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IMPORTANT NOTICE TO POLICYHOLDERS – INSURANCE ACT 2015

There has been a fundamental change to Insurance Legislation as of 12th August 2016, when the Insurance Act 2015 came into force.

The Act will modernise Insurance Law & this guide seeks to explain some of the key provisions.

To Whom Does the Insurance Act Apply

The Insurance Act applies to all "non-consumer" Insurance policies agreed on or after 12th August 2016. It will also apply to policies agreed before this date, if the terms of the Insurance are varied (e.g. by amendment or endorsement) on or after 12th August 2016.

The Duty of "Fair Presentation of the Risk"

The Act requires a Policyholder to make "Fair Presentation of the Risk" to Insurers, for all new business policies as well as renewals.

What is a "Fair Presentation of the Risk"

A "Fair Presentation of the Risk" is a presentation made in good faith that tells the insurer about all *material facts or circumstances* that are *known or ought to be known* by *Senior Management* and by the person/s responsible for arranging the insurance following a *reasonable search*. The Information must be factually correct and presented in a *reasonably clear and accessible* manner.

There are certain italicized phrases, which are key to complying with the new Act:

1. *Material facts or circumstances*

Any fact or circumstance that would influence the decision of a prudent Insurer as to whether to offer insurance and if so on what terms; or failing that, sufficient information to put a prudent insurer on notice that it needs to make further enquiries to reveal those material facts or circumstances.

2. *Known or ought to be known*

The Act requires a Policyholder to disclose all material information that is actually known or ought to be known by it or the Insureds. For example a policyholder would breach the duty of Fair Presentation of the Risk by failing to disclose Material Information due to

- lack of or insufficient enquiries
- "turning a blind eye" because the answer might be damaging

3. *Senior Management*

This would include, but not be limited to:

- The board of directors;
- Individuals who are "decision makers" in the business:- this may include non-senior management; and
- Those responsible for arranging the insurance.

Facts known by the broker will also count here, as he is the Policyholders agent.

4. *Reasonable search*

Reasonable enquiries must also be made of any relevant third parties involved with the business, including external consultants, contractors and anybody insured by the policy.

5. Reasonably clear and accessible

Presentations should be clear to Insurers and brokers, to enable the risk to be properly assessed.

For example, Data Dumping of large amounts of information with no signposting is deemed unacceptable.

Unusual or known areas of concern and activity that could affect the Insurer's evaluation of the risk should be highlighted.

Ongoing Duty of Disclosure

The duty of fair presentation of the risk arises any time the insurance is varied, usually by endorsement or amendment. If the endorsement adds, for example, an additional Insured, the Policyholder will need to be sure that there is no other material change to the risk that should be disclosed to the Insurer. In addition, some policies may require that any changes in material facts, circumstances or expectations that arise while the policy is in force also be notified to the Insurer: in this case the duty of fair presentation and the Insurer's remedies for breach of that duty will also apply.

What are consequences of failing to make a "Fair Presentation of Risk"

The remedies open to Insurers vary depending upon the nature of the breach:

- Deliberate or Reckless Breach

This would allow the Insurer to:

a) Avoid the Policy from inception
b) Refuse all claims
c) Retain the premium(s)

An example would be if an Insured deliberately conceals known / material information from the Presentation of the Risk, or makes no effort to ensure it is accurate or complete.

- Non Deliberate or Non Reckless Breach

In all other cases, the following proportionate remedies will apply. Such remedies are based on the action that the Insurer would have taken had it known the true facts:

a) If the Insurer would not have entered into the Insurance Policy on any terms, then the Insurer can avoid the policy and refuse all claims but must repay the premium.
b) If the Insurer would have entered into the Insurance Policy but on different terms, then the policy would be treated as if those terms had applied from the inception. An example of this could be an increased excess or specific exclusions.
c) If the Insurer would have provided the policy but charged an increased premium, then the Insurer can reduce a claims payment in proportion to the premium actually paid & the premium which would have been paid. For example, if the premium should have been £100,000 rather than £75,000 then the insurer need only pay 75% of the claim.

It is for the Insurer to prove that it would taken any of the above actions.

Warranties

Prior to the Insurance Act 2015, a breach of Warranty would allow the Insurers to avoid a claim & cancel the policy, even if the breach was unconnected with the loss.

The Insurance Act has altered the above & has made Warranties "suspensive conditions". This

means that cover will be suspended for that period during which the Warranty is not complied with. Correspondingly, Insurers will be liable for losses that occur after the breach of Warranty is rectified (if indeed it is capable of remedy).

The Act also requires a connection between the breach of Warranty and the loss.

Basis of Contract

The Insurance Act 2015 also specifically removes the right of Insurers to use a "basis of contract clause" to convert information provided by policyholders into Warranties and thereby refuse to pay claims if part of a presentation or a proposal is inaccurate. Insurers are not permitted to Opt Out of this clause of the Act.

Fraud

Before the Insurance Act 2015, in the event of a fraudulent claim being made, an Insurer could argue that all cover under the policy should cease and the Insurer retain all premiums. Additionally, it was not clear whether any claim payments made before the fraud was established would have to be repaid. The position now with the Act is that Insurers may terminate a policy from the date of the fraudulent act and retain the premium. Claims for losses before the date of the fraudulent act are still covered.

Insurers' Opt Out

Under the terms of the Insurance Act, Insurers are able to Opt Out of certain aspects of the Act. Should that be the case Insurers must make this clear to the policyholder and explain clearly the disadvantages or advantages of their particular interpretation of the Act and we would make any such Opt Out clear to you too.

In Summary

1. The policyholder must have a clear understanding of the risks they wish to insure.
2. Risk Information should be presented and documented in such a way as to satisfy the duty of Fair Presentation of the Risk.
3. There must be an understanding within the business as to who has relevant information at all levels of the business.
4. There should be a sign off procedure reflecting that a reasonable search of all relevant information has been made.
5. There are now new proportionate remedies available to Insurers if a Fair Presentation of the Risk is not made.
6. The Act alters the effect of Policy Warranties and the relevance of the Warranty to the claim being made.

These are important changes to Insurance Law and if you are in any doubt as to what this means for you please contact us.