Insurance Act 2015 Client Briefing Note

Duty of Fair Presentation

What you need to know

What's changing?

The Insurance Act 2015 makes some very important changes to what you have to do to ensure that your insurance policies are effective and that claims are more likely to be paid in full.

This note deals with the changes to the rules governing what information you must disclose to your insurers before the insurance policy is taken out. This new requirement is called the Duty of Fair Presentation.

Why is it important?

Failure to comply with the Duty of Fair Presentation may give your insurers grounds to refuse to pay your claim, or to reduce the amount they do pay.

When is this happening?

The Act applies to all policies governed by the laws of England, Wales, Scotland and Northern Ireland (even if the risks covered by these policies are located outside these jurisdictions) taken out after 12 August 2016 (this will include any endorsements, variations or amendments entered into after that date). However, as there are new rules about what you are required to do before your insurance policies are in place, you need to start planning for these rules now.

What should I do now?

Talk to your Lockton contacts about what you need to do in order to comply with the new rules.

The Duty of Fair Presentation

The new Duty of Fair Presentation is different to and more structured than the current duty to disclose all material information. Arguably, it increases the scope of the obligations that are imposed upon you.

To comply with the Duty of Fair Presentation, prior to the start of the Policy you must:

- disclose "every material circumstance which the insured knows or ought to know", or
- "failing that, [provide] disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purposes of revealing those material circumstances".

What is a "material circumstance"?

The new test for what is a material circumstance is largely the same as the current test: Information will be material if it "would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms".

What does an insured know, or what ought they to know?

The test for what "material circumstances" you are deemed to know, and therefore disclose, is broader than the current test. You are deemed to know the following:

- **what is known to the individuals who are part of your "senior management",**
- **what is known to the individuals responsible for your insurance (for example, your insurance manager and/or Lockton)**
- **what should reasonably have been revealed by a reasonable search of information available to the Insured", including information which is "held within the insured's organisation or by any other person".**

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Who are your "senior management"?

The Act does not identify who your "senior management" are (beyond saying they are "those individuals who play significant roles in the making of decisions" about how your activities are to be managed or organised). In order to help you understand the scope of your search for 'what you know', we will endeavour to agree with your insurers exactly who your "senior management" are. However, to assist us you will need to provide information on your management structure, identifying those people who make decisions throughout your organisation (on a global basis if need be).

What is a "reasonable search"?

In order to discover and disclose "material circumstances" You are obliged to conduct "reasonable search of the information available" to you. This search is for "information held within [your] organisation or by any other person". This will include information held by us or by, for example, your outsourced IT provider or joint venture parties.

The Act does not define what a "reasonable search" is. For larger or more complex clients, we will usually endeavour to agree the scope of your "reasonable search" with your insurers. To do this we need to present to your insurers the scope of the search you propose and to agree it with them. We therefore need to work with you to understand what you believe a reasonable search would be for your business. This will take time so you should start work on this as soon as possible.

For all clients, please note that a reasonable search will encompass all areas of the business that are covered by the relevant insurance policy (on a global basis if need be). The insurer does not have to agree to a specific scope and so the more extensive your search is and the more evidence that you can provide on your internal policies and procedures the more likely an insurer will agree to the scope. It is also extremely important that your internal record keeping (including of the enquiries undertaken and responses) is sufficient to prove that the reasonable search has been undertaken.

How do I disclose "sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purposes of revealing those material circumstances"?

If you fail to disclose "every material circumstance which the insured knows or ought to know", you will still have satisfied the Duty of Fair Presentation if you disclose information "which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purposes of revealing those material circumstances". If the insurer does not then make enquires of you to reveal the material circumstances, the insurer cannot later claim you failed to disclose them.

We will try to ensure that your presentation to your insurers is as comprehensive as possible, but it is clearly more advisable to endeavour to discover and disclose all material circumstances than to rely on the presentation putting insurers on notice that they need to ask further questions.

Because of this new rule, insurers are likely to ask more questions about your presentation than they did previously, so you need to make sure you have sufficient time to answer them fully before the start of your policy (and for any amendments to existing cover or endorsements).

What else do I need to know about the Duty of Fair Presentation?

The Act says your "knowledge" includes "matters which [you] suspected, and of which [you] would have had knowledge but for deliberately refraining from confirming them or enquiring about them". Therefore you cannot 'turn a blind eye' in your search or fail to make enquiries in the knowledge that the answer will be damaging.

Material Information must not be "buried" in dense files of documents disclosed to your insurers or in the "small print". It must be presented in a 'reasonably clear and accessible' matter.

What if I fail to comply with the Duty of Fair Presentation?

The Act provides a range of remedies that an insurer may use if you fail to comply with the Duty of Fair Presentation. The remedies are proportionate i.e. the severity of the remedy depends on the seriousness of the failure.

Whilst the remedies are more proportionate than the current remedies, insurers may still be able to avoid a policy, refuse to pay a claim or pay only part of a claim if you fail to comply with the Duty of Fair Presentation. We will provide more information on this in our next client briefing.

Act Now

For more information, please contact your usual Lockton contact.

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