

Legal Update

The Insurance Act 2015

Introduction

This is the fourth in a series of updates from the Weightmans Market Affairs Group which aim to raise awareness of the changes facing the insurance industry in relation to commercial insurance contracts following the enactment of the Insurance Act 2015 ('the Act') the main provisions of which come into force on 12 August 2016.

In our previous publications we provided an overview of the Act, considered the new duty of fair presentation and the available remedies in the event of a breach of that duty. If you've missed our previous publications on the Act, you can read them [here](#). In this update we will consider how the Act reforms the law in relation to warranties and other contractual terms in commercial insurance contracts.


Warranties and other contractual terms

A warranty, in the context of insurance law, can be described as a term in the insurance contract by which the insured promises that a particular state of affairs existed before the inception of the policy and that it will continue to exist throughout the term of the policy. An insured could also warrant to do something (e.g. install a sprinkler system) within a set period of time from inception.

Currently, if a warranty is breached, the insurer has no liability subsequent to the date of the breach. The matter warranted need not be material to the breach and the insurer has no liability even if the loss has no connection with the breach or the breach has been remedied before the time of the loss. Warranties are generally set out in the policy but frequently declarations in proposal forms turn the representations made into warranties. The latter are known as "basis of contract clauses". Some, such as the Financial Ombudsman Service and the Law Commission have long argued that the law on warranties in relation to insurance contracts is unfair.

The Act changes the landscape so that representations made pre-inception or pre-variation will no longer be capable of conversion into warranties. Further, any rule of law that states that a breach of a warranty discharges an insurer from liability under a policy of insurance is abolished. So, bearing in mind these fundamental changes, what will the law provide in the event of a breach warranty?

An insurer will have no liability, save in some very limited circumstances, if a warranty has been breached but has not been remedied. However, if a loss has occurred before the warranty is breached or (if it is one that is capable of remedy) after it has been remedied, the insurer remains liable to meet the claim for that loss.



Where a warranty requires something to be done within a specific time and it is not done within that time, the Act provides that the breach will be remedied if:

- The risk to which the warranty relates becomes essentially the same as was originally contemplated by the parties
- In other matters, where the insured is no longer in breach of the warranty.

As an example, take the situation of an insured that warrants that a sprinkler system will be installed in the insured premises within 30 days of inception but does not, in fact, do so until a later date. The Act would provide the following, unless there were other reasons for avoiding the claim:

- If there had been a fire at the premises within the 30 day period, then the insurer would be liable to meet the loss
- If the fire had occurred after the 30 day period had expired but before the sprinkler system was installed, the insurer would not be liable to meet the loss
- If the fire had taken place after the sprinkler system had been installed, the insurer would be liable to meet the claim.

The Act also makes provisions for policy terms, other than ones that define the risk as a whole that would, if complied with, tend to reduce the risk of losses of a particular kind; losses occurring at a particular location, or losses occurring at a particular time.

The insurer will not be able to rely on the non-compliance to “*exclude, limit or discharge*” its liability if the insured can show that the non-compliance could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred. Using the sprinkler system example again, if a policy term requires an insured to fit a sprinkler system within 30 days of the inception of the policy. The insured fails to do so and on day 31, the insured is burgled. Under the current law the insurer would be able to repudiate the claim as their liability would have been discharged at the end of day 30. However, under the new law the insurer will not be able to use the failure to fit the sprinkler system as justification to avoid the claim for losses incurred during the burglary as the lack of a sprinkler system is wholly unrelated to the circumstances resulting in the loss that actually occurred.

What does this mean for insurers?

As it is in the interest of both parties that time related warranties are complied with, a principle of upfront, open and honest communication can only be beneficial. Insurers may choose to follow up on those warranties and terms and consider reminding their insureds that a deadline is looming in an attempt to ensure compliance or, if it has already passed, ensuring that the breach is remedied.

It is not difficult to imagine that warranties and terms requiring an activity to be undertaken within a particular time could well fuel opportunistic fraudulent claims and it is imperative that insurers communicate these time related warranties to their claims teams to aid loss prevention. Close scrutiny should be paid to those losses notified as having occurred soon after the breach has been remedied; especially where there is a correlation to the warranty and the cause of the loss e.g. a theft occurring shortly after the insured has remedied a breached warranty to install an alarm system.

What next?

In our next update, the Weightmans Market Affairs Group will look at the provisions in the Act relating to fraud which, unlike other provisions of the Act, apply to both consumer and commercial insurance policies. Should you wish to discuss the Act and its effects in more detail, or would like assistance with your preparations, please do not hesitate to get in touch.



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