THE CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) ACT 2012

The Consumer Insurance (Disclosure and Representations) Act 2012 ("the Act") came into force on 6th April 2013. The main effects of the Act are to (1) change the disclosure obligations for consumer insurance and (2) make the remedies available to insurers more proportionate if these obligations are breached. Insurers are prohibited from contracting out of the Act, so cannot force consumer insureds to agree different terms.

It is important to note that the Act only changes the law for consumer insurance, the position concerning business insurance currently being the subject of a separate consultation process by the Law Commission.

1. WHAT IS THE DEFINITION OF CONSUMER INSURANCE UNDER THE ACT?

Consumer insurance is defined as insurance bought by individuals "wholly or mainly for purposes unrelated to their trade, business or profession". Mixed-use insurance which covers both private and business use may therefore be covered by the Act depending on its main purpose. If it is unrelated to a trade, business or profession, for example a private motor cover that included a limited amount of business use, it would probably be treated as consumer insurance. On the other hand, a policy for a taxi used only occasionally for private use would probably not be.

2. WHAT IS THE NEW DUTY TO DISCLOSE UNDER THE ACT?

Prior to the Act coming into force a consumer had a duty to disclose all material facts to an insurer prior to placement. "Material facts" are those that an insurer would consider material to its underwriting of a risk. The Act replaces this duty with one to take reasonable care not to make a misrepresentation to an insurer. As before, this duty exists prior to placement, on renewal and on a variation of a contract.

Importantly, the Act reverses much of the burden of disclosure. Consumer insureds no longer have to volunteer all material facts to insurers, but instead have to answer questions posed by the insurer – although they have to answer those questions honestly and in doing so have a duty to take reasonable care not to make a misrepresentation.

3. BEWARE AT RENEWALS

The Act says that a failure to comply with a request from an insurer for confirmation, or amendment, of details previously provided by a consumer could amount to a misrepresentation. As well as presenting a danger where insurers ask for confirmation of details provided at any time over the telephone, this could be a particularly significant issue on renewal, and Members need to be wary of requests from insurers asking if anything has changed.

4. WHAT IS "REASONABLE CARE"?

Whether reasonable care has been taken in any particular situation will always be dependant on the facts at the time, but the standard to be applied is that of a reasonable consumer. What would constitute acting as a reasonable consumer will also need to be determined in the light of all the relevant circumstances, but factors that may need to be taken into account will include:

1. The type of consumer insurance in question and its target market.
2. Any explanatory material or publicity produced or authorised by the insurer.
3. How clear and specific the insurer's questions were.
4. In the case of a question posed in relation to renewal or variation, the importance the insurer communicated it would attach to answering that question.
5. Whether or not an agent was acting for an insurer.
6. Any particular characteristics or circumstances of the actual consumer which the insurer was, or ought to have been, aware of.

If a consumer accurately answers all of an insurer's questions in a proposal form this should discharge its duty. If a consumer does not answer a question and the insurer still proceeds with the insurance this is also likely to discharge the consumer's duty, as the insurer will have been put on alert by the absence of an answer and should have reverted to the insured if it considered the position was inadequate.

The Act gives insurers a remedy in those cases where a consumer insured fails to take reasonable care to ensure that the answers given to the questions the insurer has posed are honest and accurate – if, as a result, a "qualifying misrepresentation" has been made.

5. WHAT IS A "QUALIFYING MISREPRESENTATION"?

A "qualifying misrepresentation" is made if an insurer can show that without the misrepresentation it would not have entered into the contract or would have done so on different terms.
There are two types of qualifying misrepresentations:

- Deliberate or Reckless misrepresentations: if the consumer knew it was untrue or misleading (or did not care either way) and knew (or did not care) that the matter to which it related was relevant to the insurer.
- Careless misrepresentations: a misrepresentation that is not deliberate or reckless.

In each case the burden of proving a misrepresentation lies with the insurer.

6. WHAT ARE AN INSURER'S REMEDIES FOR QUALIFYING MISREPRESENTATIONS?

Before the Act came into force a failure to disclose material facts gave an insurer the draconian right to avoid the policy. The Act preserves the right to avoid in cases where a deliberate or reckless misrepresentation has been proved to have been made, but more proportionate remedies have been introduced for cases where a

careless misrepresentation has been made. These remedies are based on what the insurer would have done had there been no misrepresentation:-

- If the insurer would not have entered into the contract on any terms, it can avoid the policy.
- If the insurer would have imposed different terms it may choose to treat the contract as if those terms applied. If, for example, it would have included a particular exclusion and the claim falls within that exclusion, the insurer will not be obliged to pay the claim. If the insurer would have charged a higher premium, any claim under the policy can be reduced proportionately.

7. "BASIS OF CONTRACT" CLAUSES

The Act abolishes, for consumers, "Basis of Contract" clauses that are commonly used in proposal forms or elsewhere that seek to turn representations made by a consumer into warranties.

8. SUMMARY

In summary, the Act provides that:-

1. if a consumer's misrepresentation was honest and reasonable by the standards of a reasonable consumer the insurer must pay the claim.
2. if the misrepresentation was deliberate or reckless the insurer may avoid the contract.
3. if the misrepresentation was not reasonable by the standards of a reasonable consumer but was careless (rather than deliberate or reckless) the insurer has a proportionate remedy based upon what it would have done if the misrepresentation had not occurred.

The above changes reflect the approach of the FOS in consumer insurance cases so, in practice, the Act may not have amounted to a substantial change. However, it has raised a question as to what disclosure warnings brokers must give to their insured clients.

9. REVISED DISCLOSURE WARNINGS

Since the Act has been in force brokers need to consider the advice given to their clients, including any standard disclosure warnings which may be used on email, renewal invitations, quotations, cover notes, Broker Insurance Documents etc.

Whilst the Act introduces changes to the way in which a Consumer Insured's disclosure obligations will be fulfilled, the position in relation to Business Insureds will remain unchanged at least until the Law Commission has completed its review of the law of business insurance. Although some changes to the law are expected, they are unlikely to take effect before 2015 at the earliest.

As a result, brokers will have an exposure if the wrong advice is given to a client about the duty which it has. Brokers need to ensure that all staff are aware of the changes which the Act has brought, and proper procedures need to be in place to assist brokers in establishing whether the client they are dealing with is a Consumer

Insured or a Business Insured. An appropriate explanation and advice can then be given.

10. STANDARD WARNINGS

In light of the above considerations, and the frequency with which standard warnings are given, one standard warning on broker documentation that can be used for consumer and non-consumer clients is likely to be preferable unless a broker only deals with business insureds. A suggested standard warning is:-

YOUR DUTY OF DISCLOSURE:

*If you are a **consumer insured** (an individual buying insurance wholly or mainly for purposes unrelated to your trade, business or profession) you have a duty to take reasonable care to answer the insurer's questions fully and accurately and to ensure that any information that you volunteer is not misleading. This duty exists before your cover is placed, when it is renewed and any time that it is varied, and your policy wording may provide that it continues for the duration of the policy. If you do not do this, your insurer may be able to impose different terms on your cover, may charge you a higher premium or, in some circumstances, may be able to avoid your policy from inception and any claims under it would not be paid.*

*If you are a **business insured** (i.e. not a consumer insured) you have a duty to disclose all material facts to the insurer before your cover is placed, when it is renewed and any time that it is varied. Your policy wording may also provide that this duty continues for the duration of the policy. A material fact is a fact which may influence an insurer's judgement in their assessment of a risk, including its term and pricing. If you are in any doubt whether a fact is material we recommend that it should be disclosed. Failure to disclose a material fact may entitle an insurer to avoid the policy from inception and any claims under it would not be paid.*

11. PROGRESS FOR BUSINESS INSUREDS

Business insurance has been the subject of a separate consultation process by the Law Commission. This has taken longer than initially estimated and the Law Commission now hopes to publish its final report and draft Bill by Summer 2014. New legislation is unlikely to come into force before 2015 at the earliest to implement the changes but, in contrast to the position with the new consumer legislation, it is anticipated that the parties will be free to agree to contract out.

12. ACTING FOR INSURERS

Where Members get involved in the preparation of questions to be asked on behalf of insurers they will need to obtain insurers' confirmation that the questions meet their specific criteria before they are used.

13. RISK MANAGEMENT MESSAGE

Following implementation of the Act in April 2013, Members need to ensure that they:

- distinguish between consumer and business insured clients at the earliest opportunity;

- advise consumer insureds to answer all insurers' questions, taking reasonable care not to make any misrepresentations and to comply with any requests to confirm or amend any details provided, particularly at renewal;
- advise business insureds of their duty to disclose all material facts to insurers and provide further guidance as to what may be material, as appropriate;
- continue to advise business insureds of the dangers of 'Basis of Contract' clauses in proposal forms, which will have been abolished for consumer insureds but not business insureds;
- change any standard warnings to ensure that they advise clients of the different disclosure obligations of consumer and business insureds (unless a Member is certain that it does not deal with any consumer insureds).

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