



HERBERT
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INSURANCE ACT 2015: KEY FEATURES

DISCLOSURE

PRE-ACT

What is the duty?

Duty on the insured to disclose to the insurer all material circumstances before the contract is concluded

What is material?

A fact is material if it would have influenced the judgment of a prudent insurer in fixing the premium or determining whether to take the risk

Whose knowledge is relevant?

Knowledge of those who represent the directing mind and will of the company, and who control what it does

Insured is deemed to know every circumstance, which in the ordinary course of business, ought to be known by him

What if duty is breached?

Insurer must show the non-disclosure actually induced the making of the contract on the relevant terms

If the insurer can show inducement, it is entitled to **avoid** the policy, ie, treat the contract as if it never existed

INSURANCE ACT 2015

Duty of fair presentation

The insured must:

- disclose every material circumstance which the insured knows or ought to know, or
- failing that, give the insurers sufficient information to put a prudent insurer on notice to make further enquiries
- present in a reasonably clear manner and accessible to prudent insurer

Disclose every material circumstance...

◦ ...which the insured knows

- knowledge of "senior management"
- knowledge of individuals responsible for insurance
- not knowledge of agents acquired in different capacity

◦ ...which the insured ought to know

- what should reasonably have been revealed by a reasonable search
- includes information held by the broker
- includes information held by persons covered by insurance

Proportionate remedies

- deliberate/reckless breaches: avoidance (no return of premium)

For other types of breach:

- if the insurer would not have entered into the contract: avoidance (but must return premium)
- if the insurer would have entered into the contract but on different terms: contract may be treated as if it included those terms from the outset
- if the insurer would have entered into the contract but would have charged a higher premium: the amount paid on claim may be "reduced proportionately"

POLICY TERMS

WARRANTY

What is it? A pre-contractual promise by the insured that a given fact is true or that a given fact will remain true, or that the insured will refrain from behaving in a particular way

Can be created by "basis of contract" clauses although such clauses will be abolished by the Act

CONDITION PRECEDENT

A contingency upon which the validity of the policy or claim may depend

BARE CONDITION

A contractual term obliging the insured to act in a particular way

Remedy for breach: Pre-Act

Breach automatically brings the insurance cover to an end

Insurer off risk from the date of breach

Breach means:

- insurer doesn't come on risk (if condition precedent is precedent to validity of the policy or attachment of the risk), or
- insured is prevented from making a claim (if condition precedent is precedent to insurer's liability)

Breach will give rise to a claim in damages if insurers can show they have suffered prejudice

Remedy for breach: Insurance Act 2015

Warranties operate as suspensive conditions

Insurer has no liability whilst insured is in breach for:

- any loss occurring, and
- any loss which is attributable to something happening during the "suspended" period

Breach means:

- insurer doesn't come on risk (if condition precedent is precedent to validity of the policy or attachment of the risk), or
- insured is prevented from making a claim (if condition precedent is precedent to insurer's liability)

Breach will give rise to a claim in damages if insurers can show they have suffered prejudice

The Act also brings in a new provision which provides that if compliance with any policy term would tend to reduce the risk of loss of a particular kind or at a particular time/location (and it is not a term defining the risk as a whole), the insurer cannot rely on a breach of that term if the insured can show that the non-compliance could not have increased the risk of loss.

OTHER PROVISIONS

INSURANCE ACT 2015

Fraudulent claims

The Act replaces the current co-existing remedies of forfeiture (under common law) and avoidance (under the 1906 Act) with a statutory regime for fraudulent claims.

The Act provides that the insurer:

- will not be liable to pay fraudulent claims;
- can elect to terminate the contract and refuse to pay claims relating to losses suffered after the fraud; but importantly,
- will remain liable for all legitimate losses suffered before the fraud.

For **group insurance contracts**, the Act provides that where a beneficiary makes a fraudulent claim under a group insurance policy, the insurer:

- has no liability to pay the fraudulent claim;
- has the option to terminate its liability to pay out in respect of losses suffered after the fraudulent act, but only as regards the fraudulent claimant; and
- remains liable for legitimate losses suffered by the fraudulent claimant before the fraudulent act.

The fraudulent claimant and the insurer are treated as though they had entered into a separate insurance contract between them, meaning that innocent group members are not unfairly prejudiced.

Contracting out

The Act allows parties to non-consumer insurance contracts to contract out of the default regime (with the exception of the prohibition on “basis of the contract” clauses) as long as any “disadvantageous term” (which puts an insured in a worse position than that under the default regime) meets the **“transparency requirements”**:

- the insurer must take sufficient steps to draw the disadvantageous term to the insured’s attention before the contract is entered into or the variation agreed; and
- the disadvantageous term must be clear and unambiguous as to its effect.

In determining whether the transparency requirements have been met, the characteristics of the insured and the circumstances of the transaction should be taken into account.

THE INSURANCE ACT 2015

The Insurance Act 2015 (the “Act”) paves the way for the most significant change to English insurance contract law in over 100 years.

The Act will come into force on 12 August 2016. It aims to address the perceived current imbalance in the law in favour of insurers which is said to put the English market at a competitive disadvantage.

This guide seeks to provide an overview of the key features of the Act and the changes it will bring about.

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