation of a contract without any limitation that it is somehow barred from doing so because of the duty of good faith. Therefore, we believe that, in New York, a reinsurer cannot breach its duty of utmost good faith merely by “relying” on a contract provision, and a court cannot set aside a contract provision merely because it can be interpreted in a manner favorable to the reinsurer.

24. **Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?**

The holding in Arkwright – that a reinsurer must pay claims that are arguably within the scope of coverage – would appear to support the contention that where a reinsurer seeks to “avoid application” of its coverage, a court may “disregard” this avoidance. (In other words, the court will enforce the contract.) However, there is no guidance on the scope of this principle, nor is this doctrine particularly characterized as a “special” judicial power or remedy.

25. **To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?**

Not applicable. There is no statutory provision for utmost good faith under New York law.

26. **Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?**

We are not aware of any reported case under New York law where an insurer was penalized on the grounds of a violation of its duty of good faith against a reinsurer, or vice versa.

IV - Reinsurance

27. **To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?**

As discussed above, the duty of utmost good faith applies both “pre-” and “post-contractually.

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16 *Arkwright* at 642.

17 *Id.*
USA (Ohio)

JENNTER & BLOCK LLP
David M. Kroeger and Sabrina Guenther

I - Definition of the Principle of Utmost Good Faith

1. In your jurisdiction, do insurance laws provide for the principle of utmost good faith (in Latin, “uberrimae fidei”) and if so, what is its meaning? Provide any definition whether under statute or according to case law.

Yes, Ohio courts have held that applicants for insurance policies owe the insurer a duty of utmost good faith. Crnic v. Am. Republic Ins. Co., 2007 WL 2949576, *2 n.2 (Ohio App. Ct. Oct. 11, 2007) (citing Buemi v. Mutual of Omaha Ins. Co., 524 N.E.2d 183 (Ohio App. Ct. 1987)); see also Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co., 660 N.E.2d 823, 825 (Ohio Ct. Com. Pl. 1995) (collecting cases). The duty requires an insured to disclose all material facts known to it that may affect the risk to be assumed by the insurer. Owens-Corning, 660 N.E.2d at 827. But this duty to disclose “is limited to present, material information, and does not extend to speculations.” Id. at 828. A fact is material if the insurer specifically requested the fact from the insured or if it would have affected the insurer’s decision to accept the policy at the agreed premium. Sherwin-Williams Co. v. Certain Underwriters at Lloyd’s London, 813 F. Supp. 576, 588 (N.D. Ohio 1993).

2. Is the principle of utmost good faith (i) a statutory principle, (ii) a common law principle or (iii) a civil law principle? Or is it to be found under statute and otherwise?


3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

No.

4. Does the principle of utmost good faith apply to all types of insurance contracts (life insurance, general insurance, reinsurance etc.)?

Yes. In Owens-Corning, the court rejected the insured’s argument that the doctrine of utmost good faith was limited to marine insurances. 660 N.E.2d at 826 (collecting cases).

5. Does the duty of utmost good faith apply only at the pre-contractual stage or is it a continuous duty applying both pre-contractually and post-contractually?

No Ohio case was found that explicitly addresses this point.

II - Application of the Principle of Utmost Good Faith at the Pre-Contractual Stage

6. Does the Principle of Utmost Good Faith apply to both the insured and the insurer at the pre-contractual stage?

No Ohio case was found that explicitly addresses this point.

A - For the Insured

7. What is the content of the duty of utmost good faith for the insured?

Describe the insured’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.

Under Ohio law, the duty of utmost good faith requires an insured to disclose all material facts known to it that may affect the risk to be assumed by the insurer. Owens-Corning, 660 N.E.2d at 827. But this duty to disclose “is limited to present, material information, and does not extend to speculations.” Id. at 828. A fact is material if the insurer specifically requested the fact from the insured or if it would have affected the insurer’s decision to accept the policy at the agreed premium. Sherwin-Williams, 813 F. Supp. at 588.


- Prudential Ins. Co. of Am. v. Carr, 199 N.E.2d 412, 415 (Ohio Ct. Com. Pl. 1964). Court held that insurer was not liable for claim under hospital expense policy when insured had omitted previous medical treatment from his application for insurance.

The Duty of Utmost Good Faith

insured’s negotiations for asbestos-related coverage. The court rejected the insured’s arguments that the doctrine of utmost good faith applies only to marine insurance, or that it applies only where the insurer had to rely solely on the representations of the insured in evaluating the subject of the insurance.

8. **Is the duty of utmost good faith for the insured equivalent to the duty of disclosure in your jurisdiction so that pre-contractually the two are indistinguishable?**

There is no separate duty of disclosure; Ohio law views the duty of utmost good faith as a duty of disclosure.

9. **If the duty of utmost good faith operates separately pre-contractually from the duty of disclosure describe that operation and how the two sit together. You may need to describe the duty of disclosure to illustrate the differences.**

Not applicable.

10. **What are the remedies for a pre-contractual breach by the insured of the duty of utmost good faith? Are the remedies different from a breach of the duty of disclosure?**

The insurance contract can potentially be voided for a breach of the duty of utmost good faith by a policyholder. There is no separate duty of disclosure; Ohio law views the duty of utmost good faith as a duty of disclosure.

11. **If the duty of utmost good faith operates separately from the duty of disclosure does one have precedence over the other?**

Not applicable.

B - For the Insurer

12. **What is the content of the pre-contractual duty of utmost good faith for the insurer?**

No Ohio case was found that explicitly addresses this point.

13. **Describe the insurer’s pre-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

No Ohio case was found that explicitly addresses this point.

14. **Is it a breach of the duty of utmost good faith in your jurisdiction for insurers not to notify the prospective insured of the nature and extent of their duty of disclosure?**

Not applicable.

15. **What are the remedies for a pre-contractual breach by the insurer of its duty of utmost good faith?**

No Ohio case was found that explicitly addresses this point.

III - Post-Contractual Application of the Principle of Utmost Good Faith (at the Claim Stage)

A - For the Insured and Third Party Beneficiary of Cover

16. **What is the content of the post-contractual duty of utmost good faith for the insured at the claim stage?**

No Ohio case was found that explicitly addresses this point.

16.1 **Do third party beneficiaries of cover have a duty of utmost good faith?**

No Ohio case was found that explicitly addresses this point.

17. **Describe the insured’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

No Ohio case was found that explicitly addresses this point.

18. **Is the insured’s intentional concealment of his/her criminal activities when completing a proposal for life policies a breach of the duty of utmost good faith?**

No Ohio case was found that explicitly addresses this point.

B - For the Insurer

19. **What is the content of the duty of utmost good faith for the insurer when dealing with a claim?**

No Ohio case was found that explicitly addresses this point.

20. **Does an insurer owe a duty of utmost good faith towards third party beneficiaries of cover in handling claims?**

No Ohio case was found that explicitly addresses this point.

21. **Describe the insurer’s post-contractual duty of utmost good faith by providing examples of the best known cases in which it has been applied.**

No Ohio case was found that explicitly addresses this point.
22. Is there a Code of Practice for insurers in your jurisdiction and, if so, how does it sit with the duty of utmost good faith?

No Ohio case was found that explicitly addresses this point.

23. Can courts disregard a term of a contract of insurance if it would be a breach of the duty of utmost good faith for the insurer to rely on the term? If so, please illustrate with examples.

No Ohio case was found that explicitly addresses this point.

24. Do courts have special powers to disregard any avoidance of the application of a policy in cases where the insured has established that it would be a breach of the duty of utmost good faith to allow the insurer to avoid the policy?

No Ohio case was found that explicitly addresses this point.

25. To the extent that an insurer’s breach of the duty of utmost good faith is under statute, is it a breach of the statute for the insurer to be in breach of its duty of utmost good faith?

No Ohio case was found that explicitly addresses this point.

26. Can a breach by the insurer of the duty of utmost good faith result in regulatory sanctions against the insurer (license suspension, banning order, etc.)?

No Ohio case was found that explicitly addresses this point.

IV - Reinsurance

27. To what extent, if any, does your jurisdiction apply different principles regarding utmost good faith to reinsurance at both the placement/pre-contractual stage, and at the claim stage?

No Ohio case was found that explicitly addresses this point.

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**Template**

This template, accompanied by explanations of the purpose of each question, was sent to contributors to the project in June 2014. Responses were received in during the summer of 2014, followed by an editing process that was carried out in close cooperation with the contributors and concluded in August with the publication of this report.

**Comparative Survey on the Duty of Utmost Good Faith - Questionnaire**

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3. Do insurance laws of your jurisdiction provide for both the principle of utmost good faith and a separate duty of disclosure for the insured?

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