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Information Duties

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Marc Dernauer / Harald Baum / Moritz Bälz

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Information Duties under Japan's Insurance Act

Yuji Ito[*]

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I. INTRODUCTION

Information duties under Japanese law are the subject of much debate among scholars and, at least for many consumers, result in much confusion.

For insurance contracts, we can view the information duty as two-directional. Put another way, an insurance contract is an agreement between an insurer and an insurance policyholder, which leads to a bidirectional dynamic.

On the one hand, there is the insurer's or the agent's[1] duty to provide information regarding an insurance contract;[2] and on the other hand, a duty is

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1 In Japan, there are two types of intermediaries in the context of insurance sales, namely, the insurance agent *(hoken boshū-nin)* and the insurance broker *(hoken nakadachi-nin)*. While the former is affiliated with an insurance company (or sometimes more than one insurance company) and works as an insurance company's agent and thus owes a duty, in principle, only to the insurance company, the latter owes a duty of good faith to his or her customer, i.e. the policyholder (Art. 299 of Business Insurance Act), so that, undoubtedly, the insurance broker owes an information duty to his or her customer.

2 Article 7 of the German Insurance Contract Act provides that the insurer owes an obligation to provide to the policyholder the conditions of an insurance contract, including the policy and other information. When scholars talk about the information duty of insurers, in most cases they are referring to this obligation in Article 7. However, when I refer to the information duty of insurers in this essay, while the duty to provide the policy to the policyholder is of course not excluded, I am not

placed on potential policyholders to provide certain information to the insurer. The former is said to be based on the ground that an insurance product is an invisible and legally constructed concept, and its features are difficult to understand, especially for consumers.[3] The latter, namely the duty of a policyholder to an insurer, is called the "duty to disclose" *(kokuchi gimu; Anzeigepflicht)*. This duty (or obligation) serves as a means for insurers to estimate risk (the possibility of the occurrence of a covered event), to decide whether they will underwrite the risk or not, and to determine the premium. Whereas the insurer's duty has become the subject of discussions only relatively recently, the duty held by policyholders has been recognized by statute since the late 19th century, and there are a plenty of precedents regarding it. This essay focuses on these two duties. More specifically, while matters related to these duties involve public and private law in certain contexts, I will explore issues related to the duties in the private law context.

II. Information Duties Held by Insurers

Let us begin with the information duties held by insurers.

1. Characteristics

The Insurance Act (hereinafter, InsA),[4] which regulates insurance contracts from the viewpoint of private law, contains no article regarding the duty of

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limiting myself to the duty to provide the policy. (For example, in a case which I share later in this essay, the main issue is the information duty to inform the policyholder of the existence of an earthquake exclusion in a fire insurance contract. If we recognize such a duty, then it is submitted that the information duty is breached even if the insurer provides the policy to the policyholder.) When scholars speak of the information duty of the insurer in Japan, the main points of view are, first, the policyholder has neither a sufficient ability to understand the conditions of contracts nor the capacity to decide whether the product matches their needs and, second, in the context of the sale of insurance products there is the potential for a salesperson to inappropriately solicit business – by explaining the policy in a misleading way, for instance – and thus there is a fear that the decision making of the policyholder could be distorted.

3 See, T. Yamashita, *Hoken-hō* [Insurance Law] (Tōkyō 2005) 178; Y. Fukazawa, *Hoken boshū* [Sale of Insurance], in: Yamashita/Nagasawa (eds.) *Ronten taikei hoken-hō 1* [Survey of issues on insurance law, vol.1] (Tōkyō 2014) 32.

4 *Hoken-hō,* Law No. 56/2009. Legislation establishing the InsA was adopted in 2008, and the Act came into effect in 2010. Before the promulgation of the InsA, rules in the area of private law regarding insurance contracts were based in the Commercial Code *(Shōhō, Law No. 48/1899),* which came into force in 1899 and was slightly

an insurer to provide information.[5] Thus, it is necessary to look at court cases in order to examine the extent to which that duty is recognized and the function the duty is performing. With that in mind, I am going to deal with these problems by introducing a few characteristic court cases. Before that, however, I would like to explain some of the characteristics of the insurer's information duty in Japan.

First of all, it should be noted that, in Japan, courts deal with insurers' information duties mainly under the law of tort.[6] One reason for this is that there are no articles in the InsA which define insurers' information duties. In addition, Article 709 of Japan's Civil Code allows for an easier and more flexible recognition of a tort in comparison with German law. Under Article 709, a plaintiff can bring a tort action alleging an infringement of a "protected legal interest".[7] In contrast, Article 823 of the German Civil Code sets a higher standard for the recognition of a tort: infringement of so-called "other rights" *(sonstiges Recht).*

It should be noted that these characteristics of Japanese regulations on insurers' information duties lead to an interesting difference between German law and Japanese law. What I mean by this is that the duty to inform is dealt with as a matter of tort law in Japan, and because of that, the agent or intermediary holds primary liability to the policyholder while the insurance company (as a principal) holds secondary liability.[8] By contrast, in Germany it

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amended with respect to the part regulating insurance law in 1911. The contents had not been changed from that point on.

5 In the legislative process associated with the InsA, there was debate on whether the Act should include an article on the duty of the insurer to compensate the damage of the policyholder and/or the right to cancel the contract on the side of the policyholder. In the early stages of the legislative process, however, the proposal to include such an article was abandoned. The reasons behind this were apparently twofold: (i) There are detailed rules about providing information in laws and/or guidelines based on the Insurance Business Act (to which I refer later), and (ii) the existence of a duty to inform on the side of insurance companies is established in court cases. See, M. KOBAYASHI, *Hoken-sha no jōhō teikyō gimu* [Insurer's Information Duty], in: Ochiai/Yamashita (eds.), *Aatarashii hoken-hō no jitsumu* [The New Practice under the Insurance Act] (Tōkyō 2008) 67.

6 There is another type of decision as well.

7 Article 709 of the Civil Code (*Minpō,* Law No. 9/1986, as amended by Law No. 94 /2013) provides that one who knowingly or negligently violates the rights of others or the legally protected interests of others owes a duty to compensate the damages caused by his or her act.

8 Article 715 of the Civil Code provides for a principal's liability for an agent. Article 283 Paragraph 1 of the Insurance Business Act also establishes this liability. Specifically, Article 283 states the following: "An Affiliated Insurance Company, etc. shall be liable for any damage caused by an Insurance Agent to a Policyholder in-

seems that the insurer owes a duty under contract law to inform the policyholder and that the intermediary (as a person employed to perform a task – *Erfüllungsgehilfe*) creates vicarious liability for the insurer.[9]

Secondly, the legal basis – especially the basis often cited by courts – for regarding the insurer's duty to provide information as a matter of tort can be found in a statute addressing the supervision of insurance companies called the Insurance Business Act.[10] The Insurance Business Act contains some articles regarding the information duty of insurers. But it might sound odd, because the Insurance Business Act is part of administrative law. Although it establishes a legal basis for exercising administrative actions, it does not, in principle, regulate legal relationships between private persons, and it cannot be utilized to establish a claim for compensation of damage on the part of policyholders.[11] Almost without exception, however, courts refer to this administrative duty when adjudicating a private suit involving issues regarding the information duty of insurers. And this kind of connection between private law and administrative law is a specific characteristic of Japanese case law on insurers' duties. This characteristic could become even more significant considering that the Insurance Business Act was amended in 2014 and several new articles regarding the information duty of insurers were inserted.[12]

Thirdly, while the total number of cases in which plaintiffs assert a breach of an insurer's information duty is not small, the actual number of cases in which such an assertion is recognized by the court remains low.[13]

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volving Insurance Solicitation […].” This Article is premised upon the liability that an agent owes as established under tort law. The insurance company to which the agent is affiliated with owes secondary liability.

9 DÖRNER, § 63 Rn. 10, in: Prölss/Martin, VVG (29. ed., 2015).

10 *Hoken-gyō-hō,* Law No. 105/1995, as amended by Law No. 45/2017. The Insurance Business Act regulates, for example, the organization of insurance companies, registration duties of intermediaries, and the solicitation process by intermediaries and insurance companies.

11 KOBAYASHI, *supra* note 5, 72; O. TAKEHAMMA, *Hoken keiyaku to setumei gimu, kokuchi gimu* [Insurance Contracts and the Duty to Explain – The Duty to Disclose], Hanrei Taimuzu 1178 (2005) 92.

12 Reference to this 2014 revision is made in the appendix.

13 My report excludes one unique set of violations that occurred in great number during Japan's “bubble economy” of the 1980s. Many variable life insurance plans were sold during that time. These variable life insurance plans were marketed with the promise that policyholders could save on inheritance taxes. However, when the bubble economy collapsed, many policyholders suffered big losses. Suits were then brought against insurers. Those types of plans were very complex, and although courts recognized the responsibility of the insurers, the variable life insurance plans could be viewed as financial instruments rather than traditional insurance plans. See,

Why? One plausible answer is that the agency's strict supervision under the Insurance Business Act has reduced the number of breaches. In my view, the supervisory agency in Japan, namely, the FSA (Financial Services Agency), has much more authority than BaFin, and insurance companies' staff members are always sensitive to the intention of the FSA. Of course, there may be other explanations. But at any rate, it must be kept in mind that the function which the insurers' duty of information performs in the private law arena in Japan is a limited one.

2. *Specific Examples*

Many cases involve issues surrounding the insurer's obligation to provide information in the context of a misunderstanding on the part of a policyholder as to the scope of the insurance contract's coverage in instances where an accident has occurred that is not covered by the insurance contract. In such cases, the relevant contract's provision on the scope of coverage is often examined by a court to determine whether the policyholder's coverage should remain bound by the terms of the contract. Now, I would like to provide three examples. In the first case, the court recognized a breach of duty by the insurer and awarded damages for solatium. In the second case, the court said even if a duty to explain an exception in a policy was violated, it does not lead to emotional damages. In the third case, the court said there was a breach of duty as in the first case, but, based on the rationale of the Supreme Court, it recognized actual financial loss, not solatium.

(1) Decision by the TōkyōDistrict Court, 8 September 2003[14]

The issue in this case was whether the insured suffered from a type of cancer covered by the insurance policy.

Under the terms and conditions of the insurance contract, the policyholder was entitled to ¥10 million if he or she contracted a specific disease like cancer. Epithelium cancers were excluded from coverage, however. The plaintiff, a woman who was suffering from breast cancer (in particular, ductal carcinoma in situ) and had had surgery to remove her left breast, filed a claim for an insurance payment. The insurer refused, saying carci-

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for example, Tōkyō District Court, 31 October 2005, Hanrei Jihō 1954 (2006) 84; Tōkyō Court of Appeals, 10 December 2003, Hanrei Jihō 1863 (2004) 41 (both recognized the liabilities of banks and insurance companies). In this kind of dispute, there are decisions which hold the insurance contract and the loan contract as invalid because of a mistake on the side of the policyholders (e.g., Tōkyō District Court, 21 November 2012 (no publication available); Tōkyō Court of Appeals, 31 March 2005, Kin'yū Shōji Hanrei 1218 (2005) 35).

14 Tōkyō District Court, 8 September 2003 (no publication available).

noma in situ was excluded under the policy. The plaintiff filed suit, arguing that the insurer was liable under tort law for not explaining the meaning of epithelium cancers in the policy.

The court held in favor of the plaintiff, stating the following:

"Considering the fact that carcinoma in situ is misunderstood even by some clinicians who have professional knowledge of the term's reference to a disease which can easily be excised without hospitalization like stomach cancer or colon cancer, it is easily premised that a general person who has no special medical knowledge possesses no precise information on what carcinoma in situ is and its method of treatment."

The purpose for which general people enter into an insurance contract is to be compensated for payments like the payment required for hospitalization, cure, living expenses, mitigation of mental pain/suffering, and so on; thus, if the policyholder has no recognition that carcinoma in situ as specified in an insurance contract is based on the classification of epidemiology, and does not reflect on the difficulty associated with a concrete treatment method, he or she cannot make an appropriate decision regarding entering into the contract, and there could be a chance for him or her to suffer unexpected loss.

[…] Thus, the defendant as an insurer, owes a duty to the plaintiff as an offeror of an insurance contract to explain either orally or documentarily at least this point [i.e., the definition of epithelium cancer]."

(2) Decision by the Supreme Court, 9 December 2003[15]

This case related to earthquake exception clauses in fire insurance contracts. Policyholders whose homes burned down after the Great Hanshin-Awaji Earthquake (or Kobe Earthquake) in 1995 sought insurance payments, and alternatively sought payment of solatium, alleging that the insurers should have explained the earthquake exception clauses. Therefore, issues related to the duty to inform arose. The lower court held in favor of the plaintiffs, and granted solatium for emotional distress, but the Supreme Court overturned this decision and ruled for the defendants.

The Supreme Court said:

"The decision regarding whether one enters into the earthquake insurance or not concerns not a personal interest (such as an interest related to one's life or body) but a property interest. Thus, even if an insurer's provision or explanation of information was insufficient or inappropriate, absent special circumstances, that insufficiency or inappropriateness cannot be regarded as a tort which gives rise to a claim to solatium."

(3) Decision by the Nagoya District Court, 3 March 2006[16]

This case related to the terms of automobile insurance policies. The issue here was a provision that said no insurance would be paid for a single-car

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15 Supreme Court, 9 December 2003, Minshū 57 (2004) 1887.

accident. The plaintiff, the named insured and also the owner of the insured car,[17] was not in good physical condition and that fact was found by the court to be revealed to the staff of the agent (defendant) in the process of the sale of the insurance. An accident occurred in which the car veered from a road and fell into a river. Because payment of the insurance claim was denied, suit was brought against the insurance agent.[18] The plaintiff was required to show that, if the plaintiff had been given the proper information regarding the single-car accident exception, the plaintiff would have purchased another policy that would have covered a single-car accident.

The court stated:

"The concrete contents of insurance contracts, including automobile insurance contracts, are prescribed in the policies, and these contents are complicated and include many different elements. Thus, it is not always easy for general policyholders to know the concrete contents of insurance contracts. This results in a major disparity in the knowledge or amount of information held between the insurer (the insurance company) and a policyholder, so that it could be fairly said that during the finalization and signing of an insurance contract, the explanation by the insurer has tremendous influence on the decision making of the policyholder."

That is the reason why Paragraph No. 1 of Article 300 of the Insurance Business Act prohibits an insurer or its agent in the solicitation process from providing false information to the policyholder or the insured, or from failing to disclose thereto any important particular stipulated in the insurance contract, and imposes on the insurer and its agent a duty to explain important matters proactively.

In light of such a relationship between an insurer and a policyholder, and in light of the regulation of the Japanese Insurance Business Act, an insurer owes a duty based on the principle of good faith to explain important matters concerning the terms of an insurance contract to the policyholder. And if the insurer fails to explain these matters or if the insurer explains these matters inappropriately or insufficiently, and as a result the policyholder suffers a loss such that he cannot receive the compensation which he expected to receive from the insurance policy – and provided that (i) the policyholder would have acted in another way had he received a proper explanation from the insurer and (ii) the policyholder would have received such

16 Nagoya District Court, 3 March 2006, Kōtsū Jiko Minji Saiban Reishū vol. 39 no. 2 (2006) 305.

17 The policyholder was a company of which the plaintiff was the CEO.

18 In this case, there was a special situation that by failing to pay the premium which is needed to establish a contract, the contract did not become effective in reality. Because that was the agent's fault, the contract was regarded as effective in the relationship between the plaintiff and the agent.

compensation had he acted in that other way – the insurer can be held liable for the damage(s) incurred by the policyholder.

The court explained:

"At the moment the request for the insurance contract was made [by the plaintiff], the plaintiff's wife told the defendant [agent] that the plaintiff was not in good health. That conversation could be regarded as pointing out the possibility for the plaintiff to be involved in an accident while he was driving the car. Thus, […] if the defendant had explained that the insurance would not be paid in the case of a single car accident, then it could be said with high probability, that the plaintiff would have sought a contract which covered a single car accident."

3. Analysis

In the wake of our consideration of the specific cases (1), (2), and (3), let us now analyze the information disclosure duties placed on insurers.

(i) First of all, with respect to the type of information that must be provided to the policyholder by the insurer, as cases (1) and (3) reflect, I think that the duty arises especially when the terms and conditions for a covered accident are not consistent with the expectations of the policyholder.

I have just referred to "the expectations of policyholders". What kind of policyholder shall we suppose here? Case (1) seems to focus on normal or universal policyholders. On the other hand, case (3) seems to focus on the exact policyholder who filed the suit. It could be interpreted in this way: Insurers owe some information duty in general, and, in cases where the special circumstances of the policyholder could be perceived by the insurer, the duty of the insurer to the policyholder can be recognized.

Plus, whether or not a provision is contrary to policyholder expectations will depend on how well-known the terms and conditions are among members of society. In this respect, earthquake exemption clauses become significant. With respect to the ruling in case (2), it is at least not impossible to interpret the Supreme Court's ruling as having acknowledged a duty falling upon insurers to provide information regarding an earthquake exception. However, in recent court cases, there is a tendency to reject the information duty regarding earthquake exceptions on the ground that they are considered to be sufficiently known by the general public.[19]

19 For example, there are cases which reject a duty to inform the insured of the existence of an earthquake exclusion, a violation of which would lead to liability to compensate, pointing to the facts that the insurance industry makes pamphlets on the existence of the exclusion and carries out PR activities in this regard, and that books on fire insurance and earthquake insurance are sold in bookstores (see, Hakodate District Court, 30 March 2000, Hanrei Jihō 1720 (2001) 32).

(ii) Furthermore, the function of the insurers' duty to inform is fairly limited by case (2) as decided by the Supreme Court. Namely, if the policyholder seeks a remedy for a breach of the information duty regarding the terms which limit the scope of coverage, he or she must establish proof that he or she would have entered into another insurance contract without such a limitation. Although such proof was acknowledged by the court in case (3), in light of the special situation that enabled that proof,[20] it would be difficult in most cases for policyholders to establish the requisite proof.

On the other hand, if and only if the policyholder succeeds in establishing such proof is the result almost the same as in the legal construction under which the limitation terms have no binding force on the parties. This is reminiscent of the interpretation of standard contracts.

III. INFORMATION DUTIES HELD BY POLICYHOLDERS

1. Introduction to the Rules

Next, let us turn to the duties held by insurance policyholders, particularly the information duties with respect to the likelihood (i.e., the risk) of an accident. In contrast to the duties held by insurers, Japanese private law – both before the enactment of the Japanese Insurance Act and Japanese Commercial Code and after the promulgation of the Japanese Insurance Act – has prescribed duties on policyholders from the outset. Although there has been some controversy surrounding the doctrinal bases,[21] there seems to be general consensus on the practical reason(s) underlying policyholders' information duties. That is to say, it is necessary to force the policyholders to disclose the possibility of the occurrence of a covered accident in order to reduce the chance of adverse selection within the insurance market.[22]

I would now like to provide a brief overview of the information duties that the Insurance Act places upon policyholders.

First, this duty was the duty to inform insurers of "material facts" before the passage of the Insurance Act,[23] but now it is only a duty to respond to

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20 In case (3), the plaintiff had a clear intention to enter into a full coverage contract and that intention was successfully proved by the testimony of parties.

21 See, U. NISHIJIMA, *Hoken-hō shinpan* [Insurance Law New Edition] (Tōkyō 1991) 46-50.

22 See, YAMASHITA, *supra* note 3, 283.

23 See Art. 644, 678 Commercial Code before the amendment in 2002. Art. 644 para.1, which prescribed that "the insurer can cancel the contract if the policyholder knowingly or from gross negligence did not make a statement on the material facts or made the false statement at the time of contract." Although no explicit definition of "material facts" was provided, the term has been interpreted to have the same

questions as posed by the insurer.[24] The duty is not a requirement on a policyholder to voluntarily provide information as to certain facts. In addition, the information that is subject to this duty is limited to "material facts." The concept of "material facts" here includes two types of information: (1) information[25] that would be likely to increase the insurance premium or (2) facts that, if known, might cause the insurer to refuse to enter into an insurance contract.[26]

Secondly, when there is an intentional or grossly negligent breach of the information duty held by the policyholder, the insurer may cancel the insurance contract. This ability to cancel the contract (a) is not retrospective, but prospective[27] and, (b) even if a covered accident occurs before the contract is cancelled, the insurer is not obligated to make an insurance payment. Moreover, the insurer does not have to return the premiums paid up to that point in time by the policyholder. However, (c) if the covered accident was

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meaning as defined in the Japanese Insurance Act (See, Ōsaka Court of Appeals, 11 November 1999, Hanrei Jihō 1721 (2000) 47).

24 See, Art. 4 Insurance Act. Insurance Act of 2008, stating "Those who become a policyholder or an insured must inform those who become an insurer of the material facts that the latter request to be informed of; material facts include those concerning the probability of the occurrence of damage which is to be covered by a non-life insurance contract". Art. 37 provides the same for life insurance contracts.

25 It could be disputed whether information such as genetic information is permitted to be the object of the information duty of policyholders. In Japan, in contrast to some other countries, there are no legal rules which prohibit such information from being the object of information duties at this time. Yamashita claims the reason is the fact that the incidence of single gene disorders such as Huntington's disease is relatively low in Japan, so genetic testing in the context of entering into an insurance contract is not a significant concern. (YAMASHITA, *supra* note 3, 302).

A case determined by the Ōsaka Court of Appeals on 27 May 2004 (Kin'yū Shōji Hanrei 1198 (2004) 48) may be related to the discussion above. The policyholder entered into a life insurance contract with permanent disability coverage, and after that he completely lost function in both of his lower limbs. He took a genetic test on the advice of the insurance company's staff and was diagnosed with Krabbe disease, a genetic disorder. Based on the results of the test, the insurer refused to pay the insurance, basing its position on the term excluding coverage for diseases developed before the policy's inception date. The court said that, in light of the current situation in which no legal regulation regarding the control of genetic information exists, there was no reason to exclude genetic information as evidence. (But the court ruled in favor of the policyholder because the invocation of the relevant clause on the part of insurer was against the principle of good faith considering that the genetic test was suggested by the insurance company's staff.)

26 Arts. 4, 37, 66 Insurance Act.

27 Art. 31 para. 1 Insurance Act.

not caused by an undisclosed fact, the obligation to make an insurance payment still remains.[28]

Thirdly – and this is supplementary to (b) – if the insurer knew that the policyholder failed to provide certain information yet would have agreed to an insurance contract with a higher premium, the insurer is still relieved of the obligation to make an insurance payment.

Under German insurance contract law, an insurer is not allowed to cancel the contract in such a case. Article 19, Paragraph 4 German Insurance Contract Act permits the insurer to claim higher insurance premiums. Japanese insurance law has not gone in this direction. However, there were discussions on whether or not to adopt such a rule before the Insurance Act of 2008 was passed in Japan.[29] Therefore, the current configuration of Japanese law can be said to have been formed consciously.

The rules described above may seem complicated. To simplify matters, let us suppose a situation in which an accident occurs and, at some point thereafter, the insurer finds out that that accident was caused by a material fact which the policyholder failed to disclose at the time of entering into the contract. In that situation, (1) the insurer has to make the insurance payment if the policyholder's non-disclosure was due to mere negligence, but (2) the insurer does not have to pay the insurance if the policyholder's non-disclosure was intentional or based on gross negligence, provided that the insurer had inquired about the fact, even in a situation in which the insurer would have entered into the contract at a higher premium. Moreover, the insurer is entitled to keep the premium it has received.

2. Analysis

As discussed earlier, with respect to the information duties imposed on insurers, an analysis must look at the current regulations as well as decisions handed down by courts. As for the information duties that policyholders must obey, however, the contents are relatively clear, and we do not have to look at court decisions at this time. Thus, partly by way of summary and conclusion, I would like to make a quick comparison between the duties of policyholders and those of insurers.

(1) The policyholder's duty is a duty to answer the questions asked by the insurer, whereas the insurer's duty is not subject to such a limitation.

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28 Art. 31 para. 2 No. 1 Insurance Act.

29 See, K. KINOSHITA, *Kokuchi gimu, kiken zōka* [Duty to Disclose, Increase in Risk], Jurisuto 1364 (2008) 23. One of the reasons was strong opposition by the insurance industry. Apparently, insurance companies did not want the criteria for underwriting to be revealed, which would have been inevitable had such a rule been adopted.

This distinction comes from the fact that the knowledge and ability of the insurer with respect to insurance contracts far exceed the knowledge and ability of a policyholder. In other words, while the insurer knows the type of facts that are material to their decisions, the policyholder does not.[30]

(2) Sanctions for a breach of the information duties placed on policyholders only apply when the policyholder acted intentionally or with gross negligence. In contrast, a breach of the insurer's information duties, as connected in part to the law of tort, leads to sanctions even when the insurer's breach was caused by mere negligence.

In my opinion, this is not a significant difference because it is firmly established that the policyholder's duty does not include the duty to ascertain facts. A policyholder does not need to inform the insurer of what the policyholder does not know. Combined with the nature of the duty as a duty to answer, it is hardly imaginable that a breach of the policyholder's duty would be caused by mere negligence.

(3) Thirdly, in the case of a violation of a duty by an insurer, the sanction is the damages caused to the policyholder. The damages are the difference between the actual financial situation and the financial situation that would have resulted had the insurer properly explained the contract.

On the other hand, if an accident has occurred and the insurer finds out there was a breach of duty, then the insurer will cancel the contract, pay no refunds of premiums, and, in addition, not make an insurance payment. But if we look at it in the same way as a breach by the insurer, the damages are the difference between actual premiums paid and the hypothetical premiums that would have been paid. That means, the difference should be the premium paid as compared to the hypothetical premium paid had the policyholder fulfilled his or her duty. Thus, the sanction is more severe when the policyholder breaches his or her duty than when an insurer breaches its duty.

What is the reason for these stronger sanctions? One possible answer might be that the duties of insurers and the duties of policyholders are fundamentally different. I think no one would argue against the idea that the duty of a policyholder comes from the asymmetry of information between the parties. But as for the duty of an insurer, it could be said that the duty does not come from that kind of asymmetry but rather from the lack of

30 Assuming that the duty to inform arises when there is a disparity of information between two parties, we can say that the insurer has much more information regarding what is material to estimate the risk, and thus the insurer owes a duty to inform in this regard. "The duty to answer" rule might be seen as an implicit expression of this duty.

sophistication of the policyholder. Even if that were so, however, I doubt that such a difference could justify the difference in rules.

Another possible answer is that, in order to encourage policyholders to avoid breaching their information duties, a more powerful sanction is required because the problem occurs only when the undisclosed information would have led to a higher premium, not to the insurer refusing to enter the contract. In that situation, the probability of discovery by the insurer is relatively lower. In such a situation, the incentive of the policyholder to avoid disclosing the fact would be higher. Thus, a severe consequence for the policyholder is necessary.[31] On its face, this seems plausible as an explanation of the rules on the policyholder's duty to inform, but, in actuality, it is not a satisfactory explanation of the difference between the rules regarding the policyholder's duty and the rules regarding the insurer's duty.[32] (Administrative supervision of the insurer's duties in subrogation of the high execution costs faced by policyholders *may* provide an explanation.)

IV. Conclusion

This essay has provided an overview of the information duties owed both by the insurer and the policyholder in Japanese insurance law. If we look to the statutes, we could say that there is no particular article in the area of private law which prescribes the insurer's information duty, and disputes between parties are dealt with as matters of tort law. But we should keep in mind that there are a plenty of detailed legal rules in the area of administrative supervision, and these rules provide a de facto basis for determining whether a claim should be acknowledged or not. By contrast, there are provisions in private law which explicitly define the policyholder's information duty, and the sanction for a breach thereof can be more severe than that for a breach of the insurer's information duty. That asymmetry could be explained by the strong (or effective) supervision over insurance companies

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31 See, T. Fujita/T. Matsumura, *Torihiki mae no jōhō kaiji to hōteki rūru* [Disclosure of Information Prior to the Contract and the Law], Hokudai Hōgaku Ronshū, vol. 52 no. 6 (2002) 2112.

32 The difference in rules undoubtedly comes from the different backgrounds on which these two notions have been developed. Whereas the policyholder's information duty is based on the traditional thinking (especially in common law countries) that an insurance contract is a contract based upon utmost good faith, and that characterization justifies the special effect of a breach of duty by the policyholder, the insurer's duty has only relatively recently begun to be discussed, and the notion is theoretically based on the trend of consumer protection. Thus, there may be no rational explanation which justifies the rules as they currently exist, but we can inquire if there is a need to change the rules.

as performed by the government; this supervision substitutes for the enforcement of the insurer's information duty by private persons.

APPENDIX

The regulation of the Japanese Insurance Business Act on the information duty of the insurer[33]

Before the amendment in 2014, the Insurance Business Act had prohibited "falsely informing the policyholder or the insured, or failing to disclose thereto any important particular stipulated in the insurance contract" (Art. 300 para. 1 No. 1 (i) Insurance Business Act).

After the amendment, a new article was inserted in addition to Art. 300, pursuant to which an insurance company or an insurance agent must "provide the contents of insurance contract and other information which are useful to the policyholder, etc., according to the specification by the Cabinet Office Ordinance" (Art. 294 para. 1 Insurance Business Act). The list of information includes many different points, for example, (i) the structure of the product, (ii) points concerning insurance payment (including *the event which gives rise to the payment)* and main cases in which insurance payment is not performed, (iii) points concerning special provisions which the policyholder can enter into, (iv) points concerning the insurance period, (v) the amount of insurance payment and other conditions concerning the underwriting, and (vi) points concerning the premium. (Art. 227-2 para. 3 Ordinance for Enforcement of the Insurance Business Act).[34]

At the same time, the amendment inserted an article concerning the duty to grasp the intention of the customer, according to which an insurance company or an insurance agent "must grasp the intention of a customer, propose the closing of an insurance contract, etc. which is in accordance with the intention of the customer, and provide a chance for the customer to make sure that the explanation of the contents of the insurance contract and the intention of the customer are consistent with the contents of the contract" (Art 294-2 Insurance Business Act).

Both an insurance company and an insurance agent owe a duty to "take measures to ensure sound and appropriate management" concerning the duties prescribed in those articles (Art. 100-2 and 294-3 Insurance Business Act), and the FSA supervises them to enforce this duty.

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33 See, T. YAMAMOTO, *Kokyaku e no jōhō teikyō gimu* [Information Duty to Customers], Jurisuto 1490 (2006) 14.

34 *Hoken gyōhō sekō kisoku*.

On the basis of these regulations, the FSA created “the general guidelines for supervision of insurance companies” and listed information to be provided. The list divides the requisite information into two categories, one of which is called “*keiyaku gaiyō* (the outline of a contract)” (information necessary to understand the contents/details of an insurance product), and the other of which is called “*tyuikanki jōhō* (information to be notified)” (information to which an insurance company should call customers’ attention). The FSA even gave examples of the appropriate font size of letters and paper size. These guidelines are, by their nature, guidelines for FSA staff members, but in practice they are accepted by the insurance industry as mandatory as if they were legal rules.