COVINGTON

The UK Insurance Act 2015: An Update

February 17, 2016

Insurance

The Insurance Act, which received Royal Assent and became law in the United Kingdom in February last year, will apply to insurance policies entered into on or after August 12, 2016. It contains the most significant changes to UK insurance law for corporate policyholders for over a century. This is an update on recent developments concerning the Act.

Reactions to the Insurance Act

Policyholders continue to expect that the Act will improve their legal position from August 2016. However, they have understandably been seeking certainty on the effect of the new Act, looking in the first instance for indications from insurers and brokers as to how certain aspects of the Act will work in practice, with particular emphasis on the fair presentation provisions. Those provisions introduce disclosure obligations for policyholders that will require policyholders and their brokers to engage in more thoughtful collection, collation and submission of data to insurers.

The UK Risk Managers' Association, AIRMIC, published a survey of its members in November 2015 that showed that almost three quarters had to date received no guidance from their insurers and over half had had no relevant information from their brokers. Only around a quarter had discussed future disclosure requirements with their insurers.

Policyholders' concerns have been fuelled by the following suggestions/developments:

- The view that insurers are more likely to try to use the remedies available to them under the Act for a policyholder's breach of its duty of fair presentation: Those new remedies have been characterized as fairer and more proportionate than the old blanket remedy of avoidance *ab initio* (in the US, rescission). But over half of AIRMIC members in the recent survey felt that some insurers were more likely to invoke these facially less draconian remedies to challenge claims under the new Act.
- The publicizing of ways in which insurers might be able to circumvent the effect of the new law: For example, insurers may re-cast warranties as conditions precedent, and thereby continue to deny coverage for a claim even if the breach of warranty does not actually contribute to the policyholder's loss.
- Indications that the judiciary may interpret the much more prescriptive disclosure regime under the Act strictly and against the interests of policyholders: In a recent British Insurance Law Association mock trial, the UK Supreme Court judge, Lord Mance, who is the foremost insurance law specialist on the Supreme Court panel, found that a corporate policyholder had breached its duty to make a reasonable search for material information because, following the departure under a cloud of a key employee, it had inadvertently failed to make enquiries of an external consultant who had had relatively limited contact with the company. This was an outcome that surprised many English lawyers and insurance market participants.

- The fact that, although the new legislation helps policyholders by providing a checklist from which to prepare a fair presentation, it also gives insurers a checklist to probe a presentation for deficiencies.

These concerns confirm that policyholders must remain vigilant as regards the impending changes and take the steps listed in our previous alert, which are repeated, with some additions, below.

Insurers' "Early Implementation" of the Act

Certain insurers have indicated that they will start implementing the spirit of the Act before August 2016 by, for example, removing all "basis of contract" clauses from their wordings, using the new remedies for breach of the duty of fair presentation instead of the old one, and only relying on breaches of warranty where they cause the loss that is the subject of the claim made by the policyholder.

Nevertheless, there appear to be differences in how each insurer intends to anticipate the Act. Policyholders should review carefully all policy materials that purport to do this: they should not assume all insurers subject to the Act will apply all of its changes favorably to them. Furthermore, the relevant insurers have not published guidance on their expectations as regards the policyholder's duty of fair presentation.

The Revival of Damages for Late Payment of Claims

The UK Treasury removed from the draft Insurance Bill, before it reached Parliament, a provision that created an implied term in all insurance contracts that an insurer must pay any sums due within a reasonable time, for fear that opposition to that provision might prevent the Bill from being passed as an uncontentious Bill before the General Election in May 2015.

The Government has now re-introduced this provision in the draft Enterprise Bill, which started its life in the House of Lords in September 2015. As of February 2016, it has reached the House of Commons in substantially the same form as it had when it was introduced, with the exception of the addition of a one year time limit for bringing claims, following insurer pressure.

Comment

In light of the new legislation, policyholders should consider steps that include the following:

- Review in consultation with their brokers and with input from their legal advisers the extent to which they:
  - need to modify their procedures for searching for, assembling and producing information in connection with an insurance placement, and the timing of these modifications to their procedures;
  - could propose to insurers any modification or clarification of the forthcoming presentation obligations - for example, seeking agreement from the insurer as to the extent of a reasonable search for information that would be required as part of an application for insurance or the format or extent of the presentation; and/or
  - should try to agree with insurers that all or some of the provisions of the new Act are deemed to apply to new business or renewals before the Act is brought into force in August 2016.

- Review carefully all changes in policy wordings proposed by insurers and be vigilant for efforts by insurers to rely on contracting-out language that could remove all or part of the advantages of the new legislation. Such efforts can be expected even before the legislation takes effect.
- Also be vigilant for insurers seeking to increase premium to compensate for a perceived reduction in their options to take action where there has been non-disclosure.
- Consider negotiating contractual provisions (such as interest or payment of collection costs) that may assist in case of late payment, in the current absence of statutory assistance.

If you have any questions concerning the material discussed in this alert, please contact the following members of our firm:

Richard Mattick	+44 20 7067 2023	rmattick@cov.com
Alexander Leitch	+44 20 7067 2354	aleitch@cov.com
John Buchanan	+1 202 662 5366	jbuchanan@cov.com
David Goodwin	+1 415 591 7074	dgoodwin@cov.com
Benedict Lenhart	+1 202 662 5114	blenhart@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues.

© 2016 Covington & Burling LLP