

The Insurance Act 2015

The Insurance Act 2015 comes into force on 12 August 2016. One of the most significant changes it makes is to the duty of disclosure which has been in place for well over a hundred years, and whilst the Act has many benefits, it will significantly impact your disclosure obligations when you take out, renew, or vary any business insurance that is subject to the law of any part of the United Kingdom. (This includes reinsurance and for the purposes of the Act the party purchasing the insurance (the reinsured) is the 'insured' and the party providing the insurance (the reinsurer) is the 'insurer'.)

For example, under the new Act:

If you do not comply with your new duties, insurers will have a new range of "proportionate remedies", which could include reducing your claim payments significantly.

You will have to disclose information known by your senior management and by the individuals responsible for arranging your insurance.

You will have to carry out a reasonable search for information you ought to know, which could include making enquiries of people outside your organisation, such as external consultants.

You will have to disclose your information to insurers in a "reasonably clear and accessible" manner.

When the Insurance Act comes into force it will bring in the biggest change to UK insurance contract law in more than 100 years. While generally a positive step forward for insureds, it will have a significant impact on your responsibilities as regards the pre-contractual duty of disclosure, and provide insurers with a number of new remedies should you fail to comply with your duties.

The Act means:

You must disclose every material circumstance you know or ought to know, or failing that, give insurers sufficient information to put a prudent insurer on notice that it needs to make further enquiries.

All information disclosed must be in a manner which would be reasonably clear and accessible to a prudent insurer and you must not make misrepresentations of any material kind.

You, as insured, are deemed to "know" every circumstance which, in the ordinary course of business, ought to be known to you. As a business insured it is taken that you know what is known to senior management and individuals responsible for your insurances. You ought to know what would have been revealed by a reasonable search of information available to you.

A deliberate or reckless failure to make a fair presentation of the risk as outlined above will allow insurers to avoid the insurance as now. Otherwise the onus is on the insurer to show what it would have done had it received a fair presentation of the risk, when it will be allowed proportionate remedies:

the insurer is still 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 at all, but

if the insurer can show it would have entered into the contract on different terms the insurer may treat the policy as having included them from the outset,

if the insurer can show it would have entered into the contract at a higher premium, the insurer may reduce the amount to be paid on a claim proportionately. For example, if the premium would have been £250,000 rather than £200,000 then the insurer need only pay 80% of any claim.

While it may appear that the new duty to "make a fair presentation" under the Act is onerous and will increase the burden on you during the pre-contractual disclosure process, the Act is generally good news for insureds. For example:

It abolishes "basis of contract" clauses.

Where a warranty has been breached, cover will no longer be automatically and permanently terminated from the date of breach, but will simply be suspended until the breach has been remedied (provided it can be remedied).

Insurers will not be able to rely on breach of certain policy terms (such as some warranties and conditions precedent) to repudiate liability for a loss if it is entirely unconnected with the breach that has occurred.

At present, if there is non-disclosure of material facts a policy can only be avoided or not avoided by insurers - there is no other option. Under the Act, what insurers can do is more circumscribed, with a new range of "proportionate remedies" (in some cases also including avoidance) available to insurers if an insured does not fairly present the risk to be covered (or varied).

Insurers will be required to play a more active role in the underwriting process.

The Act clarifies the law relating to fraudulent claims

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