The Insurance Act 2015

Insurance Institute of Norwich

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MILLS & REEVE

The future is here……

The Insurance Act

- “A modest little bill stuffed with useful things” – Lord Carrington.
- Along with the Consumer Insurance (Disclosure and Representations) Act 2012 (“CIDRA”) it is the first reform of English insurance contract law since 1906 and has been planned for over 50 years.
- Received Royal Assent on 12 February 2015. Will come into force on 12 August 2016.

Presentation of risk: the old position

- Every material circumstance which is known to the insured.
- Perceived problems
  - Duty of disclosure is poorly understood.
  - Compliance can be difficult.
  - Data-dumps.
  - Remedy for breach is too severe.

The Insurance Act : a "*fair presentation*" (IA 2015, s.3)

- **Substance**
  - Disclosure of every material circumstance which the insured knows or ought to know; or
  - Gives the insurer sufficient information in relation to those material circumstances to put a prudent insurer on notice that it needs to make further enquiries
- **Form**
  - Makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer

Materiality

- Material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms
- Examples of what might be material
  - Special or unusual facts relating to the risk
  - Any particular concerns which lead the proposer to seek cover
  - Anything which those concerned would generally understand as being something that should be dealt with in a fair presentation
- Exceptions

Knowledge

- The Insured is deemed to know what is known:
  - to the individual insured or to the senior management of a corporate insured, and
  - to the persons responsible for the insured's insurance (IA 2015, S. 4)
- Insurers are deemed to know what is known:
  - to the individuals who participate in the decision to take the risk (including what they "ought" to know). (IA 2015, s. 5).

Warranties: the old position

- S33 Marine Insurance Act 1906
- Warranties must be complied with “literally” and breach discharges the insurer from liability from the date of breach
- The Law Commission’s concerns:
  - The Insurer can refuse cover for a trivial mistake with no bearing on the risk
  - It is irrelevant that the insured has remedied the risk
  - Breach discharges the insurer from all liability regardless of the cause of loss
  - Even an innocuous statement may be a warranty

Warranties : the new position (IA 2015, s. 9-11)

- Breach will suspend but not discharge liability. In the event of breach, insurers remain liable for losses occurring before the breach and after it has been remedied.
- Breach of warranties which mitigate against a particular risk will not be fatal (but the onus is on insured to establish breach could not have increased the risk).
- "Basis of contract" clauses in the proposal form be outlawed.

Remedies: the old position

- Material non-disclosure or misrepresentation
- Inducement:
  - Would not have written the contract at all; or
  - Would have written it but on different terms
- Avoidance

Avoidance

"an unfair bludgeon

"Draconian"

"An all or nothing approach"

"does not reflect reasonable business practice in the modern age"

Remedies: the new position

- Insurer has a remedy for a breach of fair presentation if the insurer can show, but for the breach, it:
  - Would not have entered into the contract at all; or
  - Would have done so only on different terms
- (IA 2015, s. 8 and schedules 1 and 2)

The nature of the qualifying breach

- The remedy available will be determined by the nature of the qualifying breach
  - Either deliberate or reckless; or
  - Neither deliberate nor reckless

Deliberate or reckless

- The insurer
  - may avoid the contract and refuse all claims, and
  - need not return any of the premiums paid
- The burden is on the insurer to show
  - The proposer knew it was in breach of the duty of fair presentation (deliberate); or
  - Did not care whether or not it was in breach of that duty (reckless)

Neither deliberate nor reckless

- Remedy based on what the insurer would have done if a fair presentation had been given.

• **Would not have entered the contract at all**	***May avoid the contract and refuse all claims but must return premium***
• **Would have entered on different terms (other than relating to premium)**	***Contract treated as if having been entered on those terms***
• **Would have charged a higher premium**	***Reduce proportionately the amount to be paid on a claim***

Risk areas for brokers

- "The 'fair presentation':
  - Substance test: materiality
  - Form test: a new hurdle
  - Renewals

Example: form test

- Property policy.
- Insured sends broker all maintenance and HSE records for building when looking for cover.
- Documents are voluminous and many appear unnecessary.
- The Insured does not have the time to ‘waste’ going through these documents.
- What are the options for the broker?

Example: mid-term review

- Policy contains a warranty for setting of a burglar alarm.
- Insured does not comply, informs broker at mid-term review.
- No advice given by broker.
- Subsequent break-in and theft.
- Insurers decline claim as a result of breach of waranty.

Contracting out

- Possible to contract out of the proposed warranty reforms, save for basis of contract clauses.
- Any deviation from the default position must be drawn to the attention of the insured
- The clause and the consequences of breach must be spelled out in clear and unambiguous terms

Contracting out: risks for brokers

It is warranted by the Insured that the Premises will not be left without at least one Responsible Person therein unless the Intruder Alarm Installation is set in its entirety.

Any breach of this warranty will exclude any cover under section 4 of this Policy [loss arising from theft] for the whole of the term of the Policy regardless of when such breach occurred and any later compliance with this warranty will be irrelevant.

Proportionate remedies

- Less avoidance of policies
- Does this mean life will be easier?

Example 1

Limit of Indemnity:	£1million each and every claim
Premium:	£5,000
Excess:	£10,000
Claim:	£200,000

- Failure to disclose the acquisition of a small business out of which the claim emanates.

Options

A: treat the policy as being subject to an exclusion in respect of claims made against the acquired business

B: assert that a higher premium of £10,000 would have been charged

Effect

A (exclusion): insured suffers a £190,000 loss

£200,000 - £10,000 excess

B (premium): insurer's proportion = 50%

$$\frac{\text{premium charged (5,000)}}{\text{higher premium (10,000)}} \times 100$$

£190,000 x 50% = £95,000

But what if…

- The insured has three more claims arising out of the original business?

Claim 2: £250,000	reduces to £120,000
Claim 3: £50,000	reduces to £20,000
Claim 4: £500,000	reduces to £245,000

Example 2

Limit of Indemnity:	£1million each and every claim
Premium:	£5,000
Excess:	£10,000
Claim:	£200,000

Options

- A: treat the policy as if subject to an excess of £20,000
- B: assert that a higher premium of £10,000 would have been charged

Effect

- A (higher excess): insured suffers a £10,000 loss
- B (higher premium): insured suffers a £95,000 loss

But what if…

- Insured had given a blanket notification of 100 claims each worth £20,000

Option A

Insured pays £20,000 per claim
Insurer pays nil

Insured's loss:
100 x £10,000 = £1million

Option B

Insured pays £10,000 per claim
Insurer pays £5,000 per claim

Insured's loss:
100 x £5,000 = £500,000

Risk considerations: pre-remedy

- Consider engaging with insurers about application of proportionate remedies

But

- Ensure full consideration has been given to the potential impact of each remedy; and
- Give clear advice to the insured / get agreement before steps are taken

Risk considerations: post remedy

- Advise insured about implications for it in terms of future cover
- Consider whether cover still meets needs
- Failure to address the potential impact creates exposure to future claims

Conclusion

Be prepared…….

thank you

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