

# Client Update

## The Insurance Act 2015

### Key Considerations

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On 12 February 2015, the Insurance Act 2015 (“IA 2015”) received Royal Assent. The IA 2015 will come into force on 12 August 2016 and apply to all insurance contracts entered into wholly or mainly for the purposes of trade, business or profession, entered into or varied after that date. The IA 2015 includes various minor provisions relating to the Third Parties (Rights Against Insurers) Act 2010 which are intended to make it easier for third-party claimants to bring direct actions against insurers where an insured has become insolvent. The Third Parties (Rights Against Insurers) Act 2010 is still awaiting a statutory instrument to bring it into force. Together with the Consumer Insurance (Disclosure and Representations) Act 2012 (which deals with consumer insurance), the IA 2015 represents the most significant reform of English insurance law in over a century.

#### **DUTY OF FAIR PRESENTATION**

The IA 2015 places on a statutory footing the insured’s common law duty of full and frank disclosure. The IA 2015 imposes a duty on insureds to make disclosures in a manner that would be reasonably clear and accessible to a prudent insurer. The “accessibility” requirement is intended to prevent “data dumping”, i.e., disclosing a mass of data without highlighting material considerations.

Representations of fact by insureds must be “substantially correct” and representations of expectations or belief must be made in good faith. An insured must make a “reasonable search” of the information available to them, including information held by their agents or others who are intended to be covered by the insurance.

An insured will need to disclose: (i) every material circumstance the insured knows or ought reasonably to know; or (ii) sufficient information to put a prudent insurer on notice that the insurer needs to make further enquiries for the purposes of revealing the material circumstances.

A “material circumstance” for these purposes is anything that would or is reasonably likely to influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms.

### **REMEDIES FOR BREACH OF THE DUTY OF FAIR PRESENTATION**

Where the breach of the duty of fair presentation by the insured was deliberate or reckless, the insurer can avoid the contract, keep the premium and refuse to pay claims. Where the breach was not deliberate or reckless, the remedy depends on what the insurer would have done if a fair presentation had been made. If the insurer would not have entered the contract at all, it can return the premium, avoid the contract and refuse to pay claims. If the insurer would have entered the contract but on different terms, the contract is treated as if the different terms had been agreed. If the insurer would have charged a higher premium, the insurer can proportionately reduce the amount it pays on a claim.

### **WARRANTIES**

The IA 2015 abolishes the so-called “basis of contract” clauses in insurance contracts which turn an insured’s representations into warranties. Breaches of warranty that are irrelevant to the loss that occurs will no longer discharge insurers from liability.

Where the insured can demonstrate that failure to comply with a contractual term, including a warranty, could not have increased the risk of the loss which occurred, insurers will no longer be able to rely on the breach to exclude, limit or discharge its liability. A breach of warranty will discharge the insurer from liability for loss occurring after the breach. It will not discharge the insurer from liability for loss occurring before the breach or after the breach has been remedied.

### **FRAUDULENT CLAIMS**

The IA 2015 enables insurers to treat the insurance contract as terminated from the date of the fraudulent act. The previous common law position of insurers not being liable for fraudulent claims and being able to recover payments made to the insured in respect of a fraudulent claim will remain unchanged.

### **CONTRACTING OUT OF THE IA 2015**

An insurer seeking to contract out of the provisions of the IA 2015 must take sufficient steps to bring the relevant opt out term to the insured’s attention and ensure that the term is clear and unambiguous.

## CONCLUSION

Although it will be possible to contract out of the IA 2015, it represents a new chapter for insurers and insureds. It will be necessary to monitor the practical implications of these new developments and for market participants to consider how these changes will be implemented in their business.

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Please do not hesitate to contact us with any questions.