

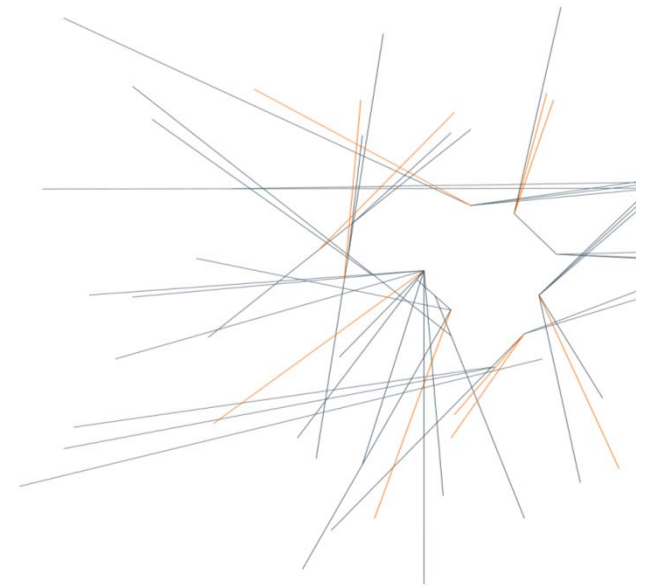
WEBBER WENTZEL

in alliance with > **Linklaters**

IMPACT OF NEW LEGISLATION ON GROUP SCHEMES

Presented by: Zelda Swanepoel & Johan Henning

July 2017



© Webber Wentzel 2014

Impact of new legislation on group
schemes

INTRODUCTION



- Structuring of group schemes – where we are today?
- Proposed amendments in terms of the Policyholder Protection Rules and the Insurance Bill: Interpretation.
- Practical implications of the interpretation and effect on businesses.

GROUP SCHEME STRUCTURING



- **What is a group scheme and how / where is it currently regulated?**
 - Currently only defined in the regulations to the LTIA:
 - *A scheme which provides for the entering into **one or more policies** other than an individual policy in terms whereof **two or more** persons, **without an insurable interest** in each other's lives, are the **lives insured**.*
 - *An individual policy is a policy under which a **particular person** is the **life insured**.*
 - Of critical importance is the definition of "**policyholder**" defined as:
 - *"the person entitled to be provided with the policy benefits under a long-term policy;"*.

GROUP SCHEME STRUCTURING



- There are numerous ways to structure a group scheme since the LTIA does not current restrict structuring possibilities.
- No real authority on the subject matter, save for the principles laid down by Judge Lewis in *Sage Life v van der Merwe 2002 (2) SA 166 (W)* and the structure of a credit life group scheme in the regulations to the LTIA.
- Distinguish between two "pillars" when structuring a group scheme:
 - The underwriting pillar regulated in terms of the LTIA; and
 - The distribution or marketing pillar regulated in terms of FAIS.
- The **underwriting pillar** deals with how the policy is structured between the insurer and the policyholder (or the proposer).
- The **distribution pillar** deals with the relationship between financial services providers, representatives, product suppliers and clients.

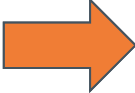
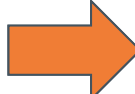
GROUP SCHEME STRUCTURING



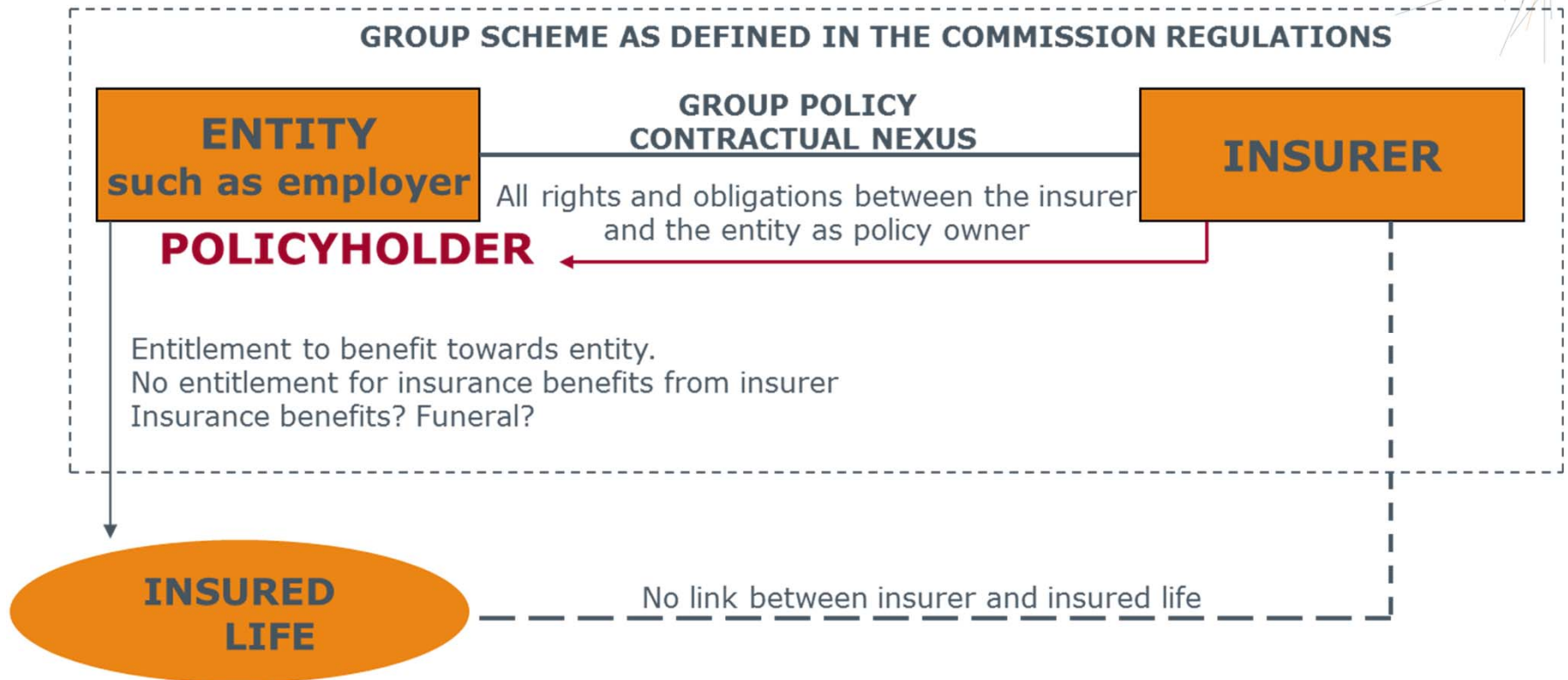
- **What problems were encountered and resulted in different group scheme structures?**
 - Access to clients and data is problematic;
 - Onerous obligations on insurers regarding receipt of premiums, issue of policy certificates, and other disclosure documents despite data issues;
 - Group schemes easily moved in terms of Part VII of the PPR;
 - Accountability of insurers where entity is not an FSP;
 - Premiums deemed received by an insurer.

GROUP SCHEME STRUCTURING

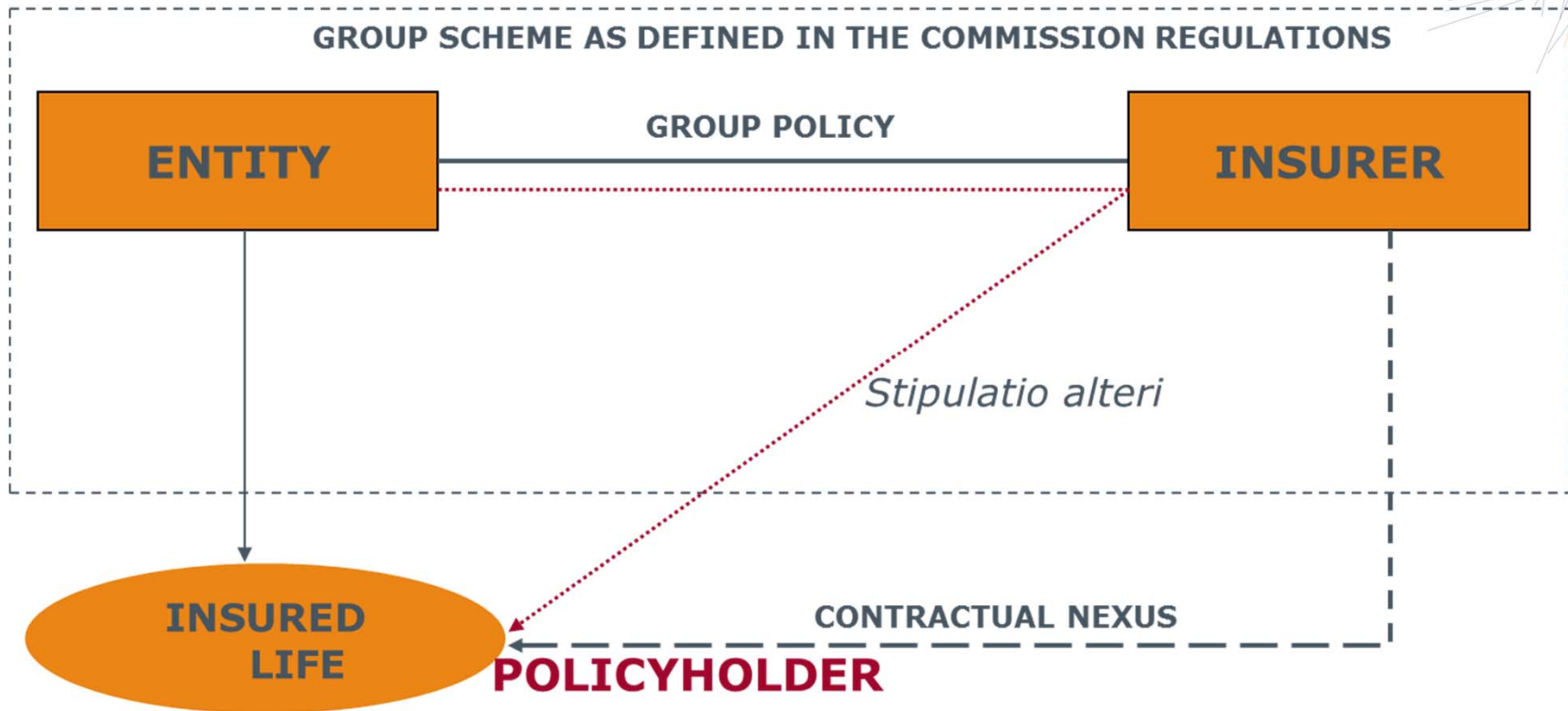
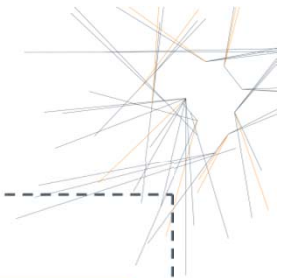


- Various structures were developed over time to address these issues.
- Four structures indicate basic principles underlying the structuring of group schemes and how the structures address these considerations.
- These structures incorporate both the underwriting and the distribution pillars:
 - Sage Life structure  where employer / funeral parlour is the policyholder.
 - Stipulatio alteri structures  where underlying members are the policyholders.
 - Part VII assistance business group schemes.
 - Agreement to underwrite structures with FSPs.

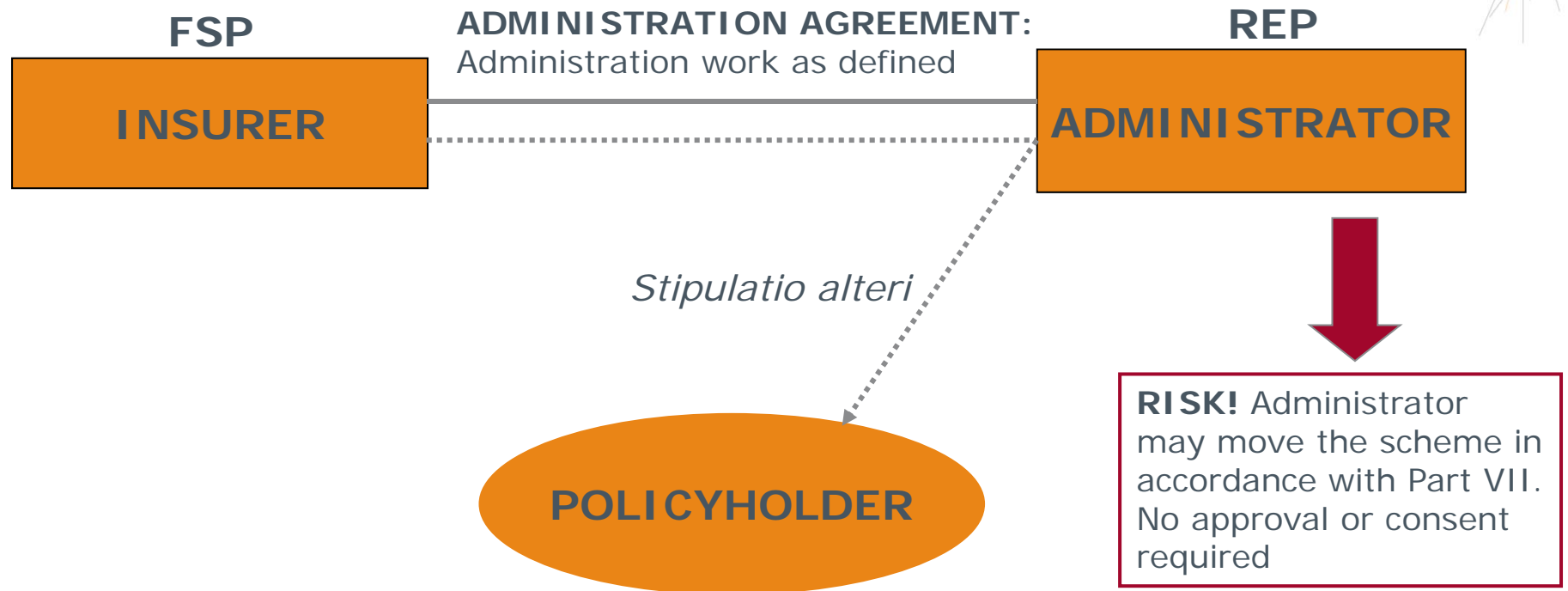
STRUCTURE 1: SAGE LIFE V VAN DER MERWE



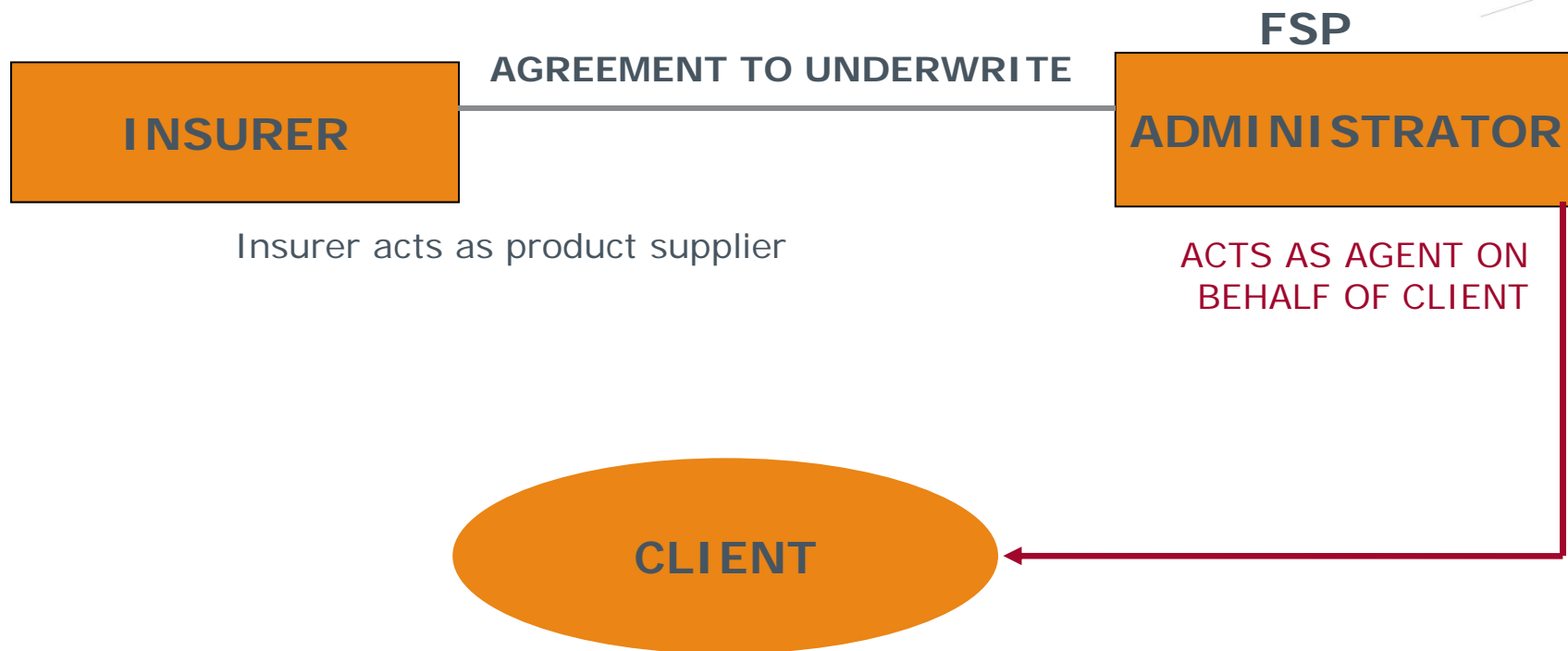
STRUCTURE 2: STIPULATIO ALTERI STRUCTURE



STRUCTURE 3: ASSISTANCE BUSINESS GROUP SCHEME (PART VII OF THE PPR SCHEMES)



STRUCTURE 4: STRUCTURE WITH FSP AS ADMINISTRATOR



CONCERNS RAISED IN RESPECT OF STRUCTURE 1



- In structures where the employer or funeral parlour is the policyholder the following risks were identified:
 - No protection afforded to the underlying members.
 - No statutory duties owed in terms of the LTIA towards the members.
 - Potential FAIS duties towards the members, albeit limited.
 - No replacement advice given.
 - Groups could be moved by a single cancellation without members' consent.
 - Members' remedies are in other legislation, such as the Consumer Protection Act or labour legislation.

CONCERNS RAISED IN RESPECT OF STRUCTURE 3

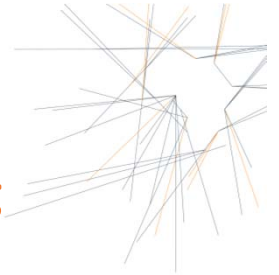


- **In PPR Part VII structures the following risks were identified:**
 - Whilst protection was afforded to members as policyholders, the administrator acting as agent of the insurer, could move the scheme to another underwriter with very limited disclosures to the members.
 - No replace advice given.
 - Resulted in adverse practises from administrators who were unhappy with an insurer.
 - Easy to structure outside the PPR, lead to different market practises and difficult interpretation issues.
 - In all other schemes, as section 37 process was required to transfer a scheme – unclear why lesser requirements were imposed for Part VII schemes.

CONCERNS RAISED IN RESPECT OF STRUCTURE 4



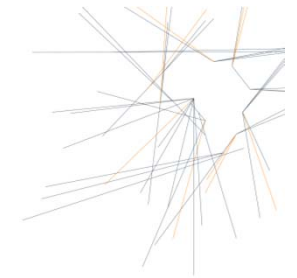
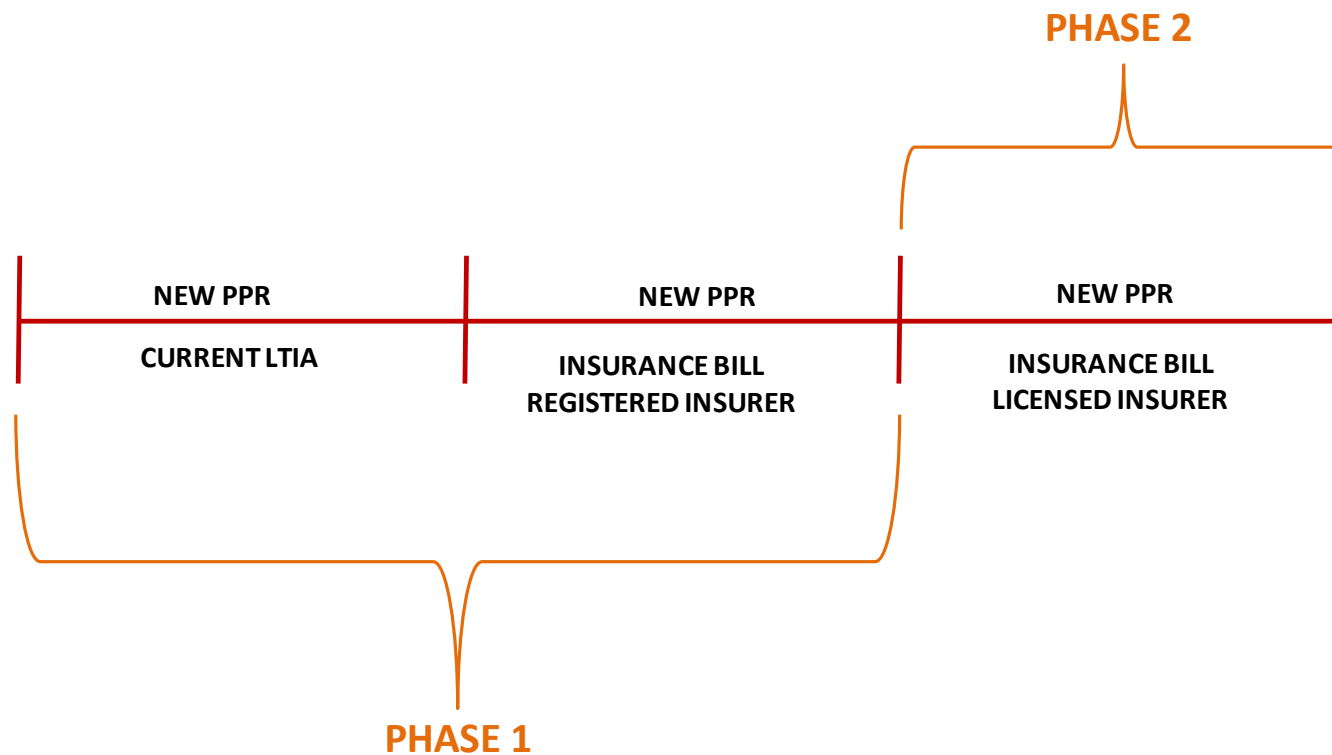
- **In structures where an FSP were introduced, the following risks were identified:**
 - Any issues of non-compliance attached to the FSP.
 - The insurer acted merely as product supplier and discharged its duties towards the FSP.
 - Greater accountability was required from insurers.
 - Difficult to regulated FSPs as opposed to insurers.
 - Policyholders had recourse against the FSP and not against the insurer.



WHAT STRUCTURE WAS ACCEPTABLE?

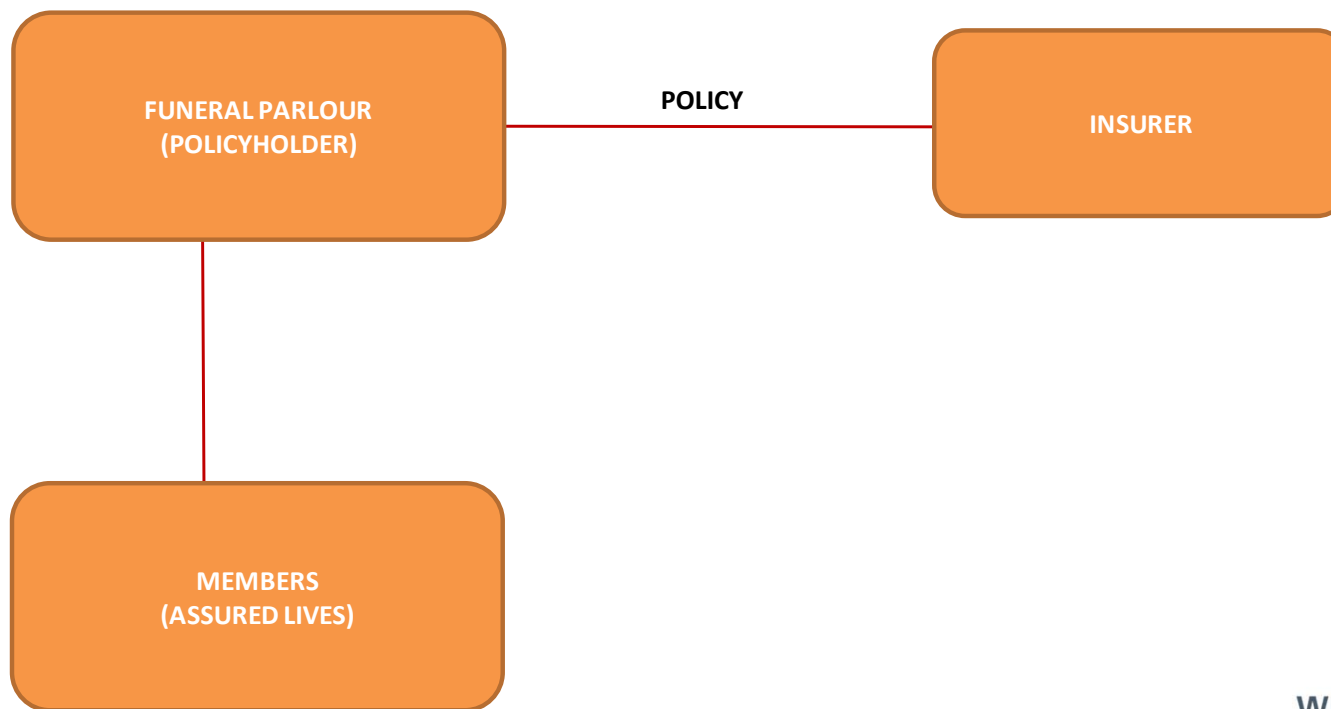
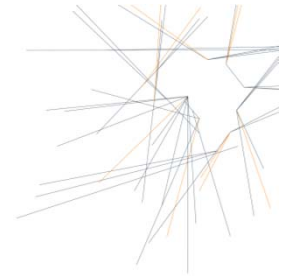
- **Only structure 2 – a stipulatio alteri structure where the underlying members are policyholders.**
- **Why?**
 - Member - policyholder and afforded statutory protections.
 - Insurer - liable towards the member for statutory compliance duties.
 - Policies could only be moved with consent of the members as policyholders.
 - An FSP performed services towards the clients, however the insurer retained accountability pursuant to the policy contract with the member.
- As a result it appears that a view was formed that only individual policies or direct policies are acceptable.
- This resulted in the changes to legislation.

INTERPRETATION OF THE NEW PPR



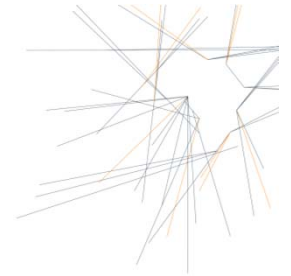
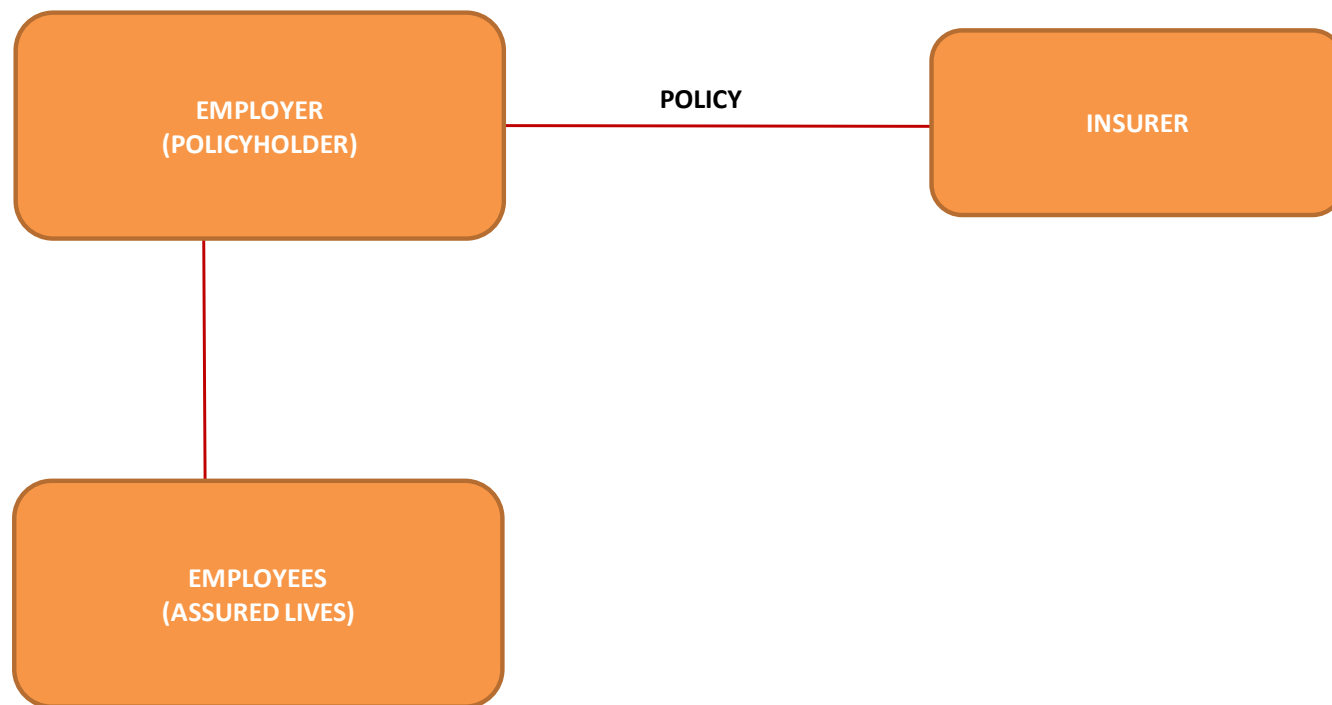
PARLOUR DIRECT STRUCTURE (STRUCTURE 1)

PHASE 1



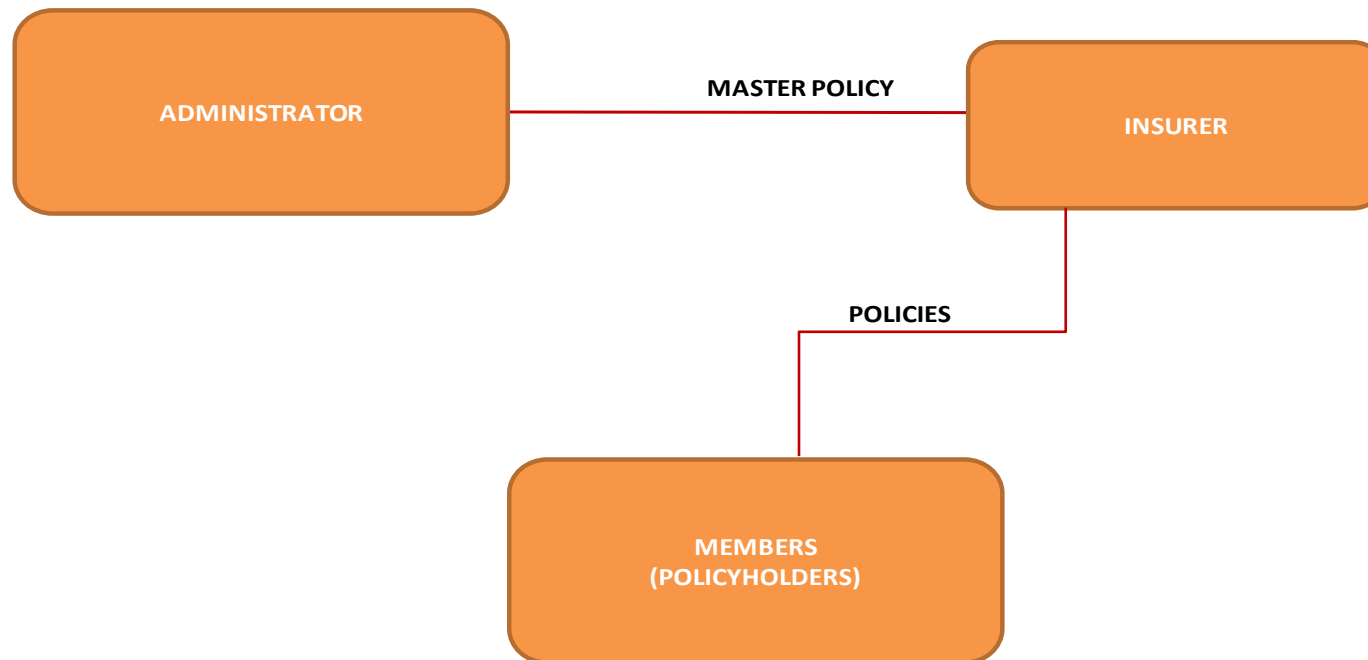
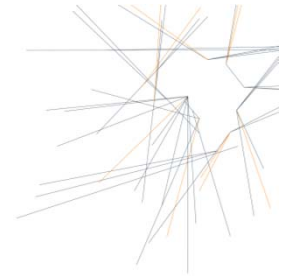
EMPLOYER GROUP SCHEME (STRUCTURE 1)

PHASE 1



STIPULATIO ALTERI / PART VII (STRUCTURE 3 AND 4)

PHASE 1



PART VII - FALLS AWAY UPON IMPLEMENTATION OF THE NEW PPR

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- **WHO IS THE MEMBER OF THE GROUP SCHEME?**

"Member of a group scheme means –

*(a) a person who contracts with a group scheme to insure him or herself;
or*

*(b) a person who contracts with a group scheme to insure the lives of one
or more other persons in which the first mentioned person has an
insurable interest."*

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- A group scheme is defined with reference to the regulations issued pursuant to the LTIA.

"Group scheme" means a scheme or arrangement which provides for the entering into of one or more policies, other than an individual policy, in terms of which two or more persons without an insurable interest in each other, for the purposes of the scheme, are the lives insured;"

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



"Individual policy" means a policy under which a particular person is the life insured, or two or more particular persons having an insurable interest in each other are the lives insured jointly;"

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- A policy contract is also defined in the new PPR as follows:

"Policy contract" means the written document or combination of documents embodying the contract entered into between an insurer and a policyholder in respect of a policy;"

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- A beneficiary is defined in the new PPR as follows:

"beneficiary" means –

- (a) in the case of a policy other than a group scheme, the person stated in the insurance policy or a person nominated by the policyholder as the person in respect of whom the insurer to meet policy benefits;*
- (b) in the case of a group scheme –*
 - (i) a member of a group scheme; or*
 - (ii) a person nominated by a member of a group scheme in respect of whom the insurer should meet the policy benefits, which person is not the policyholder of a group scheme;"*

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- Policyholder is defined as follows:

"policyholder", subject to the context, includes –
(a) a potential policyholder;
(b) ...;
(c) a member of a group scheme; "

- Due to the word ***includes*** used in the definition, the definition is not limited to a potential policyholder or a member of a group scheme, but will include the term as defined in the LTIA which, in Phase 1, is the person entitled to be provided with the policy benefits as defined in section 1 of the LTIA.



PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA

- Rule 22.3 of the new PPR deals with the termination of the group scheme by a policyholder.
- The policyholder may be a member of the group scheme or as shown, the person entitled to the policy benefits.
- For purposes of Phase 1, it cannot mean a Part VII administrator who has entered into a master policy.
- Specific protection is afforded to members of group schemes (Rule 22.3.3).
- In cases that the new policy has the same or better terms, notice must be given to each member of the group scheme.
- In cases where the new policy underlying the group scheme will not have the same or better terms, consent of each member is required.
- It seems that for purposes of Rule 22.3, a policyholder and a member has a different meaning in the particular context.

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- **May a parlour or an employer qualify as a member of the group scheme for purposes of the new PPR?**
 - Both a parlour and an employer clearly falls within the wording of sub-rule (b) of the definition of ***member of a group scheme*** being a person who contracts with a group scheme to ensure the lives of one or more other persons in which the first mentioned person has an insurable interest.
 - Sub-rule (b) can also mean that it is another member of the group scheme who contracts with the group scheme to insure another family member.

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- **How does one contract with a group scheme?**
 - Considering the definition of a group scheme, one can only contract with the insurer because the group scheme as such is not a legal entity and does not have the ability to enter into contracts.

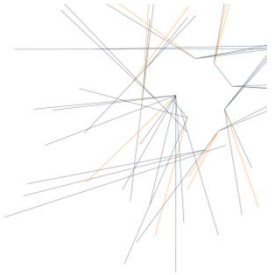
NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI MUNICIPALITY, 2012 (4) SA 593 (SCA)



- The present state of the law can be expressed as follows:
 - *Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in light of the document as a whole, and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors.*

NATAL JOINT MUNICIPAL PENSION FUND V ENDUMENI MUNICIPALITY, 2012 (4) SA 593 (SCA)

- *The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument, is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made.*

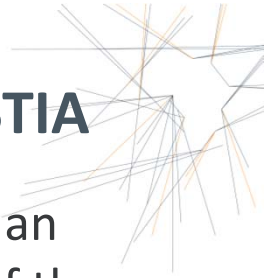


NATAL JOINT MUNICIPAL PENSION FUND V ENDUMENI MUNICIPALITY, 2012 (4) SA 593 (SCA)



- *The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*
- One must have regard to the "**explanatory document supporting consultation dated December 2016**" which accompanied the proposed replacement of the Policyholder Protection Rules.
- It is clear that the changes must be considered in light of RDR and consequently also TCF.
- Proposals such as Proposal C in the RDR Document dealing with advice and requiring that the interest of employees or persons actually paying premiums, need to be taken into account.

PHASE 1 – CHANGES TO PPR READ WITH CURRENT LTIA / STIA



- Although the parlour in a parlour direct scheme and the employer, in an employer group scheme, may fall within the wording of sub-rule (b) of the definition of ***member of a group scheme***, taken in context and in light of the background facts relating to TCF and RDR, there is a substantial risk that a court may interpret to mean ***member of a group scheme*** as the individual members in all cases.
- In the ***stipulatio alteri*** model the underlying members will be both members of the group scheme and policyholders.

PHASE 2: NEW PPR AND LICENSED INSURERS IN TERMS OF THE INSURANCE BILL



"policyholder" means –

- (a) the person with whom or with which an insurer enters into a life insurance policy or a non-life insurance policy; or*
- (b) the successor in title of the person referred to in (a);"*

PHASE 2: NEW PPR AND LICENSED INSURERS IN TERMS OF THE INSURANCE BILL



"life insurance policy" means an arrangement under which a person, in return for provision being made for the rendering of a premium to that person, undertakes to meet insurance obligations –
(a) on the happening of a life event, health event, disability event or death event; or
(b) ...;"

PHASE 2: NEW PPR AND LICENSED INSURERS IN TERMS OF THE INSURANCE BILL



"insurance obligations" means all obligations (other than the obligations of the policyholder), whether those obligations constitute an obligation to pay one or more sums of money, render services or meet any other obligations, under or arising from insurance policies, and in respect of life insurance policies, include any guarantees and discretionary participation features;"

PHASE 2: NEW PPR AND LICENSED INSURERS IN TERMS OF THE INSURANCE BILL



"group" in respect of the classes of insurance business, relates to an insurance policy entered into with –

- (a) an autonomous association of persons united voluntary to meet their common or shared economic and social needs and aspirations (other than obtaining insurance), which association is democratically controlled;*
 - (b) an employer; or*
 - (c) a fund,*
- where the association, employer or fund holds the insurance policy exclusively for the benefits of a beneficiary."*

- A funeral parlour will no longer meet the requirements for a group.

PHASE 2: NEW PPR AND LICENSED INSURERS IN TERMS OF THE INSURANCE BILL



"individual in respect of the classes of insurance business, relates to an insurance policy entered into with a person (whether individually risk rated or underwritten on a group basis) and –

(a) includes –

- (i) an insurance policy where a credit provider is the policyholder and the person in respect of whom the insurer should meet the insurance obligations, and the persons who are lives insured under the policy are debtors of that credit provider;*
- (ii) an insurance policy where an employer is the policyholder and the person in respect of whom the insurer should meet the insurance obligations, and the persons who are the lives insured under the policy are directors or employees of that employer, but*

(b) excludes –

- (i) a group insurance policy; and*
- (ii) subject to (a)(i) and (ii), an insurance policy where the persons who are the lives insured under the policy are two or more persons without an insurable interest in each other;"*

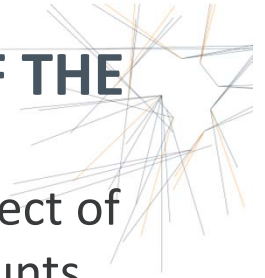
PHASE 2: NEW PPR AND LICENSED INSURERS IN TERMS OF THE INSURANCE BILL



"beneficiary" means -

- (a) in the case of an insurance policy other than a group policy –
 - (i) the person stated in the insurance policy or a person nominated by the policyholder as the person in respect of whom the insurer should meet the insurance obligations; or**
- (b) in the case of a group insurance policy –
 - (i) a member of the association or fund, or an employee; or*
 - (ii) a person nominated by the member referred to in sub-paragraph (i) in respect of whom the insurer should meet the insurance obligations, which person is not the association, fund or employer;"**

PHASE 2: NEW PPR AND LICENSED INSURERS IN TERMS OF THE INSURANCE BILL



- Considering Table 1 dealing with the classes of life insurance, in respect of the classes, **Group Death**, **Group Disability** and **Funeral Group**, amounts payable must be paid to the beneficiary.
- The question is: *Does the position of an autonomous association or employer under the Insurance Bill differ in respect of the meaning of member of a group scheme for purposes of the new PPR, due to the fact that these two groups are specifically allowed under the Insurance Bill?*
- Considering the background and specifically again Proposal C of the RDR, the position is no different than that in respect of a funeral parlour and employer group scheme in Phase 1.
- *Stipulatio alteri* group schemes may constitute individual business depending on how it is structured.



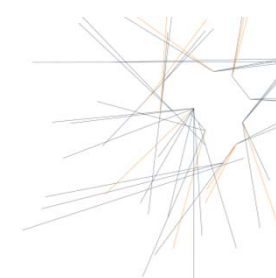
GROUP POLICY?

- **Who can be / have a group?**
 - Policy entered into with –
 - an autonomous association democratically controlled;
 - an employer;
 - a fund (friendly society, pension fund or medical scheme (ST)), where policy held for exclusive benefit of beneficiary.
 - Association, fund, employer → **policyholder (Insurance Bill)**.
 - **Beneficiary** → member or person nominated by the member in respect of whom the insurer must meet its obligations, who may not be the association, fund or employer.



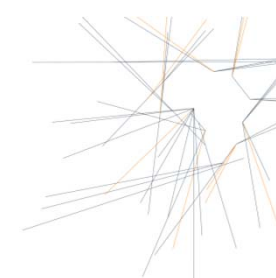
IMPLICATIONS?

- **Questions?**
 - Which associations are democratically controlled?
 - What does it mean "*to hold policy for exclusive benefit of beneficiary*"?
 - What rights are afforded to a beneficiary with whom the insurer stand in no contractual relationship? **Consider both Insurance Bill and PPR.**
- Appears that **statutory protections** are afforded to members (as beneficiaries) even if **no contractual relationship** exist between the insurer and the member. Such protections are given through statute and **must therefore be complied with.**
- Insurance Bill deals with prudential regulation – **why regulate it here?**
 - Effect for a group policy?
 - Potentially commission?



INDIVIDUAL POLICIES

- **What is an individual policy?**
 - Everything else is individual – except if structure incorrectly as a *stipulatio alteri*.
 - Specifically **includes** –
 - credit scheme where credit provider is the **policyholder** and the person **to whom the insurer must meet the obligations** and the debtors are merely assured lives [**Note: Similar to current credit life group scheme – now an individual policy**]; and
 - scheme where employer is the **policyholder** and the person **to whom the insurer must meet the obligations** and the lives assured are the employees and directors [**Note: Key man policies potentially**].



INDIVIDUAL POLICIES

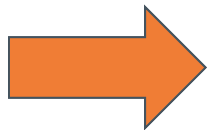
- Specifically **excludes** –
 - group insurance policy; and
 - a policy where the life insureds are two or more persons without an insurable interest in each other.
- Second one - is very problematic: If structured wrongly you will not have either a group policy or an individual policy.
- Intended to exclude all other types of group policies.
- **Question:** If not expressly prohibited – can it be structured in this manner?

- **Note an error: Amendment in Schedule 1 to "*policy benefits*" – refer to policyholder contractually entitled**

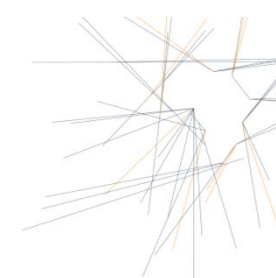
IMPLICATIONS?



- **Everything intended to be individual policies? Why have a group policy?**
 - The employer / fund / association has limited rights.
 - Statutory protections are afforded to beneficiaries who may not be the employer / fund / association even if the insurer has no contract with such beneficiaries.
 - In law beneficiaries merely have a *spes* however are now given entrenched statutory protections.
 - Payment of benefits may only be made to beneficiaries and never to the employer / fund / association.



All duties are therefore towards the beneficiary without having any contractual terms and/or protections.



IMPLICATIONS?

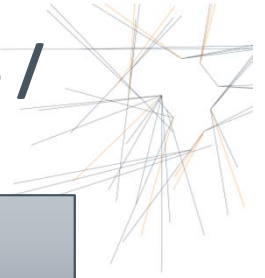
- **What is the purpose of having a group?**
 - In terms of the PPR protections – also afforded to "members of a group scheme", again without contractual relationships.
 - May therefore be better to have **individual policies** and be able to agree **contractual protections** enforceable against persons known to the insurer.
 - Can risk-rate such individual policies on a group basis.
 - Also beneficial as will have direct contractual relationships.
 - Will significantly increase compliance duties but that is in any event the case.

IMPLICATIONS?

- **What is the purpose of having a group?**
 - What about commission – will it be dependent on type of policy?
 - Why cater for group schemes at all?
 - What is the impact of not having group schemes on insurers, administrators, employers, public at large?



PRACTICAL IMPLICATIONS: FUNERAL SCHEMES / STOKVELS / CHURCH SCHEMES



STARTING POINT:
PROTECTION TO POLICYHOLDERS IN TERMS OF THE PPR EXTENDS TO MEMBERS
OF GROUP SCHEMES / EMPLOYEES / POTENTIAL POLICYHOLDERS

- **Rule 1:** Treat policyholders fairly with due regard to convenience of policyholder and policyholders must be informed and stay informed for duration of policy.
- **Rule 5: Cooling off rights**
 - Applies to all members of a group scheme;
 - If extended to all members of a group scheme who can cancel a policy – how can that work practically if no contract was entered into with the member?

PRACTICAL IMPLICATIONS: FUNERAL SCHEMES / STOKVELS / CHURCH SCHEMES



- **Rule 11: Consent from life assured**
 - Consent required from people even if insurer has no contractual relationship with the assured lives.
- **Rule 14: Disclosures and records**
 - Insurer must ensure that information is given to the policyholder so as to make an informed decision.
 - If did not enter into the contract – what informed decision can be made?
 - Upfront, at conclusion and ongoing disclosures must be made by the insurer.
- **Rule 16: Data management**
 - Have continuous access to policyholder data.

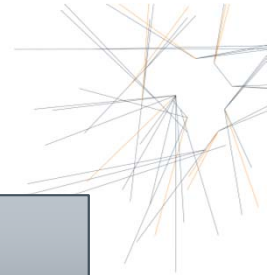
PRACTICAL IMPLICATIONS: FUNERAL SCHEMES / STOKVELS / CHURCH SCHEMES



- **Rule 22: Termination provisions**

- If terminated by insurer, the insurer must give notice to the policyholder.
- Note, non-payment of premiums must give notice to all policyholders.
- **If insurer terminates a group scheme –**
 - must have proof that policyholder is aware of termination; and
 - proof that policyholder entered into another policy.
- **If the policyholder terminates a group scheme –**
 - who is the policyholder?
 - written consent is needed if replacement and terms not the same or better.
- Currently, can move a PART VII scheme – now not possible.

PRACTICAL IMPLICATIONS: EMPLOYER SCHEMES



STARTING POINT:
PROTECTION TO POLICYHOLDERS IN TERMS OF THE PPR EXTENDS TO MEMBERS
OF GROUP SCHEMES / EMPLOYEES / POTENTIAL POLICYHOLDERS

- There is a common misunderstanding that the PPR applies only to voluntary group schemes – that is incorrect.
- It applies to all new and existing policies except reinsurance policies **regardless of the method of used to enter / advertise.**
- Typical fund policy **do not qualify as a group policy** in the Insurance Bill **BUT** is not excluded from the PPR. Fund members = members of a group scheme.
- **Rule 4** expressly deals with fund policies.



PRACTICAL IMPLICATIONS: EMPLOYER SCHEMES

- **Rule 5: Cooling off rights**
 - Applies to all members of a group scheme;
 - Thus applies on compulsory schemes to employees;
 - Thus applies to employees on voluntary schemes;
 - Thus applies to fund members in terms of fund policy.
 - If extended to all members of a group scheme who can cancel a policy – how can that work practically if no contract was entered into with the member?
- **Rule 11: Consent to insure a life**
 - In compulsory employer schemes – why is consent required if it is a condition to employment?

PRACTICAL IMPLICATIONS: EMPLOYER SCHEMES



- **Rule 14: Disclosures and records**
 - Insurer must ensure that information is given to the policyholder so as to make an informed decision.
 - Can employees in terms of compulsory schemes simply "opt out" and decide not to take part of the employer scheme?
 - What is the effect on employment contracts?
 - What is the effect on existing schemes if younger employees now opt out?
 - Upfront, at conclusion and ongoing disclosures must be made by the insurer.



PRACTICAL IMPLICATIONS: EMPLOYER SCHEMES

- **Rule 16: Data management**
 - Have continuous access to data relating to policyholder.
 - Is this practical for fund policies and compulsory employer groups?
- **Rule 22: Termination provisions**
 - See above.
 - Can an employee or fund member terminate a group policy?
 - What is the effect on the remaining employees / fund members?

WHAT ABOUT CREDIT SCHEMES?



- In the Insurance Bill indicates the credit provider as the policy and the debtors as assured lives.
- Policyholder in PPR includes a member of a group scheme.
- But – the individual does not contract with the group scheme per the Insurance Bill definition.
- Does it mean that the assured lives are not members of a group scheme for purposes of the PPR?
- The substitution rights in the PPR are afforded to the policyholder – does it not apply to the assured lives?

LAST OBSERVATION



- **Intermediary contracts**
 - May only have intermediary contracts with FSP or a representative.
 - What about contracts with people who fall in the exclusionary provisions of a representative?
 - Express prohibition not to enter into intermediary contracts with any other party.

CONTACT DETAILS

- **Johan Henning**

+27 11 530 5385

+28 82 8888 573

johan.henning@webberwentzel.com

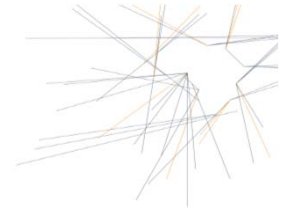


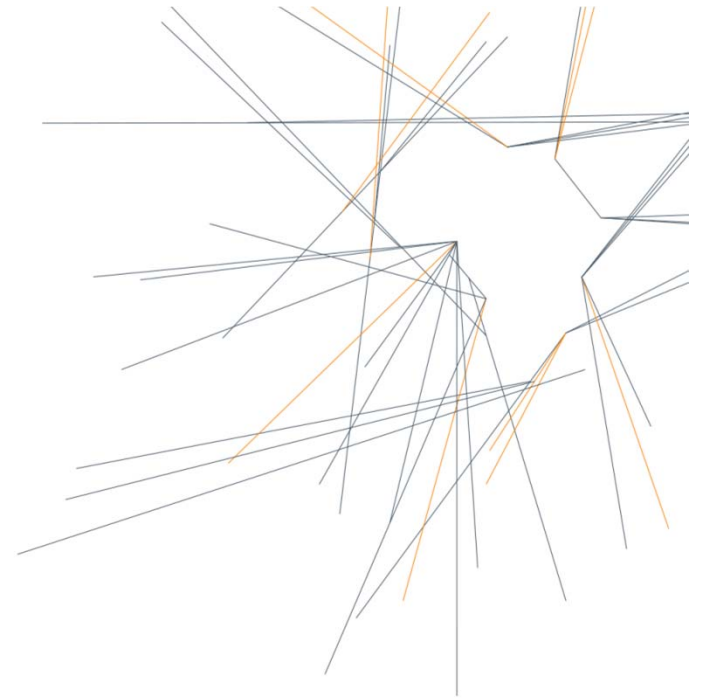
- **Zelda Swanepoel**

+27 72 530 2593

+27 11 530 5238

zelda.swanepoel@webberwentzel.com





www.webberwentzel.com

JOHANNESBURG

90 Rivonia Road
Sandton
Johannesburg, 2196, South Africa
T +27 11 530 5000

CAPE TOWN

15th Floor, Convention Tower
Heerengracht, Foreshore
Cape Town, 8001, South Africa
T +27 21 431 7000

Legal Notice: these materials are for training purposes only and do not constitute legal or other professional advice