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E-ALERT

Consumer Insurance Bill: a brave new world

Background

The Consumer Insurance (Disclosure and Representations) Bill (HL Bill 68) (the "Bill") was introduced by government on 16 May 2011. The Bill is based on recommendations made by the Law Commission and the Scottish Law Commission (the "Law Commission") and in HM Treasury's own words it "aims to radically change the relationship between consumers and insurance providers".

As we have reported in May 2010, as part of its overall review of insurance contract law the Law Commission has proposed far-reaching changes. This includes the creation of two separate legal regimes for consumers and businesses, and the abolition of the duty of disclosure in the context of what will become "consumer insurance law". The Bill has to go through the Parliamentary process before it is made into law, during which it may be amended. However, given its significance, and presuming few changes will be made (the reform project has already been the subject of extensive consultation), it is worth highlighting some of its key features.

Key provisions

- The Bill applies to “consumer insurance contracts". Those are defined as contracts of insurance between an individual "who enters into the contract wholly or mainly for purposes unrelated to the individual’s trade, business or profession", and an insurer.

- The Bill abolishes the duty of disclosure and replaces it with a duty "to take reasonable care not to make a misrepresentation". According to the Law Commission, this translates into a duty to answer the insurer's questions fully and accurately. The onus will therefore be on insurers to ask the right questions.

- Whether a consumer has taken "reasonable care" will have to be determined in light of all relevant circumstances, but a misrepresentation made dishonestly will always be taken as falling short of the reasonable standard of care expected of a consumer.

- Only a "qualifying misrepresentation" is actionable. A qualifying misrepresentation is a misrepresentation made by a consumer in breach of the duty to take reasonable care. In addition, the insurer will have to show it would have acted differently had there been no misrepresentation. The insurer, however, will not need to prove that the information which was the subject of the misrepresentation was material.

- Remedies for a "qualifying misrepresentation" depend on the seriousness of the breach (in accordance with the "principle of proportionality" already applied by the Financial Ombudsman), as follows:

  - If the misrepresentation was deliberate or reckless, the insurer may avoid the policy and keep the premium (a misrepresentation is deliberate or reckless only if the insurer can prove that the consumer knew it was untrue or misleading, or that the consumer did not care if it was; and that the consumer knew the matter was relevant to the insurer, or did not care if it was.).

  - If the misrepresentation is careless, the remedy will depend on what the insurer would have done had there been no misrepresentation i.e. he:

    (i) may avoid the policy and return the premium; or

    (ii) amend the terms of the policy, i.e. the insurance contract will be treated as if those amended terms apply (the Bill includes a mechanism that gives both the insurer and the consumer a choice to continue with the contract on the amended terms, or to terminate); or

    (iii) if the insurer would have charged an increased premium, a deduction of the amount of the increase will be made from the claims monies payable to the consumer.

- If the misrepresentation was honest and reasonable, the insurer will have to pay the claim because the representation was not a "qualifying misrepresentation" made in breach of the duty to take reasonable care.

- Parties to the contract of insurance are not able to contract out of the above rules to the detriment of the consumer.

- The Bill abolishes "basis of contract" clauses, which are declarations included, generally at the end of a proposal form, that turn representations into warranties.

- Under the Bill, a broker will still be deemed to be acting as agent of the consumer unless:
  - he/she is the appointed representative of the insurer; or
  - he/she has express authority to collect information as agent of the insurer; or
  - he/she has express authority to enter into the contract of insurance on the insurer's behalf; or
  - circumstances dictate otherwise (e.g. the broker uses the insurer's name or is asked by the insurer to solicit customers, etc.).

Comments

HM Treasury specifies that the aim of the Bill is to bring clarity into an area of law that is outdated (it is still governed by the Marine Insurance Act of 1906) and rendered confusing by layers of rules and guidance (e.g. ABI Code of Practice, the FSA's Insurance Conduct of Business Sourcebook, etc.). The Bill, however, introduces a number of new concepts and legal tests that may well require clarification by the courts through litigation.

The Bill represents the first tangible step towards legislation of the Insurance Contract Law Reform project initiated by the Law Commission back in 2006. The next significant stage should be the publication of the Law Commission's proposals as regards business insurance.

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