

The Insurance Act 2015

The Insurance Act 2015 comes into effect on 12 August 2016. The purpose is to update the law which is now over 100 years old in order to reflect the way that the insurance market has changed over this time and to achieve a fair balance between insurers and their commercial ("non-consumer") customers.

To do this the Act introduces a new duty of fair presentation and attempts to clarify what is considered to be the knowledge of the insured and insurer as well as the remedies available to insurers for a breach of the duty.

The Act also deals with how warranties and other terms are applied to make this fairer and more balanced and insurer remedies for fraudulent claims.

Duty of fair presentation

A separate communication explains the duty of fair presentation and how to prepare for it in more detail. This document summarises the Act in general terms.

The current position is that an insured must disclose every known material circumstance. The duty to make a fair presentation of the risk replaces this, requiring disclosure of every material circumstance that the insured knows or ought to know or enough information that an insurer should be aware to make further enquiries. The facts disclosed must be "substantially" correct and made in good faith. The disclosure must be made in a "reasonably clear and accessible" manner – no "data dumping" allowed.

Disclosure doesn't need to include anything that reduces the risk, unless requested, or anything that is known by, waived by, or presumed to be known by the insurer, nor anything that is common knowledge.

Knowledge of the insured and insurer

In the case of individuals knowledge includes what they know and anyone who is responsible for their insurance. In respect of organisations knowledge is the information known to anyone who is part of the senior management¹ (i.e. key decision makers) and anyone who is responsible for the insurance.

An insured is also deemed to know what should have been revealed by a reasonable search² of information available to them including any held by other parties.

Insurer knowledge would generally only be of those involved in the process of agreeing to take the risk and deciding upon terms and where information has been passed to or is readily available to those individuals.

Remedies for a breach of the duty of fair presentation

Insurers' remedies for a breach of the duty will depend on the circumstances.

If the insurer can prove that a breach was deliberate or reckless they can avoid the policy and keep the premium.

¹ Individuals who play significant roles in the making of decisions about how the business activities are managed or organised which may include (but not necessarily limited to) directors; partners, company accountant or financial controller; persons with a controlling influence such as majority shareholders with control over decisions even if not directors; staff managers; process and production managers; health and safety officers; fleet managers.

² What constitutes a reasonable search will depend on the circumstances of each case and be determined by the size and complexity of the business but could include the need to ask questions of people both inside and outside of the business.

If the breach is not believed to have been deliberate or reckless the insurer can consider what they would have done if it had not occurred and, if they can show that they:

- would not have entered into the contract they can avoid the policy and refuse any claims but must return any premium paid.
- would have entered the contract only on different terms (warranties, conditions, excesses, etc.) those terms would be applied retrospectively, even if that means that it would reduce or remove any liability to pay claims.
- would have entered the contract at a higher premium any claim would be reduced in proportion to the difference. For example, if the premium paid is £500 but it would have been £1,000, a claim payment would be reduced by 50%. The insurer would also be able to charge a proportionate additional premium for the remainder of the contract.

Warranties and other terms

Under the existing regime information provided to insurers in proposal forms and in other formats is usually warranted by policies to form the basis of the contract. These are known as "basis of contract clauses" and in the past it has been possible for insurers to avoid policies in the event that some of the information that was provided to them was wrong, even if this had no relevance to a loss. This type of clause and the implied warranties are completely abolished under the new Act.

Insurance policies will often also contain warranties and other terms that are specifically expressed, such as conditions precedent to liability, that are designed to reduce particular types of risk. The Act amends the law relating to any breach of such a warranty or term.

As mentioned above, under existing law the breach of a warranty allows an insurer to avoid policies entirely when a warranty has been breached. Warranties will now be treated as suspensive conditions meaning that cover is only suspended for the period that the warranty is not complied with and is reinstated when the breach is remedied. If it is not possible to remedy a warranty, for example if something has to be done by a specific time, it will be considered to be remedied once the conditions in which the breach was occurring no longer exist. A practical example of this would be if an intruder alarm had to be installed by a certain date but was not, the breach no longer exists once the alarm is actually installed.

In addition to this, under the Act, insurers will not be allowed to rely on an insured's non-compliance of a warranty or other term designed to reduce a particular type of risk to decline a claim if the insured can show that the non-compliance could not have increased the risk of the actual loss in the circumstances that arose. It continues to be the case that if the warranty or term defines the risk as a whole an insurer can continue to rely on this entirely.

Remedies for fraudulent claims

Under the Act if an insured makes a fraudulent claim the insurer does not have to pay the claim. The Act also clarifies that the insurer can:

- recover money they paid to the insured in respect of the claim; and
- by notice to the insured, treat the contract as terminated from the time of the fraudulent act and keep all premiums paid.

Genuine claims from prior to the fraudulent act will not be affected.

Contracting out of the Act

The Act allows for insurers to “contract out” of all or part of the Act (other than the total ban on “basis of contract clauses”) and we will monitor insurers’ intentions in this respect and whilst we expect that any such action to be relatively uncommon there will certainly be cases where this happens to a greater or lesser extent. Some insurers have indicated that they will (or have already) adopted the principles of the Act early and policy wordings may be changed or interpreted along the lines required regardless of the contract wording which would generally be in an insured’s favour. Where any insurer contracts out of part of the Act it must be clear in drawing an insured’s attention to any resultant unfavourable feature.

Summary

The aim of the Insurance Act is to encourage a better exchange of information between insurers, brokers and customers to reduce the number of disputes and achieve a more balanced system to, in turn, increase confidence in the UK insurance market.

In summary, the key points are as follows.

- Insureds must present their risks fairly and, if they do not, insurers’ remedies are related to what would have happened if they had;
- Warranties will have a narrow interpretation and treated as suspensive conditions;
- The law regarding fraudulent claims has been clarified;
- It is generally permitted to contract out of the new requirements but this must be clear, unambiguous and brought to the insured’s attention before a policy starts;
- Basis of contract clauses are banned and cannot be contracted out of.

For additional information we strongly recommend that you [view this short video](#).

You can also [view a copy of the Act here](#).

If you have any questions or concerns, speak to your usual Erimus Insurance Brokers contact.

Notice: This communication is a summary of the change in law and nothing contained in it constitutes legal advice or specific advice in relation to any particular circumstances.