

THE INSURANCE ACT 2015 (THE 'ACT')

BRIEFING DOCUMENT

Changes to Your and Our Duties

1. Background

The Act is part of a package of legislation that has sought to reform insurance contract law for consumer, marine and non-consumer insurance.

The Act reforms post contractual issues for consumer and non-consumer insurance contracts, and pre-contractual obligations on non-consumer (business) policyholders to fairly present the risk.

The Act clarifies and strengthens insurance contract law such that the Insurer ('we' or 'us') and the Insured ('you') are afforded better protection as set out below.

2. When is the Act effective?

The Act will apply to all new or varied policies ('**Relevant Policies**') commencing after 12 August 2016 (the '**Commencement Date**').

Note: the Act will not affect existing policies unless their terms are varied.

3. Duty of fair presentation of the risk

Pre-contractual obligations on non-consumer (business policyholders)

3.1. The current position is that you have a duty to provide all information to us which is material to the risk, whether or not we requested such information (subject to various exceptions) (the '**Existing Duty**').

3.2. From the Commencement Date the Existing Duty will be replaced with a new **duty of fair presentation of the risk**. This means that you must:

- a) Disclose every material circumstance which you know or ought to know; or
- b) Failing the above, provide disclosure which gives us sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

3.3. The disclosure set-out in 3.2 must be in a manner which would be reasonably clear and accessible to a prudent insurer, and in which every material representation as to a matter of expectation or belief is made in good faith.

3.4. In the absence of enquiry, 3.2 does not require you to disclose a circumstance if:

- a) it diminishes the risk;
- b) we know it;
- c) we ought to know it;
- d) we are presumed to know it; or
- e) it is something as to which we waive information.

What do you know and ought to know?

3.5. You know what is known:

- a) to you (in the case of an individual insured);
- b) to those responsible for your insurance; and
- c) to those who are part of your senior management.

3.6. You ought to know what should reasonably have been revealed by a reasonable search of information available to you.

What do we know and ought to know?

3.7. We only know matters known to the individuals who participate in the decision to take the risk and, if so, on what terms.

3.8. We ought to know only:

- a) If an employee or agent of ours knows it, and ought reasonably to have passed on the relevant information to an individual mentioned in 3.7 above;
- b) the relevant information is held by us and is readily available to an individual mentioned in 3.7 above;
- c) things which are common knowledge; and
- d) things which we, offering insurance of this kind, would reasonably be expected to know.

What remedies are available to us for a breach of fair presentation of the risk?

3.9. The current position is that if you breach your duty to disclose we are entitled to avoid the policy entirely (i.e. treat the policy as though it never existed).

3.10. Under the Act our ability to avoid Relevant Policies will be limited as follows:

- a) We may only avoid the policy, refuse all claims and return the premium if either:
 - (i) we can show the breach of the duty to make a fair presentation was deliberate or reckless; or
 - (ii) we would not have entered the contract on any terms.
- b) If the breach was neither deliberate nor reckless and we would have entered the contract:
 - (i) but charged a higher premium, we may reduce proportionately the amount to be paid on a claim; or
 - (ii) on different terms (other than the premium), the contract is treated as containing those terms.

4. Abolition of basis of contract clauses

From the Commencement Date pre-contractual or pre-variation representations by you can no longer be converted by us into warranties.

5. Remedies for breach of warranty

5.1. Previously, breach of warranty in an insurance contract discharged us from our obligation to provide an indemnity from the moment of breach, even if the breach was subsequently remedied by you.

5.2. Breaches of warranty will now serve only to suspend our liability until the breach is remedied. Therefore, we are liable for valid claims which arise after the breach has been remedied.

6. Remedies for fraudulent claims

6.1. We are not liable to pay a fraudulent claim. If we have already paid you, we can recover the sum from you and terminate the contract without returning the premium with effect from the time of the fraudulent act. This means we are still on risk for claims made before the fraudulent act occurred and the option of avoidance – treating the policy as if it had never existed – has been removed.

6.2. Where a contract of insurance covers more than one party (a group of companies for example) and only one insured party submits a fraudulent claim, the outcomes described above are available to us only against the insured party who perpetrated the fraud. Cover for other insured parties is unaffected.

7. Terms not relevant to the actual loss

The Act now provides that, where you breach a term of an insurance policy (whether it is a warranty or otherwise) which is intended to reduce the risk of loss of a particular kind, or at a particular location or time, we cannot refuse to pay the claim if you show that the breach did not increase the risk of the loss that actually occurred.

8. Contracting out and good faith

8.1. A term in an insurance contract which puts you in a worse position than you would be under the provisions of the Act is only effective if it has been sufficiently drawn to your attention before the contract/variation is entered into and is clear and unambiguous as to its effect bearing in mind the circumstances of the transaction and the kind of insured in question.

8.2. Avoidance based on breach of the duty of utmost good faith, which previously underpinned contracts of insurance, is effectively abolished by the Act.

9. Third Party (Rights Against Insurers) Act 2010

The Act makes certain amendments to and brings into force the Third Party (Rights Against Insurers) Act 2010 (which makes it simpler to bring a direct claim against us where an insured is insolvent). It also facilitates the future amendment of that Act to accommodate a new insolvency regime.

Disclaimer: The contents of this update are not intended to serve as legal advice related to individual scenarios or as legal opinions nor should this update be considered as a substitute for taking legal advice.

Contact us

IF YOU WOULD LIKE TO CONTACT US WITH A GENERAL ENQUIRY REGARDING OUR PRODUCTS AND SERVICES, YOU CAN DO SO BY PHONE **01923 478111**.

Watford

EGALE 1, 80 ST ALBANS ROAD
WATFORD, HERTFORDSHIRE
WD17 1RP
www.cofaceuk.com

