Briefing

BURGES SALMON

The Insurance Act 2015

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Are you ready for the change?

On 12 August 2016 the Insurance Act 2015 (the "Act") comes into force and will make substantial changes to insurance law in England & Wales. This will affect not only how disputes between businesses and their insurers are dealt with by the Courts but also the obligations on a business when purchasing insurance.

Some of the changes will soften the harshness of existing insurance law on businesses and make it more difficult for insurers to decline claims. However, the new law still places significant obligations on businesses in respect of their insurance. Businesses should prepare for these changes now so that when they obtain or renew their insurance they are able to comply with the new obligations. This will ensure that appropriate cover is obtained and the risk of disputes is minimised.

Buying insurance

The Act sets out what a business has to disclose to insurers; whose knowledge has to be disclosed; and the steps a business must take to find out information.

A fair presentation of the risk

The Act will replace the existing duty of disclosure in the Marine Insurance Act 1906 with a duty to make a 'fair presentation of the risk' to the insurer before the policy is entered into. This requires the insured to:

- disclose all material circumstances which the insured knows or ought to know; or
- failing that, sufficient disclosure to put a prudent insurer on notice to make further enquiries.

The first requirement is the primary obligation on an insured, the second requirement only kicks in if the insured has failed to comply with the first.

What circumstances does a business "know"?

For a business, its knowledge is that of individuals who are:

- part of its senior management; or
- responsible for its insurance.

The business will be taken to know all circumstances that those individuals know and those they suspected but deliberately refrained from confirming.

What are the circumstances a business "ought to know"?

A business ought to know information that should have been revealed by a reasonable search of information available to it – whether by making enquiries or otherwise.

This means that businesses should undertake a reasonable level of investigation for information which, if material, must then be disclosed to the insurers.

Buying insurance – key points

- Duty to make a fair presentation of the risk.
- Knowledge of senior management and staff responsible for insurance is critical.
- A need to undertake a reasonable search for information.
- Disclosure information must be presented clearly and accessibly - 'data dumping' is prohibited.

New remedies

One of the most significant changes to insurance law brought about by the Act concerns the remedies available to insurers where there has not been a fair presentation of the risk. The remedies are now proportionate to the breach.

An unfair presentation of the risk

Where an insured fails to comply with the duty to make a fair presentation of the risk, the insurer's remedy depends on the nature of the breach:

- Where the breach was deliberate or reckless the insurer may avoid the entire policy and keep the premium.
- Where the breach is not deliberate or reckless, but the insurer can prove that if the breach had not occurred it would not have provided the policy, the insurer may avoid the policy but must return the premium.

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- Where the breach is not deliberate or reckless and the insurer would still have written the policy but on different terms, the policy will be treated as having been written on those terms; for example, if the insurer can establish it would have added an exclusion or warranty, that term will be added to the policy and may affect the payment of claims already paid by insurers before the breach was discovered.
- If the insurer would have charged a higher premium any claim payment will be reduced proportionately by reference to that premium.

Remedies for breach of policy terms

Breaches of warranty no longer automatically discharge the insurer from liability under the policy.

Instead, an insurer is only alleviated of liability under the policy while the breach is ongoing. Once the insured remedies the breach the insurer is back on risk and cannot rely on the breach to escape liability. If the breach is not remedied before the loss or the breach is not capable of remedy this change will not assist insureds. However, the Act also prohibits insurers from rejecting a claim for breach of a term, where non-compliance with the term could not have increased the risk of the loss actually suffered.

In practice, this is likely in most cases to mean that insurers can no longer reject claims for breach of warranty where the loss is unconnected with the breach. However, there are likely to be a number of legal disputes over the precise ambit of this new protection for policyholders. In addition, this safeguard only applies to terms which reduce the risk of loss occurring. For example, insurers would still be able to deny a claim that was late notified if the policy contained, as a condition precedent to liability, an obligation on the insured of prompt notification.

Contracting out

An important point for businesses to be aware of is that it is possible to contract out of the provisions in the Act (apart from those relating to basis of contract clauses) by including terms in the policy which are more onerous to the insured than the Act.

An insurer must draw such clauses to the insured's attention and the clause must be drafted clearly and unambiguously.

New remedies – key points

- Proportionate remedies for breach of duty to make fair presentation.
- Insurers can no longer refuse to pay on the basis of a breach of a term (compliance with which tends to reduce the risk of loss) unrelated to the loss.
- Breaches of warranty only suspends the insurer's liability under policy, remedying the breach puts the insurer back on risk

Contact

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