Kennedys

Legal advice in black and white

The Insurance Act 2015: what you need to know

The Insurance Act 2015 (the Act) received Royal Assent in February 2015 and comes into force on or after 12 August 2016. It will apply to all policies that renew, incept or are varied after that date but the main implications are for non-consumer contracts. Everyone in the UK's insurance markets must take steps to prepare now.

Key changes

There will be a new duty on insureds in non-consumer contracts to make a "fair presentation of the risk" before an insurance contract is entered into, changing the current law under the Marine Insurance Act 1906.

There will be new proportionate remedies for breach of the duty of fair presentation.

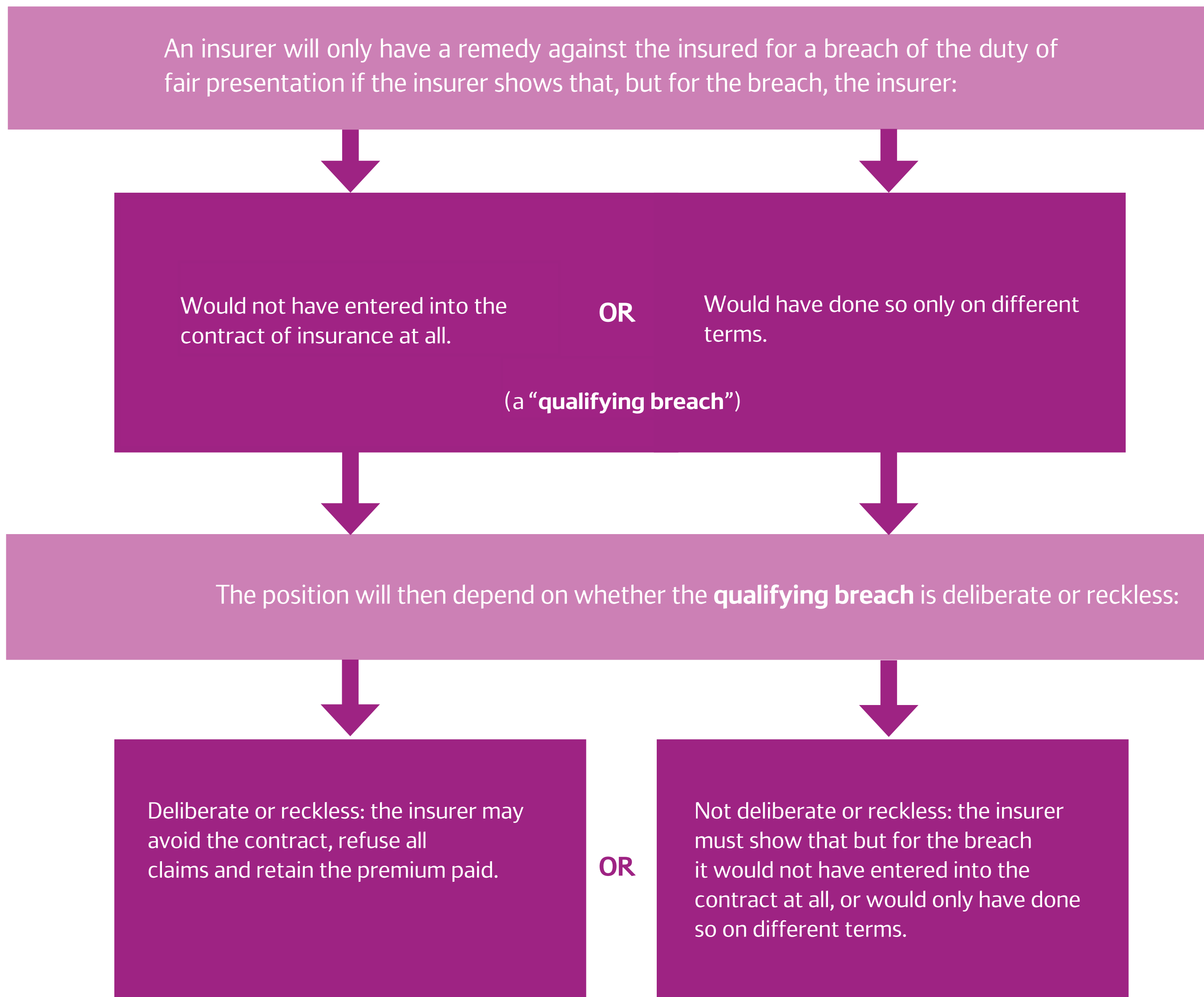
Contracting out of the new duty and remedies will be possible, subject to certain limitations, including transparency requirements.

Basis of contract clauses are abolished and the way in which warranties operate will change - cover will now be suspended for the duration of breaches of warranty only and insurers will not be able to rely on all breaches.

The law regarding fraudulent claims is codified in statute for first time.

Changes are made to allow the Third Party (Rights Against Insurers) Act 2010 to come fully into force.

Proportionate remedies



The available remedies for a non-deliberate or reckless breach reflect what the insurer would have done if it had known of the undisclosed information before entering into the contract:

- If the insurer would not have written the risk on any terms, the remedy remains avoidance of the contract.
- If the insurer would have written on different terms, the insurer can elect to rely on those terms (e.g. to provide for a relevant exclusion).
- If the insurer would have increased the premium, the indemnity is reduced pro rata to the amount by which the premium would have been increased.

The duty of fair presentation

Currently, in non-consumer contracts, an insured must disclose every material circumstance (i.e. every circumstance that would affect the underwriting judgement of a prudent insurer) known to them before the contract is concluded.

This obligation is replaced by a duty to make a fair presentation of the risk, which requires:

- Disclosure of every material circumstance that the insured knows or ought to know; or
- Disclosure of sufficient information to put the prudent insurer on enquiry.

Where such disclosure is made, the presentation will be fair if:

- Made in a manner that is "reasonably clear and accessible" to a prudent insurer; and
- The facts as represented are "substantially" correct and the representations as to expectation or belief are made in good faith.

There is no obligation on the insured to disclose a circumstance if it:

- Diminishes the risk
- Is known to the insurer
- Ought be known by the insurer
- Is information which is waived by the insurer
- Is something that the insurer is presumed to know

The new duty should hopefully reduce the practice of 'data dumping', where the insurer receives huge swathes of information without the material information being clearly identified. What an insured needs to do to comply with the duty will be fact sensitive, however, and is likely to be tested in the courts in due course.

For consumer contracts of insurance, the insured is already under a duty to take reasonable care not to make misrepresentations. Different remedies apply depending on the nature of any qualifying breach. This will not change.

Defining knowledge

Knowledge will include 'blind eye' knowledge, where a party suspects something but declines to investigate it. For an insured that is an organisation, the relevant knowledge for the purposes of the presentation of risk is that of "senior management" or whoever is responsible for the insured's insurance. What an insured ought to know (and realise it should disclose) will no doubt give rise to difficult cases, not least because a material circumstance remains defined by what would affect the underwriting judgement of the hypothetical prudent insurer.

To limit the scope for dispute, policy documentation should identify those individuals within an organisation whose knowledge is relevant.

For insurers, knowledge is generally that of those involved in the underwriting process.

Warranties

Currently a breach of warranty allows the insurer to terminate cover as at the date of breach – regardless of whether the breach was relevant to the likelihood of the loss occurring. Under the Act:

- Basis of contract clauses are abolished. This cannot be contracted out of.
- The insurer's liability for cover is suspended only from date of breach until the breach is remedied.
- Once the breach is remedied, the policy resumes.
- In certain circumstances, the insurer cannot rely on non-compliance relating to a particular kind of loss, location or time if the non-compliance could not have increased the risk of the type of loss occurring.

The timing of a breach is, therefore, key to determining whether a policy responds to a claim. Best practice would be to ensure timing is evidenced and documented.

Fraudulent claims

In the event of the insured making a fraudulent claim, the insurer:

- Is under no obligation to pay the claim.
- May recover any payments made in respect of fraudulent claims.
- May give notice to terminate the insurance cover as from the date of the fraudulent act.

If cover is terminated, the insurer may retain the premium paid under the contract.

The Act does not define 'fraud' or 'fraudulent claim'. Instead, common law principles will determine their meaning. The courts have consistently sought to deter all fraud regardless of whether the dishonest acts were material to underlying losses or the decision to pay particular claims.

Contracting out

Provisions for contracting out depend on whether the insured is a consumer or non-consumer:

Consumers – the insurer cannot agree terms that would put the consumer in a worse position than allowed for under the Act.

Non-consumers – the insurer can contract out where the terms would put the non-consumer in a worse position than allowed for under the Act, but only if the following transparency requirements of the Act are met:

- The insurer must take "sufficient steps" to draw the "disadvantageous term" to the insured's attention before the contract is entered into/the variation agreed; and
- The disadvantageous term must be "clear and unambiguous".

In practice, these requirements may often mean that an insurer is slow to seek to contract out of the provisions of the Act, since to do so would bring to the insured's attention any disadvantageous deviations from the default position under the Act.

The Third Parties (Rights Against Insurers) Act 2010

The 2010 legislation was enacted to reform the position under the Third Parties (Rights Against Insurers) Act 1930, principally to allow third parties to bring claims directly against insurers of insolvent insureds without first being required to bring proceedings against the insured to establish liability. However, the 2010 legislation as drafted did not reflect current insolvency law.

The Insurance Act 2015 contains various technical amendments to the 2010 Act to permit it to come into force.

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