The Insurance Act 2015

A fairer balance between insured and insurer

Following a nine year project by the English and Scottish Law Commissions, the Insurance Act 2015 (the Act) will come into force on 12 August 2016. The Act is seeking to create a new and fairer balance between insured and insurer.

This document aims to give you an overview of the key changes that will be introduced by the Act. This includes the impact on the following:

- The existing duty of disclosure and move to a duty of 'fair presentation'
- Remedies available to insurers
- Warranties
- 'Basis of contract' clauses
- Terms not relevant to the actual loss
- Fraudulent claims

It will also cover an insurer's ability to contract out of the new regime in certain circumstances.

Please note that the Act applies to both insurance and reinsurance contracts – where 'insurer' and 'insured' are mentioned in this bulletin, the Act applies to 'reinsurer' and 'reinsured' in the same context, where applicable.

What will it apply to?

The Act will apply to new and renewed (re)insurance contracts governed by the laws of England, Scotland, Wales and Northern Ireland (wherever they are underwritten), as well as variations to existing contracts entered into on or after 12 August 2016.

Fair presentation of the risk

Non-consumer (i.e. commercial or business) insureds will have a duty to make a fair presentation of the risk; the full requirements to satisfy the duty are set out in the Insurance Act.

What do these changes entail?

The existing duty to disclose every material circumstance known (or which ought to be known) to an insured is replaced by a duty to make a fair presentation of the risk. Listed below are some of the requirements that are included.

- Disclosure of all material circumstances of which an insured is, or ought to be aware, or providing the insurer with sufficient information to put a prudent insurer on notice that it should make further enquiries
- Disclosure is made in a way that would be reasonably clear and accessible to a prudent insurer
- Representations about material facts are substantially correct (and that representations of expectations or beliefs are made in good faith)

Where an insured is not an individual, what is known, or ought to be known to the insured means; 'what is known to individuals who are part of its senior management team or responsible for its insurance'.

The insured is also expected to know what would be revealed by a reasonable search of information, including information held by the insured's broker (which will be deemed to be the insured's knowledge, however this will not extend to confidential information acquired by the broker when acting for other clients) or a person covered by the insurance.

Practical points for consideration

Reasonable search

An insured should consider what a reasonable search might look like and who it needs to make enquiries of in order to satisfy the requirements

Clarity

The new stand-alone duty to present disclosure information in a 'reasonably clear and accessible' manner could require submissions to be signposted, structured and indexed, avoiding any 'data dumping' – insurers may even request that information is re-presented if it is not clear

Enquiries

Given the onus on insurers to make 'sufficient enquiries', insurers may begin to ask more questions during the underwriting process, so both the insured and brokers should be aware and prepared

Example

The knowledge of 'senior management' may include other stakeholders who are involved in the decision making process beyond the board (risk managers/external consultants).

Remedies available to insurers

There will be significant changes to the remedies available to insurers for non-disclosure and misrepresentation. Except where the breach of the duty to make a fair presentation is deliberate or reckless, proportionate remedies (based on what the insurer would have done if full disclosure had been made) will apply.

What do these changes entail?

Under the Act, the remedy of avoidance for a breach of the existing duty of disclosure will be abolished.

If the new duty to make a fair presentation is breached, the insurer will be able to avoid the contract (and retain the premium) if the non-disclosure or misrepresentation is deliberate or reckless. In other cases, a scheme of proportionate remedies will apply, depending on what the insurer would have done if a fair presentation had been made.

- If the insurer can show that it would not have entered into the contract on any terms, it will still be able to avoid the contract and refuse to pay claims (but will have to return the premium)
- Insurers may be able to vary the policy terms and the policy will then be treated as if it had been written on those terms from the outset. For example, insurers could apply an exclusion which might have the effect of excluding claims which would otherwise have been covered
- If insurers can show that the different term would have reduced or removed their liability for claims already paid, an insured may need to reimburse the insurer accordingly
- Instead of charging an additional premium, insurers may be able to reduce claims payments significantly

Practical points for consideration

Use of remedies by insurers

As insurers will have a wider range of remedies for non-disclosure than under the existing law, they may be inclined to use them more often than they use the current remedy of avoidance.

Warranties

The concept of warranties will remain but with important modifications.

What do these changes entail?

A warranty is a term of an insurance contract which must be complied with exactly, whether or not material to the risk. No particular form of words is required to form a warranty (even though they are usually labelled as such in a policy). A warranty is a term by which an insured:

- Undertakes to do or not do a particular thing
- Undertakes that some condition shall be fulfilled
- Confirms the existence of a state of facts

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Under the current law, the remedy for breach of a warranty is that the insurer is discharged from liability from the date of breach, even if the warranty had no causal connection to a loss and the breach can be remedied.

Listed below are some changes that will come into force with the Act.

- A breach of warranty will suspend rather than discharge the insurer's liability
- The insurer will be liable to pay claims that arise after the breach of warranty has been remedied (although the insurer will still be liable for losses before the breach, as is currently the case)

Practical points for consideration

Recasting

Insurers may seek to recast existing warranty obligations as conditions precedent to liability.

Sweep-up clauses

'Sweep-up' clauses may be used to convert all of the insured's obligations to conditions precedent to liability.

It should be noted that if conditions precedent to liability/exclusions or any other provisions are terms which are not relevant to the actual loss, the Act will apply in the manner set out below.

'Basis of contract' clauses

A sweep up declaration in a policy/proposal form that certain representations made by an insured are warranted to be true and accurate, converting pre-contract representations made by an insured into warranties, will be abolished for non-consumer insureds.

What do these changes entail?

This aligns non-consumer insurance with the position for consumer insureds under the Consumer Insurance (Disclosure and Representations) Act 2012.

Terms not relevant to the actual loss

What do these changes entail?

If a policy contains a term designed to reduce the risk of loss of a particular kind, or at a particular location or particular time, an insurer will not be able to rely on breach of the term if the insured can show that failing to comply with the term could not have increased the risk of the loss which actually occurred.

Example

If there is a breach of a warranty to maintain a burglar alarm, the insurer cannot rely on this to avoid paying a claim for flood damage if the insured can demonstrate there is no causal link.

Fraudulent claims

In cases of fraudulent claims, under the Act insurers will have the option to terminate the cover from the date of the fraudulent act without returning premium.

What do these changes entail?

The Act will introduce a default statutory regime for fraudulent claims. Insurers will remain liable for claims arising before a fraudulent act is committed but will have the option of terminating the contract from the date of the fraudulent act without returning premium.

For group insurance, the Act provides that fraudulent claims made by one beneficiary under the policy will not affect the cover provided under the contract to other parties.

Contracting out

What do these changes entail?

With the exception of the abolition of 'basis of contract' clauses (which is mandatory), insurers of non-consumer policies will be able to contract out of the Act and substitute their own agreed terms providing the insurer meets certain 'transparency requirements'.

To be effective, however, policy terms that would put an insured in a worse position than they would be in under the Act must be clear and unambiguous and sufficiently drawn to the insured's attention before the contract is entered into.

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