

Legal Update

The Insurance Act 2015

The present position

The Insurance Act 2015 (“the Act”) has received Royal Assent and comes into force on 12 August 2016 applying to all non-consumer insurance contracts entered into or varied on or after 12 August 2016. Whilst the Act replaces the duty of utmost good faith with a duty of fair presentation, the duty of disclosure remains a serious duty for an insured placing insurance, the revisions under the Act are merely a modern way of describing the disclosure requirements prompting transparency and improving the customer journey, much in the same way as the Consumer Insurance (Disclosure and Representation) Act (2012) did for consumer insurance contracts.

This legal update will look, in particular, at Part 2 and the duty of fair presentation.

Part 2 – The duty of “fair presentation”

The duty and concept of “utmost good faith” has been replaced with a “duty of fair presentation” by the insured. This duty still requires disclosure of material information and circumstances known to the insured, or the disclosure of sufficient information to put the insurer on notice that will reveal material circumstances. This part applies to new and varied contracts of insurance.

What is a duty of “Fair Presentation”?

An insured must make a fair presentation of the risk to the insurer. This means that an insured must disclose:

- every material circumstance which the insured knows or ought to know;
- sufficient disclosure to put a prudent insurer on notice that they need to make further enquiries;
- the disclosure must be made in a clear and accessible manner;
- every representation made in relation to fact must be substantially correct; and
- representations in relation to expectation or belief are made in good faith.



An insured is not obliged to disclose to the insurer anything which:

- diminishes the risk; or
- is already known to the insurer; or
- the insurer ought to know; or
- the insurer is presumed to know; or
- the insurer has waived the need for certain information.

Material circumstances include:

- special or unusual facts relating to the risk;
- the particular concerns which led to the insured seeking insurance for the risk;
- any other fact which those concerned with the particular class of insurance or activity would generally understand as being something that should be included within a fair presentation of the risk to the insurer.

The duty of fair presentation:

- is not restricted to information contained in just one document or oral presentation; ,
- must be substantially correct meaning that an insurer would not consider the difference between what is represented and what is correct to be material; and
- can be withdrawn at anytime or corrected prior to entering into the contract of insurance.

The Act places emphasis on the knowledge of both the insured and the insurer. Knowledge includes actual knowledge, matters which the individual suspected, and information which the individual would have known had they not deliberately refrained from confirming or enquiring about them.

Knowledge of the insured

The insured has knowledge of:

- things known to an individual¹, or those individuals who are responsible for the insureds insurance;
- for insureds who are not individuals, knowledge is information known to members of the insureds senior management² or those responsible for the insureds insurance.

An insured does not have knowledge of confidential information known to an individual if the individual is the insureds agent or an employee³, and the information was obtained through a business relationship with a person not connected to the contract of insurance. So, when is person connected with the contract of insurance? A person connected is a person to whom the contract of insurance is provided to the insured and any other persons for whom cover is provided by the contract. A person is also considered to be a connected person if the contract of insurance re-insures risks covered by another contract and that person is connected with the other contract.

The information an insured ought to know includes information which should reasonably have been revealed by a reasonable search of information available to the insured. Such information includes information held within the insureds organisation, or the insureds agent, or for a person provided with cover under the contract of insurance.

¹ For the purposes of the above, an individual is responsible for the insureds insurance if they act on the insureds behalf in procuring the insurance, regardless of whether that person does so in the capacity of insureds employee or agent, or as an employee of the insureds agent, or in any other capacity.

² Senior management means individuals who play significant roles in the decision making process about how the insureds activities are managed and organised.

³ An employee of the Insureds agent includes any individual working for the agent in any capacity whatsoever.

Knowledge of the insurer

The insurer has knowledge of information known to those individuals who decide on whether to accept the risk on the insurers behalf together with the terms on which the insurer is willing to take on the risk. This includes employees of the insurer, the insurers agents, the employees of the agent, and those acting in any other capacity;

The insurer ought to know:

- information known to an employee or agent who ought reasonably to have passed that information on to the individuals above;
- information in the possession of the insurer and readily available to the individuals above.

The insurer is presumed to know:

- information which is common knowledge;
- information which an insurer offering insurance to a particular field of activity would reasonably be expected to know in the ordinary course of business.

What does this mean for insurers?

Whilst it the Act doesn't come into force until 12 August 2016, insurers may wish to start preparing now in the following ways:

Underwriting

- Claims, fraud, and underwriting IT systems need to be connected so that underwriters can underwrite at inception stage and in real time;
- Underwriters and sales teams need to work smarter in terms of questioning the insured and seeking further information where appropriate;
- Underwriters need to be clear that it is their employees and agents in carrying out underwriting and sales activities that will be the parties fixing the insurer with the requisite knowledge under the Act;
- Insurers need to ensure that their underwriting and sales teams are aware of their duties and are provided with regular information from the market to ensure that they are kept up to date so as not to fall foul of the provisions of the Act on actual and presumed knowledge;
- Insurers should review their policy wordings, certificates, notices to policyholders, underwriting criteria, and question sets to ensure that they comply with the Act and to ensure that the commercial insured is targeted with the appropriate questions on those areas which materially affect risks.

Claims

- Claims teams will need access to the information provided by the insured at inception;
- Detailed records need to be kept to allow the claims teams to ascertain the facts provided in the event of discrepancies;
- There needs to be close interaction between claims and underwriting teams to establish whether or not a material circumstance is substantially correct;
- Closer co-operation between claims and underwriting teams will also help to identify and fight fraud;
- Handling guidelines and standard documents/letters will need to be updated to remove references to insurance being a contract of utmost good faith and setting out the basis of the new duty of disclosure;
- Once the Act comes into force care will need to be taken when handling claims to apply the new provisions and not confuse them with the old ones.

Complaints

- Processes will need to be amended to take into account the provisions of the Act;
- Due regard should be given to the Financial Ombudsman Service, their jurisdiction, their likely interpretation of the Act, and their powers to apply what is fair and reasonable in their adjudications;
- Insurers should bear in mind the view from the regulator that insurers should put their customer at the centre of their business and provide policies that provide real value.

Marketing

- Insurers should review all marketing material including their internet sites to ensure that they are fit for purpose in light of the Act.

Brokers

- Training and assistance will be needed for all brokers, partners, and key suppliers to ensure that they will be ready for the Act as, knowledge of agents could have knowledge of the insurer;
- Whilst brokers are agents for the insured, you will need to consider the position with tied brokers and corporate partners.

What next?

In keeping with our customer centric philosophy of providing our clients with practical solutions for changing times, Weightmans' Market Affairs Group will be issuing regular updates detailing the provisions of the Act. In our next update we will look in more detail at the remedies available for a breach of Part 2, the duty of fair presentation and provide you with practical guidance on how you could prepare your organisation for the arrival of the Act.

In the meantime, should you wish to discuss the Act and its effects in any more detail, or you would like our assistance in running your own internal Insurance Act project, please don't hesitate to get in touch.

For further information about Weightmans or to discuss any of the issues in this update, please contact Kurt Rowe, Associate, Market Affairs Team on 0207 822 7132 or email kurt.rowe@weightmans.com

Weightmans LLP

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