Insurance Act 2015 - Frequently Asked Questions

1. Is the Insurance Act 2015 law yet?

The Insurance Act 2015 comes into force on 12 August 2016.

2. Does the 2015 Act apply to reinsurance?

Yes. Contracts of reinsurance (and retrocession) are non-consumer insurance contracts for the purposes of the 2015 Act. The insurer (or the reinsurer) is the "insured" and the party providing the insurance (the reinsurer or the retrocessionaire) is the "insurer".

3. Does the Act just apply to commercial policies?

No. Whilst under the wider review of insurance law the Law Commission initially focused on consumer disclosure, resulting in the Consumer Insurance (Disclosure and Representations) Act 2012, it is misleading to think of the 2015 Act as dealing with just commercial disclosure.

The 2015 Act also deals with warranties, conditions and similar terms and insurers' remedies for fraudulent claims, all of which relate to consumer and commercial policies.

4. What are the key changes?

Business Disclosure

The duty of disclosure remains for non-consumer policyholders but the 2015 Act reframes it as a broader "duty of fair presentation".

In brief, the duty can be met either, as is currently the case, by disclosing every material circumstance which the insured knows or ought to know or, where this is not met, by disclosing enough information to put an underwriter on notice that it needs to ask for further information from the policyholder before making a decision.

This seeks to rebalance the duty, requiring policyholders to undertake a reasonable search for information available to them, whilst also obliging underwriters to play a far more active role, asking questions as necessary.

The 2015 Act defines the individuals whose knowledge will be directly attributed to the policyholder where it is not an individual (the senior management or any person responsible for the policyholder's insurance arrangements).

The 2015 Act explains that the policyholder does not have to disclose facts which its insurer already knows or ought to know about. For example, an insurer ought to know about information held in its electronic records, by the claims department or in reports produced by surveyors/other service suppliers received into the claims department. There is also a presumption that insurers will have some industry knowledge about the relevant sector.

As under the current law, renewals are treated as new contracts so the new duty also applies when an insurance contract is renewed.

Most significantly of all, the 2015 Act changes the remedies available to insurers in the event that a policyholder does not fairly present the risk. The 2015 Act will replace the existing law (which allows an insurer to avoid an entire policy if there has been a material non-disclosure) with a new system of proportionate remedies.

Firstly, an insurer must show that it would have acted differently if the policyholder had made a fair presentation. Deliberate or reckless behaviour will still permit avoidance. Otherwise, the insurer has different remedies depending on what the underwriters would have done had the risk been properly presented to them. Avoidance is still available where an insurer would have declined the risk altogether.

But if underwriters would have applied different terms (other than relating to premium) to the policy, the policy is treated as if it had always contained such terms. Past, present and future claims must therefore be dealt with as if such terms appeared in the policy. If a higher premium would have been charged, any claims can be reduced proportionately.

It is important to note that the 2015 Act does not entitle underwriters to charge more premium if they unearth material facts which the policyholder ought to have told them about.

Warranties and other terms

The 2015 Act abolishes “basis of the contract” clauses (which have the effect of converting statements of fact made in proposal forms into warranties).

It also provides that an insurer’s liability will be merely suspended, rather than discharged, in the event of breach of warranty. Therefore, an insurer is liable for valid claims which arise after a breach of warranty has been remedied.

The 2015 Act provides that non-compliance with a warranty or other term (such as a condition precedent) which is designed to reduce particular types of loss or losses occurring at a particular time or place, will not debar the policyholder's claim if the policyholder can show that the non-compliance could not have increased the risk of the loss in the circumstances in which it occurred.

However, this provision does not apply to a term which defines the risk as a whole.

It is important to appreciate that the changes extend beyond just warranties and may catch other types of contractual provision such as conditions precedent if they are of comparable effect.

Remedies for fraudulent claims

The 2015 Act clarifies the remedies an insurer has when a policyholder submits a fraudulent claim. The policyholder will forfeit the whole of that claim and insurers may terminate the policy with effect from the date of the fraudulent act, but previous valid claims are unaffected.

Where a member of a group insurance policy makes a fraudulent claim, an insurer will have a remedy against the fraudulent member but it will not affect the other members or the insurance policy as a whole.

5. Do the provisions concerning fraud in group insurance policies only apply to policies taken out by employers and the like for the benefit of individual consumers?

No. The definition of group insurance is wide ranging, covering any policy which is intended to provide benefits to persons or companies who are not named policyholders.

Many commercial policies will fall within the category of "group insurance" considering the number of extensions which appear in such policies (providing as they often do extended cover for employees, directors, subsidiary companies, principals and the like).

6. To what extent can insurers contract out of the provisions in the Act?

For non-consumer insurance, the provisions of the 2015 Act are intended to provide default rules and parties are free to agree alternative regimes, provided that the insurer makes it clear before the insurance policy is taken out that it is contracting out and that the alternative provision is clear. Contracting out is however not permitted in relation to basis of the contract clauses.

For consumer insurance contracts, an insurer cannot use a contractual term to put a consumer in a worse position than they would be in under the terms of the 2015 Act. It is important to recognise that an insurer will not be able to contract out of the Act in a group policy taken out by a commercial entity to benefit consumers in so far as any contracting out provisions would affect those consumers.

7. What is happening with the Third Parties (Rights against Insurers) Act 2010?

Whilst also having received royal assent, the Third Parties (Rights against Insurers) Act 2010 has not yet been brought into force. This is because it does not cover all relevant insolvent and defunct organisations and requires amendment. The amendments contained in the 2015 Act clear the way for the 2010 Act to come into force by adding new insolvency procedures and by providing a means of accommodating future changes in the law.

By way of background, the 2010 Act will allow a third party to bring a claim directly against a liability insurer whose policyholder has become insolvent, without first obtaining a judgment against the policyholder. It also gives claimants greater rights to find out about whether a company has insurance before issuing a claim.

8. What about damages for late payment of claims?

While this was not initially addressed in the 2015 Act, amendments have been introduced by the Enterprise Act 2016. These will come into force on 4 May 2017. It will then be an implied term in every contract of insurance that the insurer must pay any sums due within a reasonable time. A reasonable time includes time to investigate and assess a claim, and will vary according to the circumstances.

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