

Insurance Contract Law Reforms – Update on Current Position

9 March 2012

LATEST DEVELOPMENTS

The **Consumer Insurance (Disclosure and Representations) Act 2012** received Royal Assent yesterday, but will not be brought into force until 2013 at the earliest to give the industry one year to prepare for any necessary changes in advance. The Act will have no retrospective effect. The new provisions will require changes to underwriting practices by insurers, brokers, distributors, banks and intermediaries.

In this client briefing we highlight the main issues for clients to consider.

KEY POINTS

1. The Act relates to **consumer insurance only** and **abolishes the consumer's duty to volunteer material facts**. The consumer will instead be required to take reasonable care in answering the insurer's questions both fully and accurately. In volunteering any information, the consumer must take reasonable care to ensure that it is not misleading.
2. Remedies for the insurer, where they have been induced to enter a contract by a misrepresentation, will then be dependent on the consumer's state of mind.

In general terms, if the misrepresentation is:

- (a) **honest and reasonable**, the insurer must pay the claim;
 - (b) **careless**, the insurer will have a compensatory remedy based upon what it would have done had the consumer answered the question carefully; and
 - (c) **deliberate or reckless**, the insurer may treat the policy as if it never existed and decline all claims.
3. The Act also **abolishes "basis of contracts"** clauses.

IMPLICATIONS FOR CLIENTS

- **Proposal forms** may need to be recast, with simpler and tighter questions.
- Consideration will need to be given to any relevant **explanatory material** produced by the insurer and how "*clear*" and "*specific*" the insurer's questions are.
- Reviews of **sales processes and related staff training** will be required, with separate consideration most likely being needed for each product.
- Consideration will need to be given to the potential effects on **distribution arrangements** such as packaged accounts which include insurance policies e.g.

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- (i) the attribution of responsibility and **liability** for compliance with the Act between the parties; and
- (ii) the **requirements** for the consumer facing entity.

- On **renewal or variation** of an insurance contract, how clearly the insurer communicates the **importance** of answering any questions (or the possible consequences of failing to do so) to the consumer will help determine whether a consumer acted reasonably or not.

LEGAL CONSIDERATIONS

- Consideration will need to be given to:
 - (i) what **evidence** will be required to establish a consumer's state of mind;
 - (ii) what constitutes a 'new contract' to which the Act will apply? The explanatory notes state: "the Bill only applies to contracts made, and to variations (of earlier contracts) agreed, after commencement"; and
 - (iii) the impact on **sole traders and/or small businesses** which are excluded from the Act, but which currently have access to the Financial Ombudsman Service.

NEXT STEPS

Dec 2011: [Consultation Paper on Post-Contract Duties and Other Issues \(Business & Consumer Insurance\)](#): (responses due by March 2012)

- Damages for late payment
- Insurers' remedies for fraudulent claims
- Insurable interest
- Policies and premiums in marine insurance

For a summary of the consultation paper click [here](#)

2012: Consultation Paper due to be published on **Business Insurance Law: Pre-Contract Disclosure, Misrepresentation and Warranties**

2013: Bill due to be published on **Post-Contract Duties and Other Issues; Business Insurance Law; Pre-Contract Disclosure; Misrepresentation and Warranties (Business & Consumer Insurance)**

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COMMENT

The shift in the legal position provided for in the **Consumer Insurance (Disclosure and Representations) Act 2012** is designed to bring it in line with industry best practice and the standards that are currently imposed by the Financial Ombudsman Service.

The Act "...will align the law with both industry practice and the approach of regulators...We have taken a high-level approach, updating the principles set out in law to bring them into line with good practice, rather than attempting to set out prescriptive detail...[to] help to avoid the law becoming outdated again as market practice develops."

(Mark Hoban, the Financial Secretary to the Treasury before the House of Commons Second Reading Committee on 31 January 2012)

FURTHER INFORMATION & TRAINING

For more information or to enquire about any training requirements that you may have in relation to this subject please contact the person with whom you usually deal or Christian Wells / Clare Douglas

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