ADDLESHAW GODDARD

INSURANCE ACT 2015

What the Retail & Consumer sector needs to know

The Insurance Act 2015 ("Act") was given Royal Assent in February 2015 and comes into force on 12 August 2016 (see our previous e-alerts here). It will apply to all new policies (and to some variations of existing policies) entered into after that date. The Act will not have retrospective effect.

The Act is the first major overhaul of business insurance law since the 1906 Marine Insurance Act; the changes will affect all Retail & Consumer sector businesses, i.e. the Act will affect the rights of policyholders/insureds under product liability, D&O, E&O, financial lines, business interruption and cyber insurance policies (to name but a few). Insurance is crucial to R&C businesses as it provides protection from the impact of adverse events such as the costs of mass recalls, for example, arising from the horsemeat scandal a few years ago, and the recent losses sustained by Volkswagen and their trading partners in relation to the more recent emissions issue.

Key points

Put simply, the Act will strengthen the policyholders'/insureds' position by making it harder for insurers to reject claims and deny insurance coverage. In practice, this means that R&C businesses should feel more secure in the knowledge that if they make a claim against their insurers, they are more likely to receive payment. The Act also readjusts the balance between insurers and policyholders/insureds when an insurance policy is first negotiated by providing clarification around the issue of what has to be disclosed. Companies in the Retail & Consumer Sector should therefore welcome the new Act and prepare for its implementation in August 2016 by speaking now to their brokers about the new procedures they need to put into place to make sure their policies properly protect them and accord with the new law (see our practical tips section below).
Our visual guide to the Act focuses on some of the key changes to the law of business insurance under the Act.

TAKING OUT (OR RENEWING) INSURANCE

Duty of Fair Presentation of the Risk

What must be disclosed?

- every material circumstance which the insured knows or ought to know OR
- sufficient information to put prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances

How?

- in a manner reasonably clear and accessible to a prudent insurer
- in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith

A Circumstance is

- any communication made to, or information received by, the insured
- material if it would influence the judgment of a prudent underwriter in determining whether to assume the risk and on what terms

The Insured Ought to Know

- what should reasonably have been revealed by a reasonable search of information available to the insured
- what information is held within its organisation, or by any other person (such as the insured's agent or a person for whom cover is provided)

The Insured's Knowledge

A corporation will be deemed to know what is known to individuals who are:

- part of the insured's senior management (i.e. those who occupy significant roles in decision making, and how the insured's activities are managed or organised) OR
- responsible for the insured's insurance, i.e. the risk management team/department

Knowledge: "turning a blind eye": An "individual's knowledge" includes matters the individual suspected, which he would have had knowledge of but for deliberately refraining from confirming the position or refraining from making enquiries.

IN PRACTICE? Guidance for Companies in the Retails and Consumer Sector:

- Liaise with brokers and insurers to understand what is considered as material information
- If in doubt: disclose
- Plan the form of your disclosure : make it clear and accessible
- Clarify who is responsible for arranging the insurance and who is responsible for managing it for the business: make sure the Board and senior management know the key terms and conditions to ensure business compliance

TERMS AND CONDITIONS

Basis of Contract Clauses

These clauses turn representations in proposal forms into warranties: invalid under the new Act

Warranties as "suspensive" conditions

An insurer will have no liability whilst a breach of warranty is continuing BUT will under the new Act now be liable for losses attributable to (i) something that happened before the breach or (ii) after the breach has been remedied

Terms not relevant to the actual loss

- An insurer may now not exclude, limit or discharge its liability in respect of such terms when there is a breach - but the insured shows the breach could not have increased the risk of loss which actually occurred in the circumstances in which it occurred

Contracting Out

- Basis of Contract clauses: insurers cannot contract out to get around the effect of the Act
- A clause to contract out of the other provisions of the Act which would put the insured in a worse position (a "disadvantageous term") will only be effective if (i) the insurer takes sufficient steps to draw the disadvantageous term to the insured's attention before it is agreed and (ii) the term is clear and unambiguous as to its effect (the "transparency requirements")

MAKING CLAIMS: A NEW WORLD OF REMEDIES

Breach of the Duty of Fair Presentation (= a "qualifying breach")

- An insurer only has a remedy if he can show that, but for the breach:
- he would not have entered into the contract at all, or he would have done so only on different terms

IN PRACTICE? Guidance for Companies in the Retails and Consumer Sector:

- Take note of the warranties, keep a record of compliance and, if there has been a breach, the date when it was remedied
- Look out for contracting out clauses and consider the transparency requirements
- If a claim is rejected, negotiate the outcome with the insurer, bearing in mind the new remedies
- Remember it is up to the insurer to prove there was a qualifying breach which was deliberate or reckless and the insurer must be able to show how it would have acted differently

New Proportional Remedies

- If the qualifying breach was **deliberate or reckless** the insurer (a) may avoid the contract and refuse all claims and (b) retain the premium
- If the qualifying breach was **neither deliberate nor reckless**, the remedies depend on what the insurer can show it would have done had there been no breach
  - If the insurer would not have entered into the contract at all, it can **avoid** and refuse all claims but he must also repay the premium back to the insured
  - If the insurer can show that it would only have imposed different terms, the insurance contract will be treated as if it had been entered into on those **different terms**
  - If the insurer can show that it would have charged a higher premium, it may **reduce proportionally the amount to be paid** on a claim

Fraudulent Claims

If the insured makes a fraudulent claim the insurer is not liable to pay the claim and he may terminate the contract from the time of the fraudulent act whilst retaining the premium. This does not affect the liability of the insurer prior to the fraudulent act.

For information, please contact: **Sonia Campbell**, Partner on 020 7788 5173 or sonia.campbell@addleshawgoddard.com or **Dr Caroline Bell**, Professional Support Lawyer on 020 7788 5162 or caroline.bell@addleshawgoddard.com

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