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Legal update:
The new Insurance Act 2015 – how can policyholders benefit now?

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The Insurance Act 2015 (the **new Act**) comes into force in August 2016 but many insurers have indicated that they are willing to bring their policies in line with the more policyholder-friendly regime before that date. This briefing note is designed to assist risk managers and other buyers of non-consumer insurance to get ahead of the game now and benefit from these important changes to English insurance law from the date of their next renewal.

Pre-inception/ renewal disclosure

What's the change?

Under the new Act policyholders will have to make a *'fair presentation of the risk'* to the insurer before entering into the policy. This will require the policyholder to disclose every material circumstance which it knows or ought to know or, if that is not done, to give sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal those circumstances.

The new Act and Explanatory Notes also clarify that the policyholder does not need to disclose matters which the underwriting team knows, ought to know or is presumed to know and this includes information which the insurer's claims department is aware of and ought to pass on.

What can I do about it now?

The new Act introduces a number of changes to the pre-inception/ renewal duty of disclosure and many of the concepts may require further input from the English courts once the Act is in force. It would perhaps be difficult to replicate the entirety of these changes in your policy documentation, but there are a number of modifications which should certainly be sought at this stage.

– Ask your insurer to stipulate in the policy that, so long as sufficient information has been disclosed to put the insurer on notice that it must ask further questions to reveal material facts, the insurer will not be entitled to avoid the policy for material non-disclosure.

Practical tip have a conversation with your insurer about the kinds of circumstances which it considers are material.

– Agree with your insurer in writing that you are not required to disclose information that is already known or ought to be known to the insurer and make sure this includes information known by the claims department.

Practical tip ensure that your policy clearly specifies whose knowledge is relevant within your company, i.e. is it just the Board of directors and the risk manager or does it include general counsel / regional directors? Once identified, implement systems and controls to ensure there is an adequate flow of information from all relevant persons within the organisation to the risk manager.

Remedies

What's the change?

Under the current law, even an innocent failure to disclose material information can result in the policy being voidable. The remedies under

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the new Act are far more flexible. Essentially, the insurer can only avoid the policy if the failure was *'deliberate or reckless'* or, if innocent, if the insurer can show that it would never have entered into the contract had it known the material fact.

What can I do about it now?

Ask your insurer to include a clause in your policy which provides that the insurer will not be entitled to avoid the policy for an innocent non-disclosure.

Practical tip the new Act provides a series of proportionate remedies for an insurer where the failure is innocent. These are complex and their application may need to be clarified by the courts when the new Act comes into force. Try to resist including such remedies in your policy now to avoid unnecessary disputes. Many large corporate policyholders already benefit from clauses which exclude the insurer's right to avoid for an innocent (or even negligent) non-disclosure, so insurers should be willing to agree to such clauses without the corresponding proportionate remedies.

Basis of contract clauses

What's the change?

The new Act abolishes basis of clauses, which currently provide that the policyholder warrants the accuracy of answers given in a proposal form or states that such answers form the *'basis of the contract'*. The legal effect is to transform representations in the proposal form into warranties in the policy, enabling insurers to avoid liability where there has been an innocent misrepresentation in the proposal form.

What can I do about it now?

Such clauses have long been considered unfair. Look out for them in your proposal forms and policies and ask your insurer to remove them now if they appear.

Warranties

What's the change?

Under the new Act, the insurer's liability is only suspended when there is a breach of warranty and, once that breach has been rectified, the insurer will be on risk again. The Act also provides that in the event of breach of certain warranties, the insurer cannot avoid liability unless the breach could have had some bearing on the risk of the loss which actually occurred. So, breach of a warranty that premises have a working fire alarm would not discharge the insurer for liability when a flood occurs.

What can I do about it now?

These are important changes for policyholders so try to negotiate wording to this effect at your next renewal.

Practical tip many commercial policies already contain protection for policyholders where a breach of warranty is unrelated to the loss that occurs, but most do not provide that the insurer's liability is only suspended during the period of breach, so be careful if your insurer tells you that you policy is already in line with the new Act.

Conclusion

The new Act is a welcome, fundamental change in English insurance law and will provide enhanced protection for commercial policyholders who all too often fall foul of the onerous obligations which are currently found in commercial policies. There is an opportunity for policyholders to benefit now by seeking to negotiate better terms in their contracts of insurance in advance of the new regime actually coming into force.

Some global corporates (including in the UK) have previously elected to subject their policies to New York substantive law on the basis that it is perceived to be more policyholder friendly – those policyholders may now consider returning to English law which, when the new Act comes into force, will be more balanced as between policyholders and insurers.

Michelmores LLP advises policyholders on the drafting and interpretation of policy wordings, the scope of disclosure obligations, insurers' rights of inspection, claim notifications and proof of loss submissions.

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