The Insurance Act 2015


What it means to you and your Commercial / Reinsurance client

July 2016

The changes introduced by the Insurance Act 2015 apply to Commercial Insurance contracts which are subject to the laws of England and Wales, Scotland, or Northern Ireland. It comes into force on 12 August 2016 and impacts insurance and reinsurance contracts which incept or are renewed on or after this date, and to variations to existing contracts on or after this date.

Key changes:

- Duty of Fair presentation of the risk
- Rejection of a claim by Insurers for breach of warranty or similar term is no longer possible if the breach is not connected with the loss.
- Cover suspended for breach of warranty, instead of automatic and permanent termination.
- The contract will be avoided if non-disclosure was deliberate or reckless.
- Basis of contract clauses abolished.

Throughout this document Insurance shall also mean Reinsurance

Fair presentation of the risk

As a Broker of a commercial / business insured, under the Insurance Act, you will have a duty to ensure that your client makes a **fair presentation** of the risk before an insurance contract is entered into and throughout the period of the contract. **Fair presentation** requires you to :

- Provide information which is accurate and complete to the best of your knowledge.
  - This includes the knowledge of client Senior Management and, Insurance Buyers (if appropriate) and your own knowledge as the Broker.
  - Your client is expected to know what would be revealed by a **reasonable search** of information, which includes information held by you the Broker, all of which will be deemed to be client knowledge; however this will not extend to confidential information acquired by you as Broker when acting for other clients.
- Ensure that information is disclosed in a **clear and assessable** manner which will be considered as fair to a prudent insurer where the facts, as represented, are substantially correct and the representations as to expectation or belief are made in good faith.
- Ensure that every material circumstance that is known or ought to be known by the client is disclosed; or at least that sufficient information is disclosed to enable a prudent insurer to effectively analyse the risk.

There is no obligation to disclose a circumstance if:

- it diminishes the risk;
- it is known or ought to be known to the insurer,
- it is information which is waived by the insurer or is something which the insurer is presumed to know.

Practicalities:

You should consider what a **reasonable search** might look like and of whom the client will need to make enquiries in order to satisfy the requirements. This will include individuals who are part of the client Senior Management Team as well as anyone responsible for purchasing insurance.

You have a duty on behalf of your client to present information in a reasonably **clear and accessible** manner; this could require submissions to be signposted, structured and indexed to avoid “data dumping”. You may be requested to re-present the information if it is unclear.

You should understand that Insurers may ask more questions during the underwriting process as a result of their obligation to make ‘sufficient enquiries’.

The Act introduces proportionate remedies for breach of the duty of **fair presentation**. Therefore, in the event of a claim and the client had failed to make a **fair presentation** of the risk, Insurers to have a number of remedies available to them that are significantly changed from those available prior to the Act.

Except where a breach of the duty to make a **fair presentation** is deliberate or reckless, proportionate remedies based on what the insurer would have done in the event that full disclosure had been made, will apply. The ability to avoid any claim for a breach of the existing duty of disclosure will be abolished.

Insurers will only have a remedy against the client for a breach of the duty of **fair presentation** if the insurer is able to show that:

- The non-disclosure or misrepresentation was deliberate or reckless and the insurer would not have entered into the contract for insurance at all in which event the Insurer may avoid the contract, refuse all claims and retain the premium paid; or
- If the Insurer would have written the contract on different terms, the insurer can elect to rely on those terms (e.g. provide for a relevant exclusion); or
- If the insurer would have increased the premium, the indemnity is reduced pro rate to the amount by which the premium would have been increased.

As Brokers, we are obliged to disclose all relevant information which is known to us, to the Insurer. This ensures that the cover provided to the client is appropriate. Please ensure that you share with us all relevant information related to the risk, if you are in doubt what is relevant or not, please let us know.


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Warranties and terms not relevant to the actual loss

A warranty is a term of an insurance contract which must be complied with exactly, any departure from its requirements constitutes a breach. It is a term whereby the Insured client undertakes to do a particular thing; confirms the existence of certain facts, or undertakes that condition/s will be fulfilled.

Warranties can be created in a number of ways:

Construction: A warranty may be implied into a policy where, compliance with the term goes to the root of the insurance contract and where the term is material to the risk.

Express term: A warranty can be expressly labelled as such.

Basis of contract clauses: Often found in proposal forms stating that the facts set out in the form are the 'basis of the policy' and are therefore construed as being incorporated into it. This type of clause has the effect of conferring the status of a warranty on all of the pre-contractual representations made by the prospective policyholder. The Act prohibits such clauses and it is not possible for insurers to contract out of this particular change.

Warranties will continue to be in place; however, under the Insurance Act 2015 there will be significant changes to the remedies which are available to the insurer for a breach of warranty. The current law allows an Insurer to be discharged from liability from the date of the event breaching the warranty, whether or not there was a causal connection to the loss. Under the Act, a breach of warranty will suspend, rather than discharge an Insurer's liability. The insurer will be liable to pay claims that arise after the breach of warranty has been remedied.

An insurer will not be able to rely on a term which is designed to reduce the risk of loss of a particular kind, at a particular location or time, if the insured can show that compliance with the requirement could have increased the risk of the loss which actually occurred.

Matters to consider:

Existing warranty obligations may be recast as conditions precedent to liability.

General 'sweep up' clauses may be used to convert all insured's obligations to conditions precedent to liability.

Basis of Contract clauses

A sweep up declaration in a policy / proposal form indicating that certain representations made are warranted to be true and accurate will be abolished for Commercial / Business Insureds.

Conditions precedent

Conditions precedent can be divided into the following categories:

Conditions precedent to the insurer coming on risk: This is imposed at the pre-contractual stage and provides that the insurer will not come on risk until certain conditions have been satisfied. e.g. a premium payment condition.

Conditions precedent to insurer's liability to pay a claim: This is usually connected to the claims process. The consequences of the breach will depend on the words used, and will generally allow the Insurer to decline a claim, but will not impact cover going forward. e.g. the requirement to notify a claim within a specific timeframe.

Conditions precedent can be created in a number of ways:

Specification of the consequences of a breach, even though this may not be labelled as a condition precedent, the wording of the clause requires the condition to be treated as such.

Express term: classified as being conditions precedent to an insurer's risk or liability for a claim.

Sweep up clause: provides that all conditions in the policy are conditions precedent and that failure to comply with them prejudices the policyholders cover in the event of a claim.

Fraudulent claims

Insurers will have the option to terminate the cover from the date of the fraudulent act, without returning the premium. The insurer will also be entitled to recover any sums paid to the Insured in respect of a fraudulent claim. The Insurer remains liable for any claims prior to the fraudulent claim. In the event of a fraudulent claim under a group insurance, the fraudulent claim will not affect cover provided to other parties.

Contracting out

Insurers will be able to contract out of any of the provisions relating to the duty to make a **fair presentation**, warranties and fraudulent claims, except for the provision relating to 'basis of contract clauses'. They will be able to substitute their own agreed terms provided they meet the transparency requirements stipulated in the Act. Any terms which would put an Insured in a worse position than they would be in under the Act must be **clear and unambiguous** and appropriately drawn to the attention of the Insured before the contract is entered into.

Should the Insurer / Reinsurer with which we place the business contract out of the Insurance Act, you will be specifically advised.

If you have any questions in relation to the Insurance Act and its relevance to you, please get in touch with your usual RFIB contact.