

INSURANCE ACT 2015

April 2015

On 12 February 2015 the much talked about Insurance Bill received Royal Assent and became the *Insurance Act 2015*. This will fundamentally change the way both commercial and consumer insurance and reinsurance contracts operate in the UK. This briefing note provides a summary of the changes, and our recommendations for what you can do to be prepared.

Whilst the Insurance Act 2015 was put on the UK statute books on 12 February 2015, the provisions contained within it (and set out below) will not come into force until 12 August 2016. Insurers and reinsurers, therefore, have some time to ensure that their policies, documents, client communications and proposal forms etc. are amended to reflect the new law.

DUTY OF DISCLOSURE

- a) The existing duty to disclose every material circumstance known (or which ought to be known) to an insurer is replaced by a duty to make a “fair presentation of the risk”. This can be satisfied by either:-
- (i) disclosing all material circumstances of which it (the Insured) is or ought to be aware (having made enquiries of its senior management team/those responsible for its insurances and made a reasonable search for information); or
 - (ii) giving the insurer sufficient information to put a prudent insurer on notice that it should make further enquiries.

All representations made must be substantially correct and made in good faith and disclosed information provided by the insured in a clear and accessible manner (eg no data dumping at the last minute).

- b) Consequences of the breach of this duty are:-
- (i) If the breach is found to be deliberate, fraudulent or reckless then the insurer can void the policy completely, not pay any claims and retain the premium.
 - (ii) In all other cases, the remedy must be proportionate, depending on what the insurer would have done if a fair representation had been made.

NOTE

Please note that the purpose of this briefing note is to provide a summary of and our thoughts on the law. It does not contain a full analysis of the law nor does it constitute an opinion by Lockton Companies LLP on the law discussed. The contents of this briefing note should not be relied upon and you must take specific legal advice on any matter that relates to this. Lockton Companies LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of the material contained in this briefing note. No part of this briefing note may be used, reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Lockton Companies LLP.

- (iii) Therefore, if an insurer can show that it would not have entered into the policy on any terms then it may still be able to avoid the policy and not pay claims (but will have to return the premium).
- (iv) Other remedies include amending the cover from the inception date or (if a higher premium would have been charged) proportionately reducing the amount paid for a claim based on the original premium received as a proportion of the higher premium that would have been charged.

WARRANTIES

- a) “Basis of Contract” clauses will be abolished and will no longer be valid.
- b) For both commercial and consumer insurances, a breach of warranty will suspend rather than discharge the insurer’s liability. Therefore the insurer will still be liable to pay claims where the circumstances relating to that claim arise after a breach of warranty has been remedied. The insurer will continue to be liable for claims that pre-date the breach.
- c) In some instances a breach of warranty will only prevent a claim if it had a causative effect on the loss. Put simply if a policy term is designed to reduce the risk of loss of a particular kind, or at a particular location or particular time, the insurer will not be able to rely on a breach of the term if the insured can show that failing to comply with the term could not have increased the risk of the loss that actually occurred (eg the breach of a sprinkler system warranty cannot be used to refuse to pay a claim for a theft at the same premises).

FRAUDULENT CLAIMS

- a) Insurers remain liable for claims made prior to a fraudulent claim being committed.
- b) If a fraudulent claim is made then the insurer is not liable to pay the claim, can recover any sums already paid out in relation to that claim and can cancel the insurance policy from the date of the fraudulent act without returning the premium.
- c) For group insurances, fraudulent claims made by one beneficiary under the policy will not affect the cover provided under the policy to other parties.

CONTRACTING OUT

- a) Parties to non-consumer policies can contract out of some of the default statutory positions set out above (except the “basis of contract” clause abolition).
- b) If there is contracting out then the duty is on the insurer to make sure any terms that put the insured in a worse position compared with the Act are clear and unambiguous and to sufficiently draw these to the insured’s attention before the policy is entered into.

So what does it mean for you?

At this stage our main message is that you should continue to assume that your policies are covered by the old law until August 2016, unless we advise otherwise. Here are the factors for you to consider in the meantime.

For current insurance policies and those incepting or renewing up to August 2016, there is no change unless the insurer introduces changes to the policy wording (which some may do as they build towards the implementation date). **The duty of disclosure etc. remains the same and all current policy terms and conditions must be adhered to.**

From August 2016 the general current view is that the changes will be beneficial to Insureds on the whole especially non-consumer clients (although consumer policies are affected by the changes, the main impact on these policies has been the Consumer Insurance (Disclosure and Representations) Act 2012). The changes bring greater clarity to laws that govern insurance policies, and remove some of the more draconian measures that are currently available to insurers. **Current opinion is that, hopefully, the number of legal disputes will reduce.**

This doesn't really change the requirements that you need to follow when making disclosures. Although the duty of disclosure is clearer and the remedies for a breach proportionate.

This does place greater emphasis on you making sure that the information you provide your insurer is clear and accessible. We recommend that you make enquires of a range of individuals in their organisations and other searches to satisfy the letter of the law in this regard.

Proportionate remedies are better than what is available currently, especially for policies that have low premiums. A breach of duty may give the insurer the right to reduce the amount they pay on a claim based on the higher premium they would have charged had they known all facts (eg for a £100,000 claim on a £4,000 original premium, a 100% premium increase to £8,000 could reduce the settlement by 50%, to £50,000).

If you have any queries about the above, please contact your Lockton account servicing team.

For warranties, it is great news that "basis of contract" clauses will be abolished. Also, the warranty breaches will only be suspensive rather than give the insurer the right to terminate the contract. **However, we remind our clients of the need to familiarise their organisations of all material warranties and conditions of their policies, especially those that require action to be taken.**

The Act envisages that some insurers may want to contract out of these proposals and introduce their own wordings, but the obligations on the insurer regarding presentation of terms and communication to the client may restrict this from occurring frequently. **If contracting out does become an option we will endeavour to highlight for you those policies offered that contract out versus those that don't.**

Finally, the limit of the insurers' options in relation to avoiding policies or not paying out on claims for breach of warranties, misrepresentations etc may well have an impact on premium pricing. Insurers may scrutinise information more closely, and they may reject some risks, which - they may have accepted before the changes. This may reduce the options available. **It is therefore imperative that you are open and honest in your disclosure, and provide all necessary information in a clear format to enable us to present your risk to insurers.**

Some insurers have recently gone public on their decision to adopt the spirit of the Act with immediate effect. Insurers are approaching this differently and, where appropriate, we will draw this to your attention as part of the renewal process. Even if that insurer's policy wordings has not have been updated.

