The Insurance Act 2015

The Insurance Act 2015 (The Act) is a new piece of legislation that relates to commercial insurance which came into force on 12 August 2016. The Act implements reforms recommended by the Law Commission and updates current insurance contract law which was created over 100 years ago.

The Duty of Fair Presentation

Currently every material fact known should be disclosed to insurers, this is known as the duty of disclosure. If not; the insurer is entitled to avoid the policy and refuse all claims under it.

From the 12 August 2016, the duty of disclosure was replaced with a duty of fair presentation. This relates to all information that is material to the risk which must be disclosed prior to a contract being entered into.

In order to fulfil this duty of fair presentation to insurers, all information needs to be accurate in content and in an accessible format.

You and your insurance broker need to be able to demonstrate that a reasonable search has been conducted to ensure that you are both aware of any facts that may be material to the risk.

This means you liaising with key personnel within your business, including the Board but also people who have significant decision making roles or have detailed knowledge of your business.

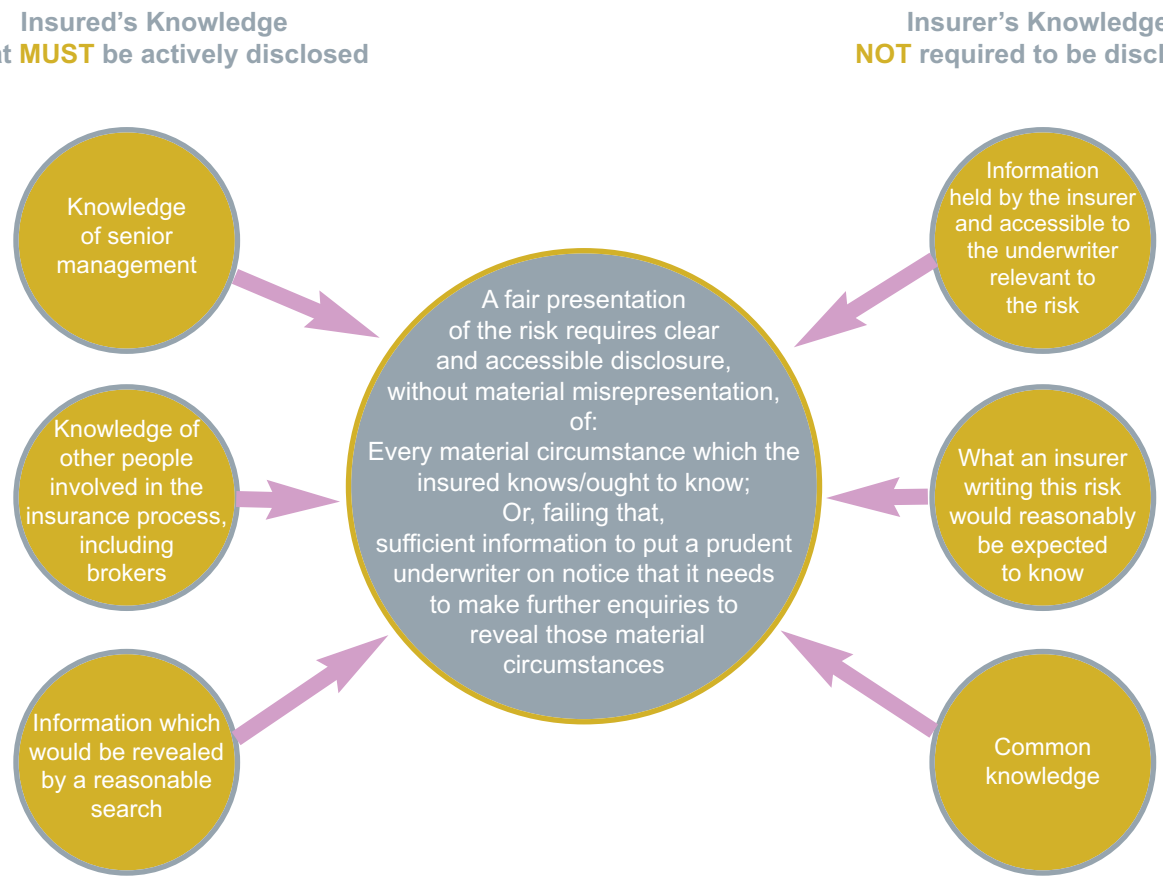
Even though the duty of disclosure has been replaced with the duty of fair presentation, there is still the requirement for all material information presented to be correct, this is no different from the existing Law and the test of this is also unaltered, in that “it would influence the judgement of a prudent underwriter to establish if they will accept the risk and on what terms”.

The courts will not look favourably on brokers who data dump; hence any reference to a website or particular piece of information must be signposted clearly by you and us.

Ryan’s will work with you to ensure that you are satisfied with the overall adequacy and fairness of the information provided and that a reasonable search has been undertaken. This means that we will continue to document conversations and meetings we have with you, share information presented to insurers and retain data and correspondence in a responsible and secure manner.

A fair presentation and provision of material information, should prompt an insurer to request additional information in areas where they require a better understanding of the risk. This applies prior to inception or renewal of any insurance policy, as after this point the insurer waives their right to request additional information.

The Duty of Fair Presentation: How it fits together



Basis of contract clauses are included in insurance documents (can be seen in Statement of Fact documents) and convert all statements made by you into warranties. If information is inaccurate, it may result in you facing an allegation of material non-disclosure, misrepresentation or an allegation of breach of warranty.

Currently a breach of warranty may mean that the insurer is discharged from its obligations from the date the warranty is breached, irrespective of whether the insurer has been prejudiced in any way by the breach. Cover is not reinstated even where the breach is remedied.

Basis of contract clauses will be abolished and this means that all warranties will become "suspensive conditions". This means that an insurer will be liable for losses that take place after breach of warranty has been remedied, assuming this is possible as some breaches can never be remedied. This means the contract will remain suspended for the rest of the policy term. For example, if there is a warranty that a building is built of brick and mortar when it is actually built of wood, then this breach can not be remedied. Hence, great care should be taken not to breach any warranties.

In addition, if a loss is suffered once liability has been resumed and the insurers can prove that something that occurred in the suspended period contributed to the loss, then the insurer does not have to pay the claim.

The changes with regard to warranties should also stop situations whereby an insurer can repudiate a claim where the loss is unrelated to the breach of warranty. For example, where there is a security warranty on the policy to install a burglar alarm and that is not done, insurers will not be able to refuse to indemnify in the event of a flood loss. However, as mentioned previously, this could affect the claim if the warranty had some bearing on the loss that occurred i.e. theft loss occurring when a burglar alarm is not fully functional.

The existing remedies for breach of duty of disclosure and a breach of warranty mean that an insurer has only one remedy – to avoid the policy and walk away from all claims, even if non-disclosure was inadvertent.

The remedies for material non-disclosure or misrepresentation will change so that it will be possible to avoid a policy and keep the premium only where the misrepresentation or non-disclosure was deliberate or reckless.

In all other cases (even where the insured is innocent), a scheme of proportionate remedies may be applied:

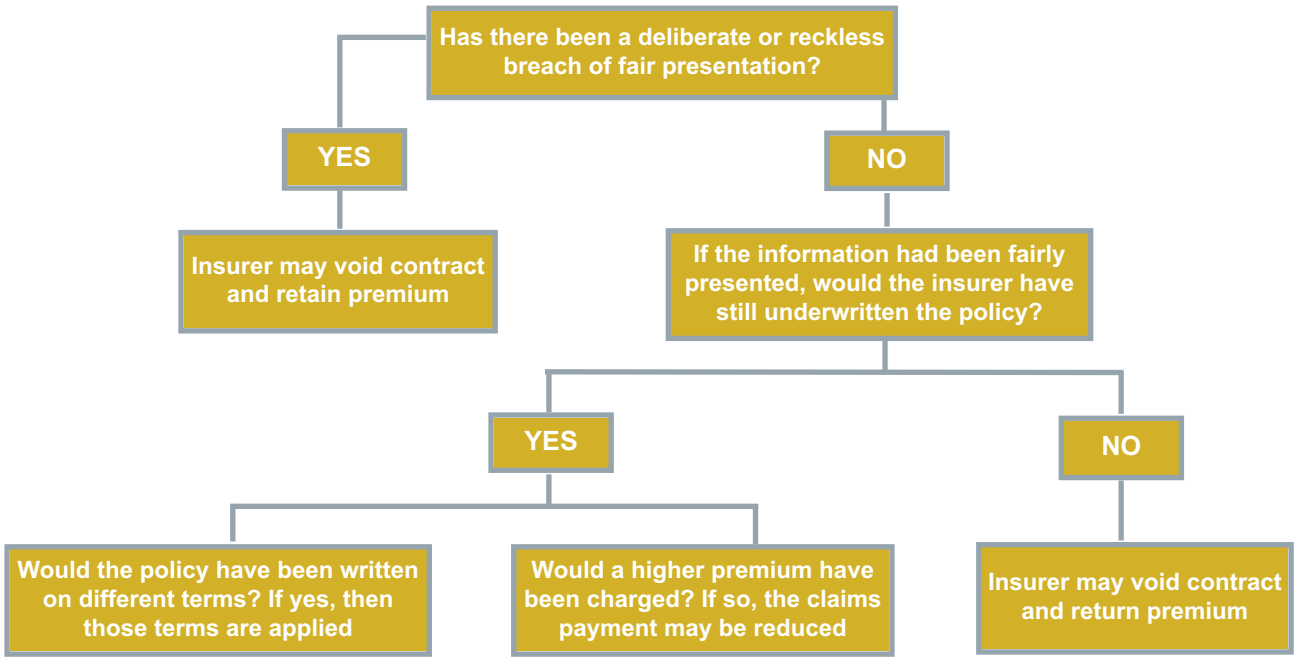
- Where the insurer would have declined the risk altogether, the policy can be avoided, with a return of premium.
- Where the insurer would have accepted the risk but included a contractual term, the contract should be treated as if it included that term from inception and/or renewal (irrespective of whether the insured would have accepted that term).

- Where the insurer would have charged a greater premium, the claim could be scaled down proportionately.

What an insurer would have done at the time if it had been presented with all facts is subjective. It may be hard to disprove that an insurer would have viewed a certain breach as so serious that they would not have written the risk at all.

In order to have any remedy at all under the Act for non-disclosure or misrepresentation, the insurer will require the same proof currently required to avoid a policy.

Remedies



Remedies for fraudulent claims The law can be unclear but at the moment, an insurer is not liable to pay a fraudulent claim. It can avoid the policy and can recover any sums already paid in respect of it.

Under the Act, an insurer will also have the option of terminating the contract from the date of the fraudulent act (not the discovery of it), without any refund of premium.

The insurer can then refuse to pay any claims from that point onwards (but will remain liable for legitimate losses before the fraud).

The Act does not define what a fraudulent claim is, but we expect it to become clear in the future.

In respect of Group insurances and fraudulent claims, the Act makes special provision for situations in which a member of a group insurance policy (i.e. a policy arranged by one person for a number of people such as Group companies) makes a fraudulent claim.

Where this happens, the insurer will have a remedy against the fraudulent member but it will not affect the other members or the insurance policy as a whole – cover will remain in place for the other “innocent” beneficiaries.

Contracting out Contracting or opting out, means that insurers could include a disadvantageous term to your policy to change the basis of cover.

The Act has not been created with the intention for insurers to opt out and we believe that we will not see this extensively in mainstream business insurance. We will work with you and insurers in the event that opting out is applied to your policy to ensure that it is appropriate, proportionate and that you are aware of the terms applied. Insurers are, however, not permitted to opt out of basis of contract clauses.

What this means for you The Act will provide a new framework for insurance contracts and as with all new statutes, there is a process of consultation and interpretation within the industry before we can be clear on what this means.

A key area that we have identified as being one where you will require most support and guidance is that of the duty to undertake a reasonable search and ensure a full disclosure of material information. This will inevitably place a higher burden on you in terms of the risk information you provide, and it is important that you make (and can evidence this) a full and effective enquiry within your business ensuring that you collate information from the appropriate people. Ryan’s are working

with insurers, and this will continue to be the case through to implementation in August, to understand their approach and anticipate any changes they will make. Some forward thinking insurers have already started to make changes and Ryan's will work with them to assist you and ensure that all information is presented to them.

What remains important is the need for you to continue to disclose all material facts. If you fail to do this it may mean that there is a very real risk that insurers may make changes to your cover and ultimately your claim may not be paid.

Ryan's will keep you updated about the Act; and in the meantime if you have any doubts about facts considered material, you should discuss them with a member of your Ryan's team.