

# Summary of the Insurance Act 2015 key changes

## Disclosure and Misrepresentation

The Act replaces the insured's current duty of disclosure with a requirement that the insured must make a "fair presentation of the risk". This will mean insurers no longer have the right to void an insurance contract for breach of the duty of utmost good faith.

Commercial policyholders will be required to disclose every material circumstance that they know or ought to know. Failing that, they'll need to give their insurers information that is sufficient to put the insurer on notice that further enquiries may be necessary, for the purpose of revealing those material circumstances.

For disclosure purposes, the insured will be taken to know what is known or ought to be known by the insured's senior management and by individuals responsible for the insurance. Such persons will of course vary depending on the structure of each organisation, but in practice may include insurance managers, risk managers, company secretaries, finance directors and general counsel.

What an insured "ought to know" will be assessed objectively i.e. what should reasonably be revealed by a search of information available to the policyholder. The onus is then on the insurer to ask additional questions following presentation of the risk. This represents a significant change from the existing law and is intended to ensure that the insurer takes a more pro-active approach to the disclosure process.

The fair presentation of risk also requires the insured to make the disclosure in a manner which would be reasonably clear and accessible to the insurer. The aim here is to discourage "data-dumping" or simply bombarding the insurer with vast amounts of information without any attempt to assess whether relevant or not.

The policyholder is obliged to disclose information held by its insurance broker or other agent, and the separate duty of disclosure imposed on brokers by section 19 of the 1906 Act is abolished.

In terms of an insurer's remedy for breach of the duty of fair presentation, the new Act provides for a range of remedies which are intended to be more flexible and proportionate. Unless the breach was deliberate or reckless, there will be no right to avoid the policy and the onus will be on the insurer to demonstrate what it would have done had it received a fair presentation of the risk.

## Warranties

Under the existing law, a breach of warranty discharges the insurer from all liability under the insurance contract, even if the breach has no connection with the insured's loss. Under the new Act, a breach of warranty will not automatically take the policy off risk. Instead warranties will be of suspensive effect such that an insurer can only rely on a warranty whilst the insured is in breach. Insurers will come back on risk if the breach is subsequently remedied or where the breach is capable of being remedied.

Where a loss occurs, and a policy term has not been complied with, insurers will be prevented from relying on the non-compliance to exclude, limit or discharge their liability under the policy if the insured can show that non-compliance with the term did not increase the risk of loss which actually occurred.

At present insurers often rely on so called "basis of contract" clauses as a means of converting pre-contractual statements and information supplied to insurers into warranties.

The use of “basis of contract” clauses has been the subject of much criticism, because of their potentially draconian consequences. The Act now abolishes the use of “basis of contract” clauses which is a welcome development for policyholders.

## Contracting Out

The Act is intended to operate as a default regime for commercial contracts and allows parties to any commercial contract to contract out of the legislative changes. Contracting out is only permitted where insurers comply with the Act's transparency requirements, by taking steps to highlight to the policyholder the disadvantages of the term to which they are agreeing, in so far as it puts the insured in a worse position than under the Act. The term must also be clear and unambiguous in its effect. Parties cannot, however, contract out of the “basis of contract” clause prohibition.

## Fraudulent Claims

The Act has sought to clarify the remedies available to insurers in the event of fraud. Where fraud is committed, the insurer will now not be liable to pay any part of the claim, regardless of whether only part of the claim is fraudulent. The insurer can also elect to terminate the contract and refuse to pay claims relating to losses suffered after the fraud occurred. However, the insurer will remain liable for any losses legitimately incurred before the fraudulent claim was made.

The Act also enables any fraudulent member of a group policy to be separated from the other members. The insurer has no liability for the fraudulent claim and the option to terminate the policy with effect from the date of the fraud, but only as regards the fraudulent claimant. The aim is to ensure that innocent members of the group are not unfairly prejudiced.

## Summary

It is to be hoped that in the long term the Act will result in greater certainty and equality in the position between policyholders and their insurers. The introduction of the new Act presents several challenges as well as opportunities for policyholders:

- Revisit processes for collating disclosure information so as to comply with the requirement to provide a “fair presentation of the risk”. Policyholders may need to update/document their processes for identifying relevant disclosure information and for recording what information has been disclosed with the policy application.
- Policyholders may wish to agree in advance with insurers what constitutes a reasonable search by documenting in the policy or elsewhere the scope of the search to be undertaken.
- Policyholders may also wish to specify in their policies the identity/roles of those persons within the organisations who are deemed to be part of the insured's senior management or individuals responsible for the insurance whose knowledge is attributed to the policyholder for the purposes of the Act.
- It's anticipated that new policy wordings will emerge from the insurance market. This will be an opportunity for policyholders to negotiate better contracts, for example to limit insurers' remedies in the event of an innocent or negligent failure to provide a fair presentation.

*Source: Sarah Turpin, Frank Thompson and Sarah Emerson - K&L Gates.*

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