YOUR PERFORMANCE MEDIA INSURANCE ACT 2015

PERFORMANCE
FILM & MEDIA INSURANCE

The Insurance Act 2015

The Insurance Act 2015 (the Act) comes into force with effect from the 12th August 2016 and will apply to every commercial insurance policy. There has been no bigger change to the legislation governing insurance relating to clients in the commercial (non-consumer) sector since the Marine Insurance Act of 1906.

New disclosure rules will apply to all new “Business Insurance” (Business Insurance is any insurance which is not Consumer Insurance) policies and to any variations to existing Business Insurance policies.

Whilst the main changes apply to Business Insurance, there will be changes in relation to warranties, onerous provisions and fraudulent claims for all insurance policies whether “Consumer” or “Business”.

A Consumer is defined as; “an individual who enters into the contract wholly or mainly for **purposes unrelated to the individual’s trade, business or profession.”**

Important Changes

Duty of Disclosure

You will be expected to have a robust procedure in place to identify and verify information that needs to be disclosed to insurers for them to assess the risk.

On the face of it, this may appear to be a simple change of words – 'duty to disclose material facts' now becomes 'duty to make a fair presentation' – but this gives rise to a change in the expectations of insurers and accordingly the actions you will need to take. The process for identifying and presenting information about the business will now become more onerous and time-consuming. You should therefore work closely with your broker to be confident that you are meeting your obligations.

Insurer Remedies

Currently insurers can cancel your cover from outset and refuse to pay claims if you are in breach of a Warranty under the policy, irrespective of whether this has any bearing on the loss suffered. Under the Act, the remedies available to insurers take into consideration how a breach affects the insurer and the cover provided. Insurer responses should now be proportionate and not unfairly penalise policyholders.

Duty of Disclosure

This now becomes a duty to make a fair presentation of the risk. Essentially, this does not alter the fact that you need to disclose all material circumstances to the insurer prior to the commencement of cover, change to cover, or renewal in order for them to fully assess the risk presented and set appropriate terms for the granting of cover. However, the Act does now clarify (subject to this being tested in the courts) what is meant by a fair presentation, and what a firm is deemed to know.

You must therefore;

- Disclose all material circumstances known, or which ought to be known, by you. These might include special or unusual facts relating to the risk and particular concerns that led you to seek insurance. Sufficient information will need to be disclosed to put a prudent insurer on notice to make further enquiries. We will assist you in identifying the type of information that would be deemed to be 'material' for your specific circumstances.

To facilitate adequate disclosure you will need to:

- Undertake a reasonable search (what is deemed 'reasonable' will depend on the size and complexity of the business)to establish information;
    - Known by senior management. This means anyone playing a significant role in the making of decisions about how your business activities are to be managed or organised). This may extend beyond your main board, and such individuals may need to be educated as to what this entails.
    - Known by your insurance team (internal), or your broker. We will provide you with the information we hold about you, and you will then need to check this and update it as appropriate.
- Have a documented 'paper-trail'(paper or electronic communications) to demonstrate that a reasonable search has been undertaken, including how such responses were verified as being correct and made in good faith.
- Present information to insurers in a clear and structured manner so that the insurer can readily assess it. Providing ambiguous or poorly sign-posted information ('data dumping') is unlikely to satisfy your obligation. Clarity is paramount and we will agree the content and structure of this with you prior to submission to insurers.
- If an insurer is put on notice about a relevant matter in connection with the proposed insurance, they now have an obligation to make further enquiries. Prior to implementation of the Act they were not required to do so.
- The Act also states that certain information does not need to be disclosed. It is advisable to be cautious as any uncertainty could lead to a dispute with the insurer. The information which does not need to be disclosed is as follows;
    - Information already held by them
    - What an insurer writing this risk would reasonably be expected to know
    - Common knowledge
    - Matters that reduce the risk, or which the insurer has waived their right to
- If in doubt about whether something needs to be disclosed – disclose it

Insurer Remedies

Rather than simply cancelling cover and refusing to pay claims in the event of a misrepresentation or non-disclosure of material facts, insurers must now act in line with what they would have done if there had been a fair presentation of the risk.

It is still important to remember that it is still open to insurers to say that if a fair presentation had been made they would not have entered into the contract on any terms. They would then be able to avoid the contract and refuse claims.

The Act sets out the range of remedies available to insurers as follows;

- Breach of a warranty will result in insurer's liability being suspended rather than discharged. This is not applicable where the breach does not increase the risk, but the burden of proof for this rests with you.
- Subsequent compliance with the terms of the warranty will result in cover being reinstated. You should however bear in mind that compliance may not always be possible, for example where a warranty relates as to the construction of a building.
- In the event of fraud, this does not automatically bring the policy to an end. The insurer may;
    - Decline the claim (even non-fraudulent aspects)
    - Recover monies already expended in relation to the claim
    - Terminate cover with effect from the date of the fraudulent act. Cover would still be in force prior to the fraudulent act.
- Avoidance is still permitted, but isn't automatic, or the only remedy
- If the breach was deliberate or reckless the contract can be terminated from inception and the insurer may retain the premium. This must be proven by the insurer.
- If the breach was not deliberate or reckless;
    - If the insurer would not have written the risk they can avoid the contract but must repay the premium
    - If a higher premium would have been charged the claim can be reduced proportionately (e.g. if premium was £1,000, but would have been £1,500, claims reduced by 1/3rd - £500/£1,500). Some insurers have elected to opt-out of this part of the Act and instead intend to simply deduct the premium increase from the claim settlement.
    - If additional terms would have been applied, these are deemed to have been applied from inception/renewal. This can be in addition to charging a higher premium and any subsequent claim reduction. Furthermore, the insurer can retrospectively adjust previous claims if they are affected by the imposition of the new terms.

What else is changing?

Abolition of Basis of Contract Clauses

These turned information provided by the insured, for example on a proposal form, into warranties. If the information was incorrect this allowed insurers to terminate the contract irrespective of materiality.

- Specific warranties are still permitted, but not a sweeping provision turning all information into warranties.
- Although the difference between warranties and conditions precedent will diminishes, a claim may still be declined for something that happened whilst the policy was suspended due to breach.

Insurers and commercial customers may contract-out some of the provisions of the Act

It is not permitted to contract out of the abolition of Basis of Contract clauses

- It is currently uncertain how insurers will respond to this flexibility. To date the type of contracting-out that has been indicated by insurers may work in the favour of customers. For example where there is a breach of the 'fair presentation' provisions, rather than claims being reduced in proportion to the under-payment of premium some insurers will simply reduce the settlement by the shortfall in the premium paid. Whether this is beneficial will depend on the amount of premium increase requested and the amount of the claim settlement.
- You should agree with your broker whether you want them to approach insurers that have contracted out of the Act in any way and ensure that you appreciate the effect of what is proposed.

Damages for the late payment of insurance claims (proposed change)

- The Enterprise Act 2016 makes an amendment to the Insurance Act 2015 and, for policies incepting from 4 May 2017, insurers will be required to pay policyholders with valid claims within a reasonable time in relation to the size/complexity of the claim.
- Assessment of this will take into consideration the reasons for any delay and whether the insurer has acted reasonably in attempting to handle the claim promptly.
- The policyholder would need to show that a financial loss has been suffered and that they have also acted reasonably.

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