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IN ASSOCIATION WITH:

HERBERT SMITH FREEHILLS KRAMER

10 Years of the Insurance Act 2015

A law that reshaped the industry… or did it?

Survey report

About Herbert Smith Freehills Kramer

Herbert Smith Freehills Kramer is a full service international law firm and the leading global adviser for policyholders.

We are the leading global adviser for policyholders with coverage issues, and represent clients in the largest, most strategically important and complex insurance disputes. We have been consistently recognised as the market leader representing policyholders in significant coverage disputes in the London and international markets for two decades. We have the largest team of lawyers dedicated to assisting policyholders in the UK and 6 of our partners are recognised as ranked individuals, being the leading lawyers in this field:

- Band 1: Insurance Litigation: Mainly Policyholders, Chambers UK
- Band 1: Insurance Litigation for Policyholders, Legal 500 UK
- Band 1: Insurance sector: Policyholder (International & Cross-Border) in the UK, Chambers Global
- Insurance Team of the Year, Legal Business Awards: 2019 – 2021

We are free from conflicts with all the major global insurers including Lloyd's.

We have market leading expertise and a proven track record in assisting clients on all classes of insurance policy including:

- Liability policies of all types – professional indemnity, D&O, public and products liability, employers' liability, including those written on Bermuda Form
- Cyber, whether free-standing or as part of other covers
- Warranty and indemnity and contingent risk insurance, including tax specific policies
- Energy and marine policies of all types – cargo, CAR, operational package policies, control of well
- Property damage/business interruption
- Political risk, trade credit, trade disruption, contract frustration
- Crime

While assisting with major claims is our core expertise, we also use our expertise to advise clients on non-contentious aspects of insurance, including the review of policy wordings and risk allocation under contracts.

We are proud of our long-standing partnership with Airmic and are delighted to have worked with Airmic on various technical guides and projects for over a decade to assist Airmic members, promote legal certainty and reduce the scope for contested claims.

Contacts:

- Fiona Treanor, Partner, Herbert Smith Freehills Kramer
- Joanna Giza, Senior Associate, Herbert Smith Freehills Kramer
- Sarah Irons, Knowledge Counsel, Herbert Smith Freehills Kramer

About Airmic

Airmic celebrated its Diamond Anniversary in 2023 and today is the UK and Ireland's largest and most vibrant risk management and insurance association. Airmic has over 450 corporate members, more than 2,000 individual members, and is supported by a network of leading risk and insurance partners and affiliated institutes, associations, and universities.

We are growing through welcoming both those in the risk and insurance professions and in roles connected to risk and insurance, including those with a primary focus on governance, sustainability, finance, compliance, law, human resources, information security, health, safety and security, resilience and business continuity, and academia. As such, we are in a strong position to represent the views of our members, and to advocate for their needs within business, standards and regulatory bodies, and government in the UK, Ireland and internationally. We are active members of FERMA the Federation of European Risk Management Associations and IFRIMA the International Federation of Risk and Insurance Management Associations.

Our members enjoy access to a wide variety of face to face and online events and learning opportunities, networking, special interest groups and regional meetings, supported by a competency framework and mentoring scheme. Our online library of research materials, guides, papers, newsletters and curated readings, feature work by some of the brightest, most innovative, and experienced talent.

This report is based on 58 responses gathered in a survey conducted by Airmic and Herbert Smith Freehills Kramer from March to April 2025.

"Airmic plays a key role in promoting the integration of risk management and insurance, helping organisations navigate uncertainties while protecting their assets. Airmic emphasises that risk management and insurance should not operate in silos but, instead, work together. This approach is particularly important in today's fast-changing environment, where emerging risks demand a dynamic response. In this context, the Insurance Act provides a framework for standards of fairness and accountability – it sets boundaries – but it does not replace the need for risk management relevant to sectors, jurisdictions, and the nature, scale, complexity and maturity of organisations. The Act supports good risk management practice for stakeholders in insurance contract management, but in line with Airmic's strategic objectives, managing risk and insurance requires collaboration."

Julia Graham
CEO
Airmic

Introduction

This year marks the 10-year anniversary of the Insurance Act 2015 (the Act) receiving royal assent, which paved the way for the most significant reform in insurance law in the UK in over 100 years.

The Act was welcomed at the time by industry players as bringing commercial insurance law in the UK up to date with the realities of the modern world and was heralded as a tool to combat the perceived imbalance in the law in favour of insurers.

To mark the anniversary and to see what impact the Act has had on both the placement of policies and the handling of claims from the policyholder perspective, we conducted a survey among risk managers and have analysed the results with the help of leading global law firm, Herbert Smith Freehills Kramer. We repeated some of the questions that we posed in a survey we ran in 2015 before the Act came into force, and it has been interesting to compare and contrast the results.

Respondents came from a range of industries including energy, pharmaceuticals, real estate, financial and professional services, and retail. It should be noted, however, that those responding to the survey will be engaged, sophisticated risk managers and their experience may not reflect that of smaller SMEs and those policyholders with a less formal risk function.

"We worked closely with Airmic in the run-up to the Act coming into force to assist Airmic members in understanding and making the most of the new legislation. It has been interesting to work with Airmic by way of follow-up on this survey to see what impact the Act has had for policyholders in practice. I am pleased to see that the survey results show that the Act has had a positive impact on placement, with policyholders reporting greater engagement with their insurers on the disclosure process pre-inception."

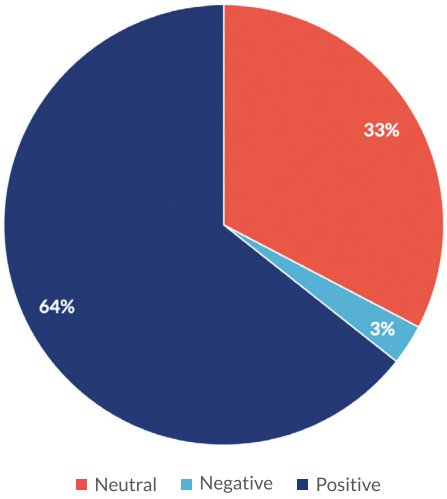
"Policyholders do still need to be mindful, particularly when negotiating policy wordings, to ensure that conditions precedent and warranties are kept to a minimum and are clearly drafted and labelled. This is particularly so given the results suggest that insurers may be increasing their use of conditions precedent. It is a good to see, however, that concerns expressed a decade ago that insurers might be more inclined to challenge claims under the Act are apparently unfounded (among our survey respondents at least)."

Fiona Treanor
Partner
Herbert Smith Freehills Kramer

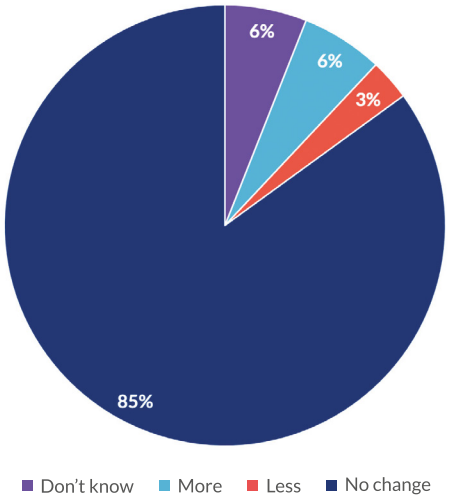
Key findings

- The Act has had a largely positive impact. This sentiment is reflected in respondents reporting better engagement with insurers at the pre-contract disclosure stage.
- The number of disputes between policyholders and their insurers remains largely unchanged, with only 6% of respondents experiencing an increase in disputes.

Do you think the impact of the Insurance Act 2015 has been overall positive, negative or neutral?



Have you had more or a similar number of disputes with Insurers since introduction of the Insurance Act 2015?



- There is no suggestion from the survey results that insurers are seeking to avoid the more insured-friendly provisions introduced by the Act either by (i) contracting out of the Act to any great extent or (ii) seeking to argue that breaches of the Duty of Fair Presentation were deliberate or reckless, so as to circumvent the proportionate remedies introduced by the Act for breach of the Duty of Fair Presentation.
- However, some of the results suggest that there may be an increasing use by insurers of conditions precedent in policies. Breach of a condition precedent can lead either to coverage not attaching or to a claim being denied, irrespective of whether the breach had any impact on the claim. This increasing use of conditions precedent by insurers had been a concern raised by Airmic when the Act was introduced:
  - o A fifth of respondents have experienced insurers introducing more conditions precedent into policies.
  - o Almost a quarter of respondents have experience of insurers introducing sweeper clauses into their policies. These are clauses which provide that all the obligations on the insured are conditions precedent to the insurer's liability under the policy.

"The Marine Insurance Act 1906 was indisputably in need of reform. Clearly, a law drafted at the turn of the 20th century no longer reflected the social and economic realities of the 21st century. What worked for sailing ships was no longer relevant to an IT-based industry insuring many different kinds of goods and services across the globe. At the Law Commission, we had the very clear objectives of reinforcing the UK's position as a leading international insurance centre and codifying into law what was widely agreed to be best practice. Since the Insurance Act was passed in 2015, remarkably few cases have reached the courts. In addition, most policies follow the new law even though it is possible to contract out. We take this to be evidence that by working closely with all sides of the market, we succeeded in achieving a good balance between the interests of policyholders and insurers alike."

David Hertzell
Law Commission
Senior Counsel | Commercial and Common Law Team

"The 2015 Act simply codified the best practice that was already in place for global insurance programmes. From our perspective, the Act appears to have had more impact on brokers and insurance companies, particularly for personal lines and smaller commercial programmes."

Derek Reeves
Head of Insurance Risk, Group Risk
Schroders

Duty of Fair Presentation

Pre-contractual disclosure

What changes did the Act introduce?

The Act introduced a new Duty of Fair Presentation in non-consumer insurance contracts. Under the Act, the insured must:

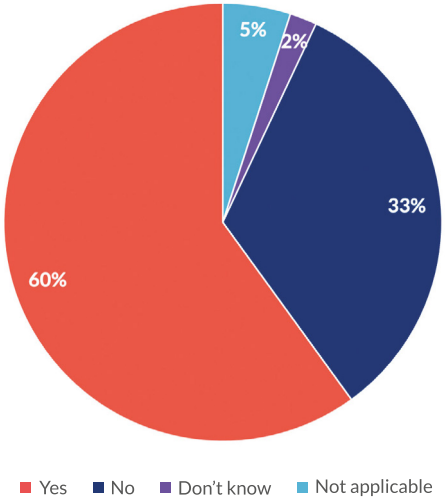
- disclose every material circumstance which the insured knows or ought to know, or
- failing that, give their insurer sufficient information to put a prudent insurer on notice to make further enquiries
- present the information in a reasonably clear manner that is accessible to a prudent insurer.

The Act also sets out how to ascertain the insured's knowledge for these purposes. An insured is taken to "know" what is known to the insured's senior management and individuals responsible for the insured's insurance (which encompasses risk managers and any employee who assists in the collection of data or negotiates the terms of the insurance). An insured "ought to know" what would have been revealed by a reasonable search of information available to the insured.

What has been the practical impact for policyholders?

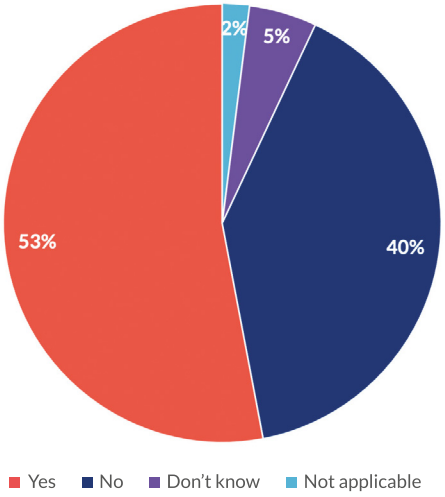
60% of respondents say that the Act has altered the way they approach disclosure.

Has the Insurance Act 2015 altered the way you approach disclosure (e.g. have you changed your processes as an organisation) compared with your approach before the Act was introduced?

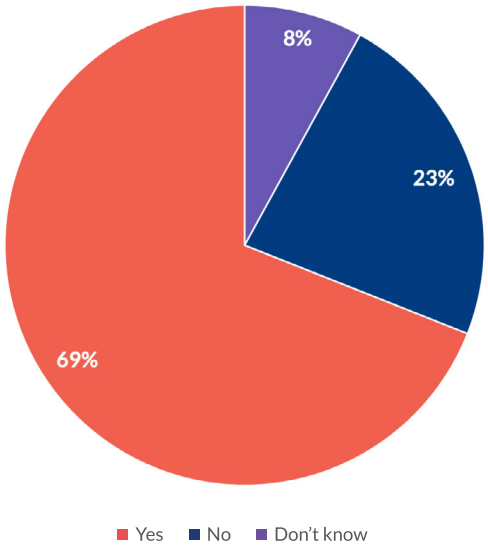


In practice, this has resulted in greater engagement with insurers according to over half of respondents (53%). 69% of respondents have agreed with insurers whose actual knowledge is relevant for the Duty of Fair Presentation and 65% have discussed what constitutes a "reasonable search" with their insurers.

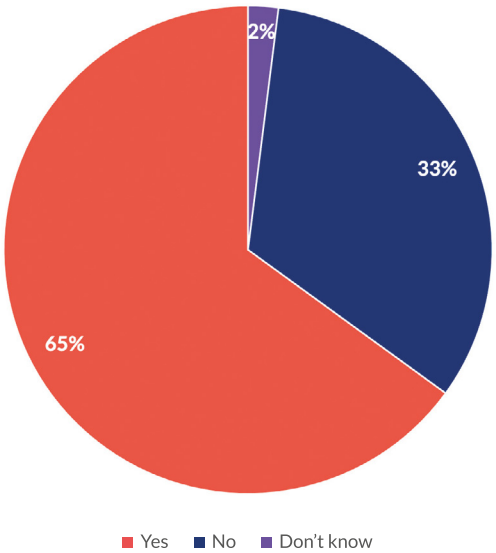
Has the Insurance Act 2015 resulted in greater engagement with your Insurers around the disclosure process, compared with your engagement before Act was introduced?



Have you agreed with Insurers whose actual knowledge is relevant for the Duty of Fair Presentation (i.e. senior management and those responsible for insurance)?

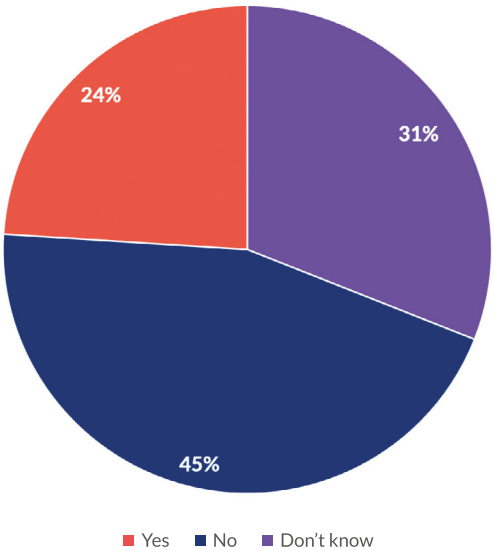


Have you had discussions with your Insurers about what is a "reasonable search" for the purposes of the Duty of Fair Presentation?



Interestingly, less than a quarter of respondents said that their insurers had been willing to sign off on, approve or agree to the "reasonable search" process undertaken (which might suggest that insurers were still 'hedging their bets' and waiting to revisit whether they regarded the search as reasonable if a claim arose later).

Have Insurers been willing to sign off on, approve or agree to the "reasonable search" process you have undertaken?



Remedies for breach of the Duty of Fair Presentation

What changes did the Act introduce?

The Act introduced a range of proportionate remedies in the event of a breach of the new duty which replaced the sole remedy of avoidance under the old law (for breach of the duty of good faith). Under the old law, this was an inflexible remedy, which applied regardless of whether the breach was deliberate or not.

Under the Act, unless the breach is deliberate or reckless (in which case the remedy of avoidance is still available), the onus is on the insurer to show what it would have done had it received a fair presentation of the risk:

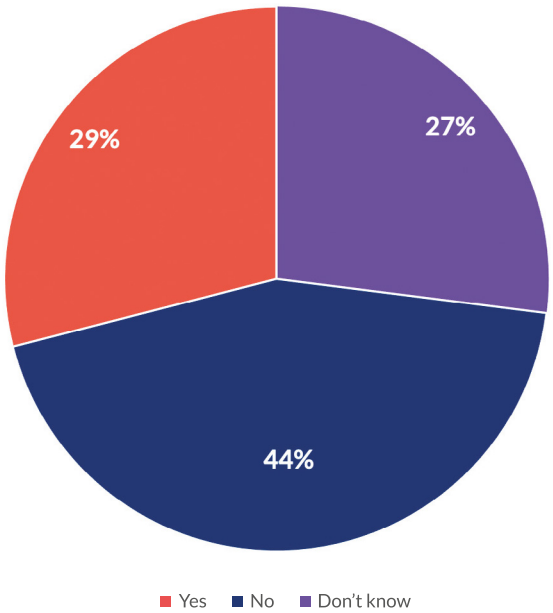
- the insurer will still be entitled to avoid the policy if it can show that had it received a fair presentation of the risk, it would not have entered into the contract (but it must return the premium); but
- if the insurer shows that it would have entered into the contract but on different terms, then the insurer may treat the policy as having included those different terms from the outset. This could result in the addition of warranties or exclusions which could affect the recoverability of claims; or
- if the insurer would have entered into the contract but only at a higher premium, the insurer may reduce the amount to be paid on a claim proportionately.

What has been the practical impact for policyholders?

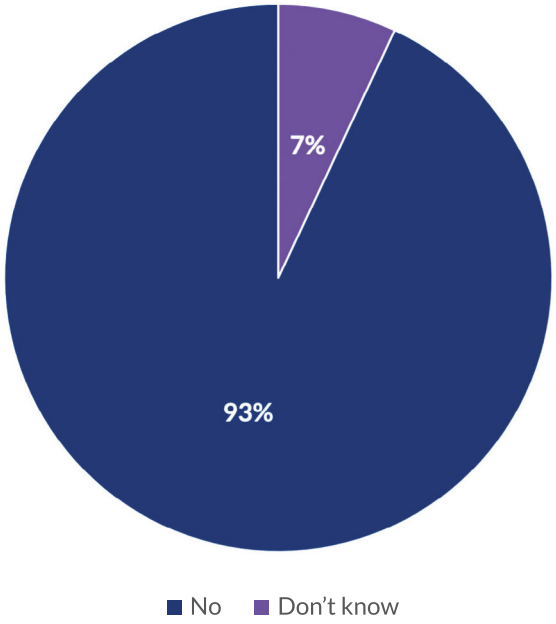
Almost a third of respondents (29%) have policies which limit the insurer's remedy for breach of the duty of fair presentation to situations where there has been a deliberate/reckless breach of the duty, which puts the insured in an even better position than they would have been under the Act. This is good news for those policyholders.

There were concerns that insurers may seek to argue more frequently that there had been a deliberate or reckless breach of the Duty of Fair Presentation to circumvent the proportionate remedies introduced by the Act. The vast majority of respondents said that they had not experienced insurers seeking to run such arguments, but it remains unclear what the position is in the industry as a whole and no good data is available.

Do any of your policies limit Insurers' remedies for breach of the Duty of Fair Presentation to situations where there has been a deliberate/ reckless breach of the duty?



Have Insurers sought to prove that a breach of the Duty of Fair Presentation was deliberate/reckless (to enable them to avoid the policy)?



There were concerns that insurers may seek to argue more frequently that there had been a deliberate or reckless breach of the duty of fair presentation to circumvent the proportionate remedies introduced by the Act. The vast majority of respondents said that they had not experienced insurers seeking to run such arguments, but it remains unclear what the position is in the industry as a whole and no good data is available.

There have been two cases which concerned breaches of the Duty of Fair Presentation. Both are useful reminders that the onus is on the insurer to show what it would have done had there not been a breach of the Duty of Fair Presentation.

In Berkshire Assets (West London) Ltd v AXA Insurance UK Plc [2021] EWHC 2689 (Comm), the insured had failed to disclose the fact that one of its directors was the subject of criminal charges in Malaysia at the time the policy was renewed. The insurer argued that had this been disclosed, it would not have written the risk and was therefore entitled to avoid the policy. The insurer put in evidence an internal practice note on "disclosure of previous insurance, financial or criminal matters", which provided that if an insured client disclosed matters that fell within particular "negative criteria", the risk would not be acceptable to the insurer and should be declined. The court was satisfied that if the criminal charges had been disclosed, the insurer would have declined the risk.

The case of Tynefield Care Ltd v The New India Assurance Company [2024] concerned the adequacy of disclosure of previous matters connected to insolvency. The court noted that the question of what the insurer would have done had there not been a breach of the duty of fair presentation is a factual one and not one for expert evidence. Here, the insurer provided sufficient evidence to persuade the court that it would not have written the policy had it known a director had an insolvency history.

Policy wordings

What changes did the Act introduce?

The Act:

- Abolished basis clauses

  A basis clause is a declaration (contained either in a proposal form or policy wording) that certain representations made by the insured are true and accurate. By operation of the basis clause, this declaration was incorporated into the policy as a warranty, which meant that any inaccuracy in the information provided by the insured would be a breach of warranty and the insurer would be discharged from any liability from the date of breach.

- Made warranties 'suspensive conditions'

  This means that in the event of a breach of warranty, the Act provides that the insurer's liability is suspended during the time the insured is in breach but can be restored if the breach is remedied. This contrasts with the 'all or nothing' approach of the old law, where breach of warranty automatically discharged an insurer's liability even if the breach was trivial or did not relate to the insured's loss in any way.

- Introduced a new provision at section 11

  Section 11 of the Act prevents the insurer from relying on breach of a term by the insured if the breach could not have increased the risk of loss in the circumstances in which that loss occurred. This applies to breaches of warranties and other terms which would tend to reduce the risk of loss of a particular kind or loss at a particular location or time but not to terms which define the risk as a whole.

What has been the practical impact for policyholders?

Section 11

When the Act received royal assent a decade ago, there was uncertainty surrounding the scope of section 11 of the Act and how it would operate in practice. How would parties identify which policy terms fell within the scope of this provision? Would the parties identify clauses to which section 11 applies to minimise some of the uncertainty this provision brings?

The answer to this latter question appears to be no, or not very often. 66% of respondents to the survey said that neither they nor their insurers had identified clauses to which section 11 of the Act applies.

It had been anticipated that section 11 could be an area that gave rise to disputes given the uncertainty surrounding its scope. It is not clear to what extent section 11 has either assisted policyholders in pursuing claims or given rise to disputes between them and their insurers since the Act came into force. To date, there has been just one judgment which considered this provision: MOK Petro Energy v. Argo (No. 604) Limited [2024] EWHC 1935 (Comm).

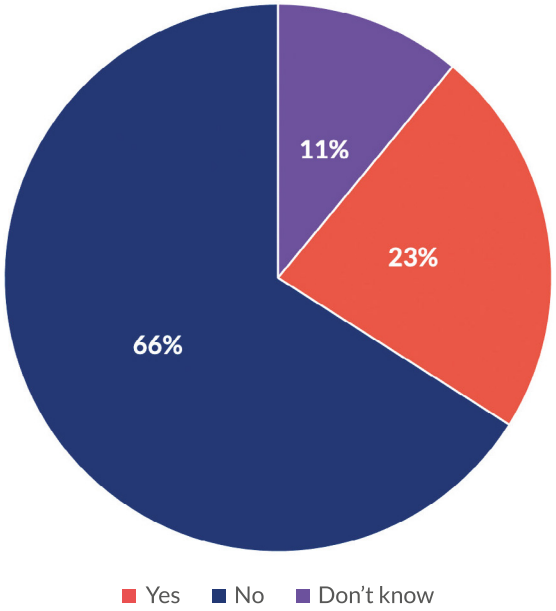
In this case, the policy contained a warranty which required inspection and certification of a cargo. Although there had been an inspection of the cargo, there was no contemporaneous evidence of certification and the insurers argued that this was a breach of warranty and denied liability. The insured relied on section 11 and argued that its failure to comply with the certification element of the warranty could not be relied on by the insurers because compliance would not have reduced the risk of loss that occurred. In obiter comments, the court disagreed and said that section 11 requires a broad enquiry such that both aspects of the warranty must be looked at together, i.e. although only the certification element was breached, the court was entitled to consider whether a breach of the clause as a whole could have increased the risk of the loss occurring (which the court said it would).

It will be interesting to see how arguments relating to section 11 are made in other cases.

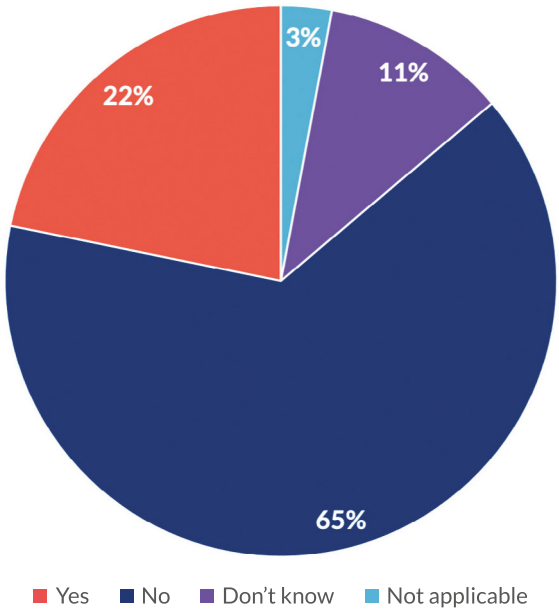
Conditions precedent

While not directly addressed by the Act (save for the impact of section 11 above), Airmic has noted previously that the use of conditions precedent to liability has increased since the Act came into force. That trend has continued, with 23% of survey respondents saying that they have experienced insurers seeking to introduce sweep-up clauses to their policies and 22% experiencing insurers seeking to add more conditions precedent to their policies.

Have you experienced Insurers seeking to introduce sweep-up clauses (clauses which provide that all obligations on the insured in the policy are conditions precedent to the Insurers' liability) to your policies?



Have your Insurers sought to introduce more conditions precedent to your policies since introduction of the Insurance Act 2015?



Breach of a condition precedent can have serious consequences for the policyholder and gives the insurer the right to deny liability for a claim or the policy as a whole depending on the wording of the condition precedent. An increase in their use may be cause for concern, particularly if insurers are using conditions precedent to circumvent the various other policyholder protections introduced by the Act.

In certain circumstances, conditions precedent may be used for legitimate reasons, particularly in relation to the attachment of cover. For example, the insurer of property may require the insured to obtain an up-to-date survey of the property and to comply with certain specific requirements set out in the survey if cover is to attach.

However, the conditions precedent used most commonly by insurers, particularly (but not exclusively) in liability policies and speciality risks, are conditions precedent to liability to make or pay a claim (or part of a claim). Conditions precedent may deal with notification requirements, claims co-operation and/or seeking insurer consent to the incurring of costs. The issue for policyholders is that breach of a condition precedent provides the insurer with an ability to decline the claim in response to what is often inadvertent conduct on the part of the insured in circumstances that don't prejudice the insurer. By contrast, if the same provisions were expressed as bare conditions, the only remedy available to the insurer in the event of breach would be damages for the insured's breach and it is rare that breach of a policy condition (particularly those relating to claims co-operation) will give rise to a quantifiable loss. In our view, conditions precedent to liability give rise to fundamentally different considerations to conditions precedent to the attachment of cover, which, while onerous, can serve a legitimate purpose during underwriting if used sparingly and specifically.

Policyholders should limit the inclusion of conditions precedent in their policies wherever possible. However, where the importance of a particular term or obligation requires it to be a condition precedent, such terms should be expressly labelled and the policyholder must take steps to ensure that it complies strictly.

The case of Scotbeef Ltd v D&S Storage Ltd (in liquidation) [2025] EWCA Civ 203 is a reminder of how significant the effect of breach of a condition precedent can be on a policyholder's ability to claim under a policy. In the case, the Court of Appeal considered the proper categorisation of representations and warranties relating to information provided by the insured to the insurer prior to inception of the policy. The Court of Appeal found that the relevant clauses were future warranties (a promise by the insured that something will or will not be done) as well as being conditions precedent (because they were expressly labelled as such). As the insured was in breach of those warranties (which were also conditions precedent), the insurer had no liability.

On the facts of this particular case, the various policyholder protections introduced by the Act (such as proportionate remedies for breach of the Duty of Fair Presentation, making warranties into suspensive conditions and the introduction of section 11) did not assist the insured.

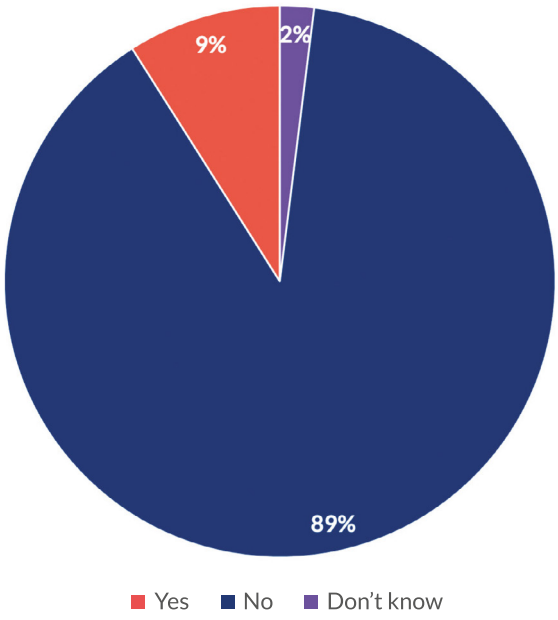
Contracting out

While the Act is intended to be a default regime, it was recognised that some provisions may not be suitable for all markets and commercial parties. The Act, therefore, allows parties to contract out of the Act (with the exception of the prohibition on 'basis of the contract' clauses) as long as any "disadvantageous term" (which puts an insured in a worse position than that under the default regime) meets the "transparency requirements":

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

Contracting out does not appear to be happening frequently in practice, as less than 10% of respondents had experienced insurers seeking to contract out of the Act.

Have you experienced Insurers seeking to contract out of the Insurance Act 2015?



Claims

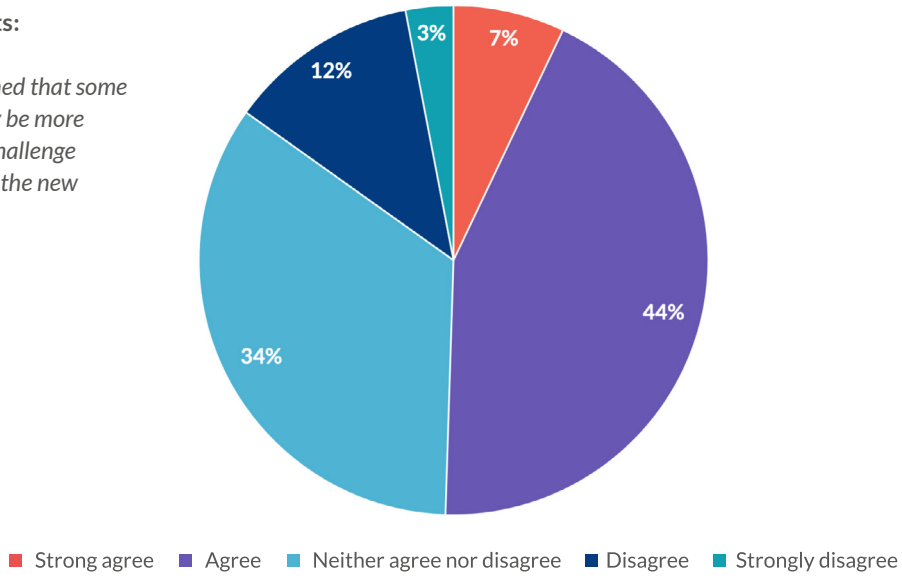
What impact has the Act had on insurers disputing claims?

Prior to the Act coming into force, there was concern that the Act might mean insurers would be more likely to challenge claims. Over 50% of respondents in our 2015 survey agreed with this sentiment.

Interestingly, this has proved not to be the case according to our 2025 survey in which over 70% of respondents said they had not found insurers were more inclined to challenge claims or there had been no change.

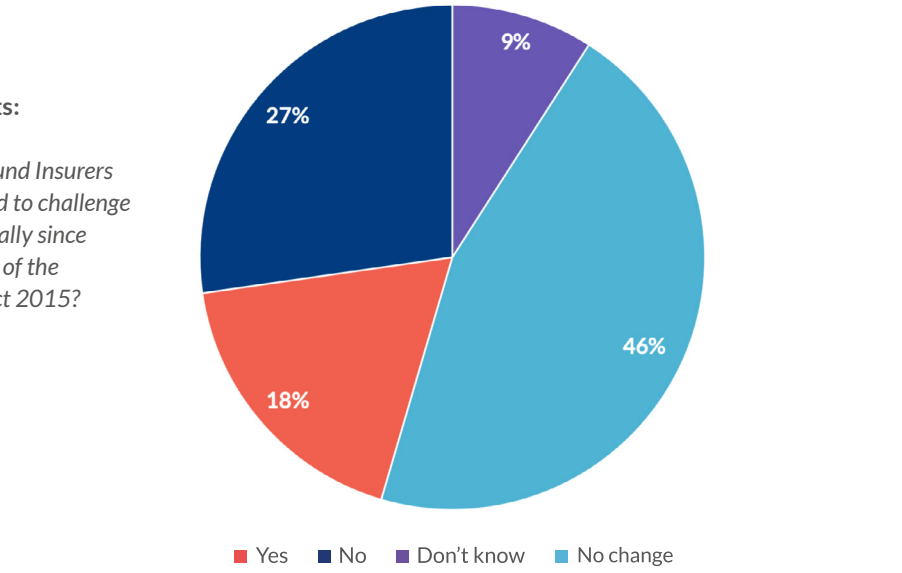
2015 results:

I am concerned that some insurers may be more inclined to challenge claims given the new remedies.



2025 results:

Have you found Insurers more inclined to challenge claims generally since introduction of the Insurance Act 2015?

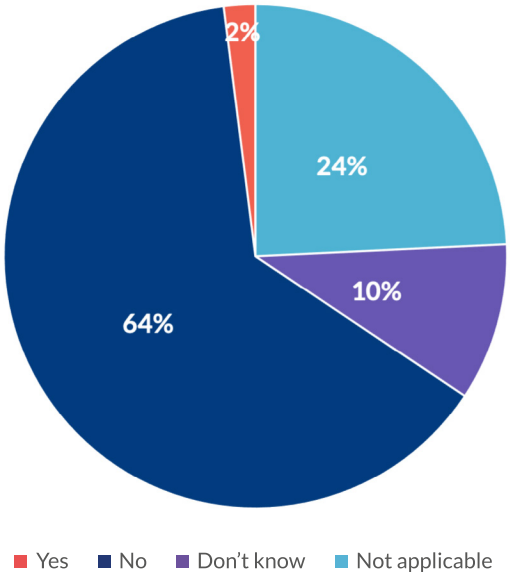


Are policyholders exercising their new right to claim damages for late payment of claims?

The Act implies into every policy a term that insurers must pay claims within a reasonable time. This introduced a new right for policyholders to claim damages in the event of late payment of a claim. The Act provides that what is "reasonable" depends on all relevant circumstances, including the type of insurance and the size and complexity of the claim.

Some parts of the insurance market report anecdotally that policyholders are exercising their right to claim damages for late payment as a matter of matter of course,[1] which they say risks parties spending time and costs on this aspect of the claim in circumstances where it has not yet been determined that insurers have a liability. This is not backed up by the results of our survey in which only 2% of respondents said that they had ever demanded damages for late payment.

There has been an implied term in every insurance contract made on or after 4 May 2017 that an Insurer must pay claims within a reasonable time. When Insurers have been slow to play a claim, have you ever demanded damages for late payment?



To date, just two cases have considered section 13A of the Act, which implies into every insurance contract a term that insurers must pay claims within a reasonable time: Quadra Commodities S.A. v XL Insurance Company SE [2022] EWHC 431 (Comm) and Delos Shipholding SA & Ors v Allianz Global Corporate and Speciality SE [2024] EWHC 719 (Comm). In both cases, the policyholder was not successful in claiming damages for late payment of its claim. It is clear that a policyholder wanting to pursue a claim under section 13A must robustly evidence its loss due to any late payment.

"It is encouraging that, even after a decade, a concern raised by Airmic members at the time of the Act's introduction – specifically, the fear that insurers would use it as a basis to challenge a greater number of claims – has not materialised. The survey results provide a measure of reassurance about the practical impact of the legislation and reinforce confidence in the stability and fairness of the current claims environment."

Ben Cooney
Director, Insurance & Risk Management
Avison Young

[1] See press release by the LMA on 13 March 2025: https://www.lmalloyds.com/lma/News/Releases/2025/lma_130325.aspx

airmic

Marlow House
1a Lloyd's Avenue
London
EC3N 3AA
+44 207 680 3088
enquiries@airmic.com
www.airmic.com