Insurance Act 2015

The Insurance Act 2015 (the "Act") applies to commercial insurance contracts (or variations of insurance contracts) entered into on or after 12 August 2016. It represents the most significant change to English commercial insurance law in over 100 years, introducing a new duty of fair presentation, changing the disclosure obligations of the insured, and changing the remedies for breach of warranty and fraudulent claims. Some provisions of the Act apply to consumer insurance. This note focusses purely on its impact on business insureds.

BEFORE THE ACT

Prior to the Act a business was required to tell the insurer "every material circumstance" which it knew or ought to have known "in the ordinary course of business" before buying insurance (section 18 of the Marine Insurance Act 1906). A material circumstance is one which would influence a prudent insurer in fixing the premium or deciding to take the risk. Failure to do so means the insurer can avoid the policy and refuse all claims under it.

This has led to complaints of unfairness because, it is said, businesses have to "second guess" what insurers want to know, insurers don't need to ask all relevant questions when covering a risk, only when a claim arises, and businesses that fail to mention a minor issue can lose all benefit from a policy. It has also meant the courts straining to find no non-disclosure of a minor issue just to prevent the unfairness of the policy being avoided.

NEW DUTY OF FAIR PRESENTATION

Instead of businesses being required to tell the insurer every material circumstance which would influence a prudent insurer in fixing the premium or deciding to take the risk, the duty is on the business to make a fair presentation of the risk, and the insurer to ask appropriate questions.

A fair presentation of the risk is one:

- which makes the required disclosure (as to which, see below)
- which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and
- in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

The first requirement changes the existing duty of disclosure, the second requirement is new and the last requirement reflects the law prior to the Act.

Duty of disclosure

Under the Act, the insured must:

- ***either*** disclose every material circumstance which the insured knows or ought to know (this is the same duty that existed before the Act);

- ***or*** (and this is new) provide disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

(A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.)

So whilst the duty of disclosure remains, it will be fulfilled even if a business failed to disclose a material fact, if it did disclose sufficient information for the insurer to realise it should make further enquiries. Insurers should now be scrutinising presentations from brokers more carefully and making sure they ask additional questions where appropriate.

Reasonably clear and accessible disclosure

The insured's duty to make reasonably clear and accessible disclosure to a prudent insurer is a new requirement. It doesn't have to be in one document or presentation. This requirement should help insurers scrutinise the information they are given by a business to assess whether they need to make further enquiries for the purpose of revealing material circumstances.

Remedies for breach of the duty of fair presentation

Previously insurers had the 'all or nothing' remedy of avoidance for a business insured's breach of the duty of disclosure or good faith.

Under the Act, in order to have a breach of the duty of fair presentation, an insurer now has to demonstrate that **it would have acted differently if the insured had made a fair presentation of the risk**. If it can do this, the remedies available depend on whether the insured's breach was deliberate, reckless or otherwise:

- for a **deliberate or reckless breach**, the insurer can avoid the contract from inception, refuse all claims and keep any premiums paid. It is for the insurer to show that the breach was deliberate or reckless;
- for a breach which was **neither deliberate nor reckless**, the remedy depends on the action the insurer would have taken had the insured made a fair presentation of the risk:
    - if the insurer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must in that event return the premiums paid;
    - if the insurer would have entered into the contract, but on different terms:
        - the contract is to be treated as if it had been entered into on those different terms if the insurer so requires; and
        - if the insurer would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim. .

These changes are positive news for brokers and insureds. Insurers will be required to pay claims (either in full or a greater part) that previously could have been avoided.

BREACH OF WARRANTY

Remedies for breach of warranty

Before the Act, a breach of warranty resulted in the insurer being completely discharged from liability from the time of the breach. This was the case no matter how trivial the breach was, or even if the breach itself did not cause any loss.

Under the Act, a breach of warranty by the insured only suspends the insurer’s liability from the time of the breach until it is remedied. The insurer will not be liable for any loss that occurs during this period, or which can be attributed to something which occurs during this period. However, the insurer’s liability will be reinstated once the breach is remedied.

Furthermore, the Act provides that if the business makes a claim, the insurer cannot rely on any breach of contract (whether a warranty or otherwise) to avoid paying that claim if the breach could not have increased the risk of the loss which occurred. (This does not apply to terms which define the risk as a whole.)

Basis of the contract clauses

Before the Act, proposal forms generally stated that the answers given by the insured were the “basis of the contract”, which meant that they were all warranties, so that an incorrect answer would allow insurers to avoid for breach of warranty. The Act abolished these “basis of the contract” clauses.

INSURER’S REMEDIES FOR FRAUDULENT CLAIMS

Before the Act, an insurer was entitled to terminate an insurance contract on discovering fraud.

Under the Act, if the insured makes a fraudulent claim against the contract, the insurer:

- is not liable to pay the claim;
- can recover any sums it paid to the insured in respect of the claim; and
- may also treat the contract as having been terminated with effect from the time of the fraudulent act, meaning that it may refuse all liability to the insured under the contract in respect of events occurring after the fraudulent act and need not return any of the premiums paid, although it will still be liable for legitimate claims made in respect of events occurring before the fraudulent act.

In respect of group insurance policies, the above remedy is varied in that the insurer can only treat the contract as having been terminated as against the fraudulent claimant, not other members of the group.

CONTRACTING OUT OF THE INSURANCE ACT REGIME

Parties can contract out of the provisions of the Act (apart from the prohibition on basis of the contract clauses), as long as any ‘disadvantageous term’ (i.e. one which puts the insured in a worse position than that under the Act’s regime) meets the ‘transparency requirements’, which are that:

- the insurer must take sufficient steps to draw the disadvantageous term to the insured’s attention before the contract is entered into; and
- the disadvantageous term is clear and unambiguous as to its effect.

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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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