Marsh ProBroker

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# Broker Adviser

## The Insurance Act 2015

The Insurance Act 2015 (the "Act") received Royal Assent on 12 February 2015, bringing about the biggest change to English insurance contract law in more than 100 years, and will come into force in August 2016.

The Act redresses an imbalance in the existing law, which is sometimes overly in favour of insurers. For example, it abolishes basis of contract clauses; clarifies the insured's duties relating to pre-contractual disclosure of information, and introduces fairer and more proportionate remedies for non-disclosure and breach of warranty.

## KEY CHANGES

The Act will affect all policies subject to the laws of England and Wales, Scotland and Northern Ireland that incept, are renewed, or are varied after August 2016 (unless insureds reach an agreement with insurers that the provisions of the Act will apply straight away to policies which incept, renew, or are varied before then).

The Act updates the statutory framework for insurance and reinsurance contracts in the following key areas:

- Disclosure and misrepresentation in business and other non-consumer contracts.
- Insurance warranties in consumer and non-consumer insurance contracts.
- Fraudulent claims in consumer and non-disclosure insurance contracts.

The Act will also bring into force the Third Parties (Rights against Insurers) Act 2010, which is not yet in force.

## DISCLOSURE: KEY CHANGES

| Current Law | Insurance Act 2015 |
|---|---|
| The insured has a duty to disclose every material circumstance which is known to the insured. | The insured has a duty to make a **"fair presentation of the risk"** to the insurer. This means that the insured must:<br>• Disclose every material circumstance which it **knows or ought to know;** or<br>• Failing that, the insured must give the insurer **sufficient information to put a prudent insurer on notice that it needs to make further enquiries** for the purpose of revealing those material circumstances.<br>The insured must also:<br>• Make the disclosure **"in a manner which would be reasonably clear and accessible to a prudent insurer"**; and<br>• Must not make misrepresentations. |
| The insured is deemed to **"know"** every circumstance which, in the ordinary course of business, ought to be known to him. In the context of a business insured, the knowledge of the directing mind and will is attributed to the insured. | A business insured is taken to know what is known to the insured's **"senior management" and individuals "responsible for the insured's insurance"** (which includes risk managers and any employee who assists in the collection of data, or who negotiates the terms of the insurance).<br>An insured "ought to know" what would have been revealed by a **"reasonable search"** of information available to the insured. |
| The duty to disclose material facts is owed by the insured and also independently by the broker. | The broker's independent duty of disclosure is abolished, but the broker's knowledge is attributed to the insured. |
| Single (draconian) remedy of **avoidance** ab initio for non-disclosure and misrepresentation. | A new regime of **proportionate remedies** for non-disclosure and misrepresentation is introduced.<br>Unless the non-disclosure or misrepresentation is deliberate or reckless (in which case avoidance is still available to the insurer), the onus is on the insurer to show what it would have done had it received a fair presentation of the risk:<br>• 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<br>• if the insurer shows that it would have entered into the contract, but on different terms (other than premium), the insurer may treat the policy as having included those different terms from the outset; or<br>• if the insurer would have entered into the contract but only 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 GBP400,000 rather than GBP300,000, then the insurer need only pay 75% of any claim. |

### INSURANCE WARRANTIES (AND OTHER TERMS): KEY CHANGES

| Current Law | Insurance Act 2015 |
|---|---|
| Breach of warranty discharges the insurer's liability under the insurance contract in its entirety, and permanently, from the date of breach. | Warranties act only as suspensive conditions.<br>The insurer's liability is **suspended** while the insured is in breach of warranty, but can be restored if the breach of warranty is subsequently remedied by the insured. |
| "Basis of contract" clauses operate to convert the insured's pre-contractual representations (including answers to questions on the proposal form) into warranties. | "Basis of contract" clauses are completely abolished. |
| Breach of warranty discharges the insurer's liability under the insurance contract in its entirety, even if the breach is only trivial or does not in any way relate to the insured's loss. | The insurer may not rely on the insured's breach of a warranty or other policy term to avoid paying a claim **if the breach could not have increased the risk of loss**. This applies to breaches of warranties and other terms which would tend to reduce the risk of loss of a particular kind or at a particular location or time. However, this does not apply to policy terms which define the risk as a whole. |

### REMEDIES FOR FRAUDULENT CLAIMS

| Current Law | Insurance Act 2015 |
|---|---|
| Co-existing remedies of forfeiture under common law and avoidance under statute. | A new single statutory regime for fraudulent claims.<br>The insurer:<br>• Is not liable to pay fraudulent claims.<br>• May elect to terminate the contract, and refuse to pay claims relating to losses suffered **after** the fraudulent act; but whether or not it terminates the contract, the insurer will remain liable for all legitimate losses suffered **before** the fraudulent act. |

## CONTRACTING OUT

The new Act will be a **default regime** for all business insurance contracts. However, the Act does allow parties to **contract out** of the default regime (**apart from** as regards the prohibition on basis of contract clauses), and to contract into an alternative regime, provided any "disadvantageous term" (i.e. any term which puts the insured in a worse position than it would have been in under the new default regime) meets certain **"transparency requirements".**

These requirements are that (i) the insurer must take sufficient steps to draw the disadvantageous term to the insured's attention in advance; and (ii) the disadvantageous term must be clear and unambiguous as to its effect.

## KEY CHANGES

The Act will put insureds in a better position than under the existing law. The Act has been welcomed by insurers, as well as insureds and brokers, and some insurers have already indicated that they are willing to reflect the reforms in the language of their policies in advance of August 2016. We believe that now it has received Royal Assent, the Act is also likely to start driving practical change in the way business is placed and underwritten in the London market.

Even though the Act does not come into force until August 2016, you may wish to start thinking about the following points:

- The changes will only affect policies governed by the laws of England and Wales, Scotland and Northern Ireland. Therefore, consider which of your clients' policies will be affected. For example, your client may have a policy placed abroad in a local market that is subject to English law, or might be an overseas client with a policy placed in London, subject to English law.
- The placement/renewal process may need to start earlier than usual, in order to allow for engagement and pre-agreement with the insurers as to what information will be searched for and disclosed, and in what manner.
- Underwriting presentations will need to be structured, so as to comply with the duty to make a "fair presentation of the risk".
  - It will no longer be acceptable to deluge insurers with electronic information in the expectation that "material circumstances" will be found somewhere within it.
  - Structuring, indexing, and signposting should now be used in underwriting presentations, to highlight key information to underwriters; and presentations should not be overly brief or cryptic.
- Consider how best your clients will carry out a "reasonable search" for information.
  - Start thinking now about how your clients will collate and present the disclosure information to insurers, and who within their organisation has that information.
  - Remember that a change of broker, or a change of personnel within a client's organisation, could present challenges when ensuring that a reasonable search has been carried out.
  - As evidence may need to be provided to show that a reasonable search has been carried out, and as the knowledge of you as the broker will now be treated as part of your client's knowledge, it would be prudent to have a clear agreement with the client regarding who will be responsible for searching for and storing information which may need to be disclosed to insurers (for example, records of historic site surveys).

We hope that these initial comments on the Act provide a useful summary, and assist in highlighting some of the key issues which will be relevant.

We will keep you updated and will issue further guidance as the market's preparations for the Act develop. In the interim, if you have any queries, please do not hesitate to get in touch with your usual Marsh contact.

## CONTACT US

Should you require any clarification or assistance, please contact the team by:

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