The Insurance Act 2015 —frequently asked questions

Why was the Act introduced?

The Act aims to make insurance fairer for policyholders – redressing an imbalance in the previous law that sometimes overly favoured insurers.

When does this Act come into effect?

The changes come into effect on 12th August 2016. It affects all insurance policies (written under English law) that are started, renewed or altered on or after this date.

What are the main changes being made by the Act?

The Act updates insurance law in three key areas:

•Disclosure and misrepresentation – what risk information you must present to your insurer, and how

•Warranties – how breaches of warranty (and other similar policy terms) are dealt with by insurers

•Fraudulent claims – what insurers can do if you make a fraudulent claim

Who does the Act cover?

The parts of the Act that relate to your duty to disclose material facts / make a fair presentation, and insurers' remedies if you fail to do so, relate only to business insurance contracts, not to consumer contracts.

(A 'consumer' insurance contract is a contract taken out by an individual for purposes that are wholly or mainly unrelated to the individual's trade, business, or profession. A 'business' insurance contract is any contract that is not a consumer contract.)

However, all the other parts of the Insurance Act –the parts relating to warranties and other terms, and insurers' remedies for fraudulent claims – apply to all types of insurance, both business and consumer.

What is the insured's duty of pre-contractual disclosure under the Act?

Under the Act, when taking out insurance, a business has a duty to make a 'fair presentation of the risk' to the insurer. This means that you must:

•disclose every material circumstance that you know or ought to know or, failing that,

•give the insurer 'sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal those material circumstances'; and

•disclose the information in a manner that is 'reasonably clear and accessible', and would be easily understood, by a prudent insurer; and

•not make any misrepresentations.

Whose knowledge needs to be disclosed?

You must disclose material information known by your 'senior management' team and by the individuals (inside and outside your organisation, including your brokers) who are responsible for arranging your insurance. You must also carry out a 'reasonable search' for relevant information that you ought to know, which could include making enquiries outside your organisation, e.g. of your brokers, as well as inside.

Who are 'senior management'?

'Senior management' is defined in the Act as 'those individuals who play significant roles in the making of decisions about how the insured's activities are to be managed or organised'.

What happens if I fail to disclose a material circumstance or misrepresent the facts?

Under the Act, insurers will have a range of 'proportionate' remedies for non-disclosure and misrepresentation. The insurer's remedy will depend on whether or not the non-disclosure or misrepresentation was deliberate or reckless.

If the non-disclosure or misrepresentation was deliberate or reckless, the insurer can still 'avoid' the policy, i.e. cancel it from day one and treat it as if it had never existed. In these circumstances, the insurer does not have to return the premium.

If the non-disclosure or misrepresentation was not deliberate or reckless, the insurer's remedy will depend on what it can show it would have done had it received a 'fair presentation of the risk'.

1. If the insurer can show it would not have entered into the contract at all, it will still be entitled to avoid the policy (i.e. effectively cancel it from day one) but will have to refund the premium.

2. If the insurer can show it would have entered into the contract but on different terms, other than relating to premium, it may treat the policy as having included those different terms from the outset.

3. 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.

The Act says that insurers will be entitled to avoid (i.e. cancel from the start) a policy if a breach of the duty of fair presentation is 'deliberate or reckless'. What does 'reckless' mean?

The Act defines a 'reckless' breach of the duty as one where the insured did not care whether or not it was in breach of that duty. The law treats someone who is reckless / does not care whether a fact is true or not as fraudulent, so when the Act speaks of deliberate or reckless breaches, it is describing an insured that is fraudulent in presenting its risk.

What happens if, under the Act, you breach a warranty, and how has this changed from the previous law?

Previously, if you breached a warranty, the insurer was automatically, and permanently, 'off risk' from the date of the breach. Now, under the Act, if you breach a warranty, cover is simply suspended until you have remedied the breach (assuming it can be remedied).

For example: under the Act, if a warranty stipulates that you must install a burglar alarm at your premises within 30 days of the policy starting but you do not install it until 45 days after the policy started, cover will be suspended between days 31 and 45.

If a warranty is breached and therefore cover under my policy is suspended (until the breach has been remedied), and we then have a loss during the suspended period, but the loss has nothing to do with the breach, is there cover or not?

The starting point in this scenario is that there is no cover. The loss occurred during the period in which cover was suspended and the insurer will not be liable for losses occurring or attributable to something happening while you are in breach, regardless of whether the breach had any connection to the loss.

However, the exception is when the warranty is a 'risk mitigation term' (i.e. a term that seeks to reduce the risk of a loss of a particular kind, or at a particular location, or at a particular time, and is not a term that defines the risk as a whole). If the warranty is a risk mitigation term, then insurers cannot rely on the breach of warranty during the suspended period to avoid paying the claim – but only so long as the breach could not have increased the risk of the loss that actually occurred, in the circumstances in which it occurred.

In effect, this means that although cover is suspended for the period that you are in breach of warranty, you may have cover for a loss that occurs in that period if the warranty is a risk mitigation term and the breach of warranty could not have increased the risk of the loss. However, you will not have cover for a loss where a breach did increase the risk of the loss.

Whether there is scope to argue that the warranty is a risk mitigation term is something on which you may need to take legal advice.