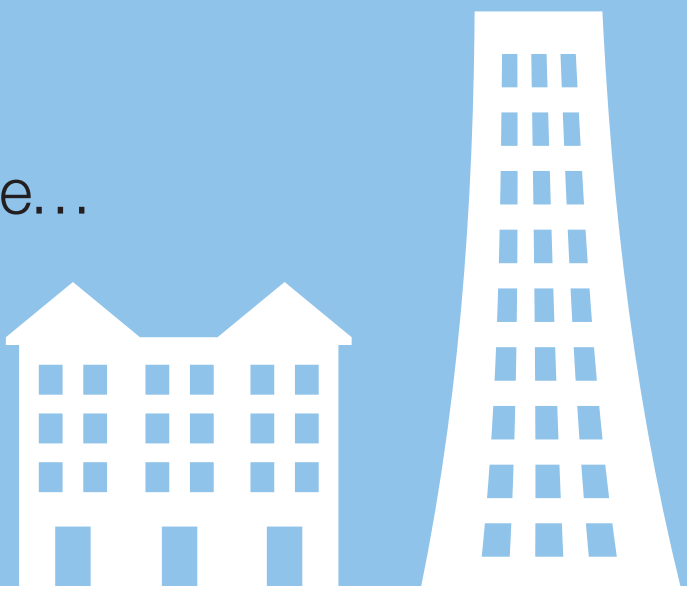
The Insurance Act 2015

Main changes at a glance…



...for Appointed Representatives

Introduction

The 12th August 2016 is the implementation date of the Insurance Act 2015; it represents the most significant change to insurance contract law in this country for over 100 years. The Act is about insurers, brokers and policyholders working together effectively to deliver more reliable insurance placement. What it brings is greater fairness, transparency and certainty to policyholders and that can only be a good thing as we at Deacon strive to deliver the best possible outcome for our clients.

Essentially the Act is about modernising and updating the rules that govern insurance agreements within UK **commercial** insurance and will involve changes to wordings for policies - specifically when it comes to the disclosure of details. The changes will have significant impact on how insureds and insurers approach policies, creating new duties for insurers and policyholders to comply with.

The Insurance Act 2015 applies to all policies governed by the laws of England and Wales, Scotland and Northern Ireland that are placed (or varied) after 12th August 2016.

The majority of the Act will only apply to **non-consumer** insurance contracts as the existing Consumer Insurance (Disclosure & Representations) Act 2012 has previously addressed duty of disclosure for consumers.

This bulletin has been produced for Appointed Representatives dealing with **non-consumer** insurance contracts; your Deacon business contact will discuss any factors which will affect you.

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Duty of fair presentation

The 'duty of disclosure' is replaced with a 'duty of fair presentation', which means that before taking out insurance policyholders will need to make a 'fair presentation of the risk' to the insurer. Broadly, this means giving to the insurer in a clear and accessible manner, accurate details of matters that would affect their underwriting decision. The insurer will ask for more information if required, however policyholders do not need to tell them information that is considered common knowledge i.e. Performance of a particular car.

- The primary duty as the insured still includes disclosing material facts they know or ought to know. If our policyholders are the owner/manager, it means they should know everything – which is quite onerous.
- The duty of fair presentation demands full disclosure. While the Act compels insurers to share a greater responsibility for drilling down into that presentation, policyholder's responsibility for full disclosure in the first instance remains undiluted.
- The Act defines 'knowledge' as including senior management knowledge, the insurance buyer's knowledge and other relevant information the policyholders held elsewhere or via specific suppliers, contractors and third parties that could be established by a reasonable search. This will demand more planning, more process and more preparation time from policyholders - and us as your broker and you as our Appointed Representative
- The information the policyholders disclose must be presented to the insurer in a way that gives a clear indication of risk and circumstance to a prudent insurer.
- Where policyholders have had a relationship with an insurer for some time and already holds information that relates to your insurance cover, the insurer will be taken already to know that information. With a new insurer however, it's important to give them a detailed submission but one that still recognises they ought to know matters of common knowledge.

The new insurer remedies for breach of disclosure have changed significantly...

The Act sets out the following new requirements:

- **Deliberate or reckless breach:** the insurer can walk away from the policy and keep premiums from the policy inception – but ONLY if it can prove a deliberate or reckless breach of fair presentation. The onus lies with your insurer, not you.
- **Non-deliberate or non-reckless breach:** there will be multiple remedies available but the responsibility lies with the insurer to show how they would have behaved if they had known all of the material information.
  - *Insurer would not have written risk:* if the insurer would not have written the risk, the insurer can void the policy but MUST refund all premiums from inception.
  - *Higher premium originally chargeable based on the breach data:* if the insurer would have charged a higher premium, the insurer can then reduce a claim settlement proportionately.
  - *Application of new or different terms (e.g. conditions and exclusions, not premiums):* if the insurer would have included new terms, or imposed different terms, the extra terms can be applied retroactively and the policy honoured under those new terms. For example, retroactively applying a higher excess.

But how might these changes pan out in practice?

- The reduction of the claim in proportion to the undercharging of premium could be significant in some cases.
- While the changes might help stop the complete avoidance of policies by insurers, it gives an insurer the ability to underwrite a risk retrospectively. This means you have less certainty around what will happen in the event of a claim if there has been a non-disclosure.
- Insurers still have the ability to void a policy - for instance if they can show they would not have taken it on had they known the full facts - but also have the ability to exclude certain risks, reduce claims settlements proportionately when they would have charged a higher premium or impose large deductibles. This may still allow them to effectively reduce the amount payable on a claim.

Unpicking those warranties in practice…

Basis of Contract Clauses will be outlawed by the Act - so words along the lines of 'this proposal forms the basis of and is incorporated into the contract' can no longer be used. A basis of contract clause converts statements made during the presentation of a risk into a warranty. Warranties are terms in the policy that require a policyholder to do something e.g. setting the burglar alarm when the premises are closed.

Previously if a policyholder had not strictly complied with a warranty then the law said the insurer was discharged from all liability. This meant that, even if a policyholder had set its burglar alarm on the day of the theft but didn't always set it, some insurers could have refused to pay the claim on the basis that the policyholder had not previously complied with the warranty.

The new Act is much fairer because in the same circumstances, so long as the burglar alarm was on at the time of the theft, the claim would be paid. Therefore, a breach of warranty can be remedied, following which full cover resumes and a breach of warranty will not allow the insurer to decline a claim if the insured can show that the breach did not increase the risk of the loss which has in fact occurred.

- Warranties will only apply to the specific circumstances of the loss; so the fact that an intruder alarm is inoperative when a policy has an alarm warranty will no longer be a bar to making a flood claim for example.
- However a warranty can become operative at a tangent. What happens if a policy has an alarm warranty and the alarm is inoperative, an intruder gets in but sets the place on fire? The insurer could still argue that the breach of the warranty has contributed to the loss.

Warranties will become 'suspensive' conditions under the new Act…

- This means that while the insured is in breach then there is no cover for losses flowing from that particular breach.
- But once it is remedied then cover is reinstated - unlike under the Marine Insurance Act 1906 where a warranty cannot be remedied.

Insurers Remedies for Fraudulent Claims

The Act provides the insurer with clear statutory remedies when a policyholder submits a fraudulent claim. If a claim is tainted by fraud, the policyholder forfeits the whole claim, they cannot recover the part of the claim that would genuinely have been payable.

The Act also provides that the insurer may refuse any claim arising after the fraudulent act and can serve notice that it is treating the contract as terminated from the date the offence was committed. However previous valid claims arising prior to the fraudulent act are unaffected. The insurer need not return premium following notice of termination based upon the submission of a fraudulent claim.

Contracting Out

For non–consumer insurance, insurers will be able to contract out of the Act, except in respect of the provisions relating to basis of contract clauses. Any term of a policy which is more disadvantageous to an insured than the regime in the Act will require 'contracting out'. If an insurer is contracting out, this means that any such term, in order to be effective, must be brought specifically to the attention of the policyholder or the policyholder's broker before the contract is entered into and must be clear and unambiguous. Contracting out is only permitted for non-consumer insurance and any contracting out wording must satisfy certain transparency obligations.

The final countdown…

The Act applies to all renewals from 12th August onwards, but the duty of fair presentation under the Act applies to any mid-term adjustment (MTA) after that date. An MTA may be for something as simple as replacing a vehicle in a motor fleet or adding a new piece of machinery to a property policy.

As your Principal firm, Deacon have been planning for the Act for a number of months and have been working closely with insurers to agree new policy wordings. As an Appointed Representative firm we ask that you understand your responsibility with regards to the 'Duty of Fair Presentation' and work with us and our mutual policyholder's to:

- Provide enough detail for Insurers, reviewing all parts of the policyholders business where there's risk
- Collate & present the information fairly to the insurers at renewal time
- Demonstrate that you have conducted reasonable searches – and that those searches are authorised at the appropriate level?

What are the next steps?

For **Appointed Representatives** dealing with clients classified as **non consumers** there is additional online learning to be completed. Once you have read this document and shared it with other staff members conducting insurance mediation, you will need to access your online training. You can access the learning via the internet by clicking on the link below:

Insurance Act 2015 on-line training module

You will need to input your **name** and the name of your firm which enables the system to produce a certificate at the end of the learning. **Please supply evidence of completion to your Deacon business contact.**

Please keep a record of all staff that have been provided with this document and online training and keep this document with your training records.

The content of Browne Jacobson's on-line training module is designed to provide an overview of the key changes the Act will bring about. It does not constitute legal advice and does not provide a substitute for it. If you have any queries in relation to the training or the Act generally, Browne Jacobson would be delighted to hear from you.

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