



Insurance Act 2015 Fact Sheet – October 2018

Key impact

The Insurance Act updates the responsibilities of policy holders to make a fair representation of the risk when applying for/renewing insurance. This will have an impact on rental companies when they are arranging motor insurance.

The legislation came into force on 12 August 2016.

Background

Since 2006 the Law Commission and Scottish Law Commission have been conducting a joint review to reform insurance contract law, with the intention to modernise it in such a way that it responds to the world in which we live in today; legislation set over a 100 years ago is out of touch and out of date.

This review was completed via a two phased approach, the first being the Consumer Insurance (Disclosure and Representations) Act 2012, aimed at the private individuals, followed by the Insurance Act 2015. This Act reforms post contractual issues for consumer (private individuals) and non-consumer (commercial policyholders) insurance contracts alike and for commercial policyholders, changes to pre-contractual obligations. The key provisions of the Act relate to disclosure, warranties, conditions and fraud.

Duty of Disclosure and Representation

It has always been the responsibility of the policyholder to disclose all material facts when seeking a quotation from an insurer.

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Advice should always be obtained from your own professional advisers before committing to a specific action.



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Whilst the 2015 Act continues to require such disclosure it also extends to include ‘a wider duty to make a fair representation of the risk’. This is perhaps one of the most important aspects that will require careful attention when sourcing insurance cover and at the same time, one of the most difficult to quantify, as there is no one answer that fits all.

However a ‘fair representation of the risk’ is: “a presentation that discloses, in a manner that is reasonably clear and accessible, every material circumstance which is known or ought to be known by an insured’s senior management, or those responsible for arranging the insurance following a reasonable search.”

This can be expanded on as follows:

- *reasonably clear and accessible* – the information must be presented in a way which would be reasonably clear and accessible to a prudent insurer. This is designed to prevent overly brief presentations but equally those that bombard the insurer with information/data etc. that gives no signposting or direction on what is particularly material.
- *every material circumstance* – a material fact is something that would affect the judgment of a prudent insurer in deciding whether to take the risk and, if so, on what terms. Broadly speaking, this is the same as under current law
- *known or ought to be known* – this includes knowledge which is actually known, or which should be known following a reasonable search
- *senior management* – this includes individuals who play significant roles in the making decisions
- those responsible for arranging insurance – this includes employees within the insured’s organisation who arrange the insurance, as well as third parties, including brokers. As a result, a broker’s knowledge of a material circumstance can be imputed to an insured even if the insured itself is unaware of it
- *reasonable search* – There is no ‘one size fits all’ answer to this, as what counts as reasonable is intended to be flexible and will be determined by the size and complexity of the business. The insured must take reasonable steps to ensure that it extends to any other person who may hold material information. This could apply to information held by the broker, other agents (e.g. advisers, outsourced service providers) and even (if reasonable) other third parties.

The duty is satisfied if either all material circumstances are disclosed by the business, or sufficient information is provided to put the insurer on notice to make further enquiries

Considerations for rental companies

Rental companies may wish to ask the following questions internally to determine whether they need to make changes on how they present their insurance risk:

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- What exactly is my business activity and is there anything special or unusual about our risk compared to other similar businesses that should be flagged clearly to insurers?
- What is the basis of the current policy cover?
- What data capture is necessary?
- What is the profile of my business and my customers?
- How is premium rated?
- Have you implemented any changes in risk management / customer qualification procedures to the business; if so please provide details, the reasoning behind such action and what impact this has had?
- Do I give sufficient lead in time ahead of renewal to complete the necessary processes of complying with the Act?
- Who is likely to count as 'senior management' and 'people responsible for placement of insurance' in our business?
- Do we ask enough questions of senior management at the moment or do we need to adapt our standard data gathering process to be more in-depth?
- Based on the structure of the business, who needs to be consulted as part of a reasonable search for the insurances we buy as a business?
- How much time should we allow for people to gather information and respond to us?
- What is the best format to do this in – formal written questionnaire, short discussions with key staff, site visits?
- How can we document that a reasonable search has been undertaken and signed off by appropriate people, in case we need to rely on it in court?

Other changes

Remedy for failing to make a fair presentation of the risk

Whilst the Act reminds customers of the continued need to disclose material facts, the focus is on making customers and insurers aware of the different remedies available in the event of an innocent, deliberate or reckless failure to make a fair presentation of the risk.

In the event of an innocent failure to make a fair presentation, where an insurer would have issued a policy albeit at a different premium, they will proportionately reduce the amount payable for a claim's settlement by comparing the premium that would have been charged with that actually charged. If the insurer would have applied different terms, these will apply at settlement of the claim.

In the event that a policy would not have been issued at all, an insurer may avoid the policy but will return the premium.

Only in the event of a reckless or deliberate failure to make a fair presentation, would an insurer have the option of avoiding the policy and not returning the premium.

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Basis of contract clauses (warranties)

Basis of contract clauses are abolished for all classes of insurance. These are clauses which incorporate all statements made in the proposal form as warranties in to the insurance policy.

Remedy for breach of warranty

All warranties are made remediable. If a business breaches a warranty, the insurer's liability is suspended for the duration of the breach. If the breach is remedied before a loss occurs, the insurer has to pay the claim.

Remedy for breach of terms designed to reduce particular types or risk (Conditions Precedent)

Where an insured breaches a term of an insurance policy (whether it is a warranty, condition or similar) which is intended to reduce the risk of particular types of loss, the insurer cannot refuse to pay a claim if the insured shows that the breach did not increase the risk of the loss.

Remedy for fraud

The option of avoidance – treating the policy as if it had never existed – has been removed. This means that the insurer is still on risk for claims made before the fraudulent act occurred. The insurer has the option to terminate the policy with effect from the date of the fraudulent act. The Act sets out the remedies available to the insurer in the event of fraud. If the customer exaggerates, makes a fraudulent claim, or uses fraudulent documentation, an insurer may refuse to pay the claim. They may also have the option to terminate the policy and retain the premium from the date of the fraudulent act.

Further information

This fact sheet has kindly been put together by Sentinel Insurance Solutions to assist members. For further information contact:

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