

A new insurance bill is in the pipeline



Fabien Lerede
Syndicate Claims Director
+44 20 3320 8898
fabien.lerede@ctplc.com

- The bill will repeal the long-established duty of disclosure upon the assured and their brokers, replacing it with a duty to make a fair presentation of the risk.
- The bill codifies the current case law which provides that the insurer is not liable to pay a fraudulent claim or may recover any sum already paid in respect of that claim.
- The bill will address gaps in the Third Parties (Rights against Insurers) Act 2010 by adding all forms of administrations under the Insolvency Act 1986.

A new insurance bill is due to be introduced into Parliament in July 2015 which, if enacted, will significantly reform insurance contract law in England and Wales. The purpose of this article is to examine the key changes that will be brought about by this piece of legislation.

If enacted, the Insurance Bill (HL Bill 39) will apply to all insurance contracts worldwide that are governed by English law and could have the potential to impact upon all our members since it amends both the Marine Insurance Act 1906 (MIA) and Third Parties (Rights against Insurers) Act 2010.

Changes to the duty of disclosure

The bill will repeal the long-established duty of disclosure imposed upon the assured (section 18 MIA) and their brokers (section 19 MIA) and replace it with a duty to make a fair presentation of the risk. It will also abolish the right to avoid an insurance contract for breaching the duty of utmost good faith placed upon both parties (section 17 MIA).

This “duty to make a fair presentation of the risk” requires the assured to disclose “every material circumstance which he knows or ought to know” or in the alternative provide sufficient information to put the insurer on notice that it needs to make further enquiries for the purpose of revealing these material circumstances. It also imposes a duty not to make misrepresentations.

In many ways, the bill effectively codifies principles that have already been developed by the courts; requiring both parties to play an active role in the process that leads the insurer to decide the terms upon which it intends to insure a risk.

Remedies for breach of duty

The real change achieved with the reform is in respect of the remedies for breach of the ‘duty of fair presentation of the risk’. Whereas avoidance is currently the only remedy, the bill intends to introduce a regime of proportionate remedy. If this breach of duty is deliberate or reckless, the insurer will still have the right to avoid the contract. Otherwise, its remedy will depend upon the action it would have taken had a fair presentation of the risk been made. In practice, the insurer will try to demonstrate either that it would never have entered into the contract (but return the premium) or it would have charged higher premium (thereby reducing the claim payment in proportion to the underpayment of premium).

Changes to law on warranties

The bill prohibits ‘basis of contract’ clauses inserted into an insurance policy that purport to convert all representations made by the assured in connection with a proposal of insurance or a proposed variation of the policy into warranties.

The bill will not prevent an insurer from inserting warranties into the policy as long as it has been expressly agreed with the assured. However, it will change the position with regard to the remedy in the event of breach of a warranty. Whereas the law currently operates to discharge any liability that the insurer may have from the moment

of the breach, the new law will suspend the insurer's liability from the moment of the breach up until the breach has been remedied. As such warranties are viewed as a risk control measure, this is actually in line with the current practice of the club.

Changes to insurers' remedies for fraudulent claims

Practically, the bill codifies the current case law, which provides that the insurer is not liable to pay a fraudulent claim or may recover any sum already paid in respect of that claim. It will also allow the insurer to treat the contract as having been terminated with effect from the time of the fraudulent act. At this juncture, it is important to highlight that, from a P&I perspective, the bill will not apply in the event that a third party commits a fraud against the member who then seeks reimbursement from the club. For example, a crew member receives compensation from a member for an injury which is reimbursed by the club, but it later transpires that the crew member had committed a fraud.

Contracting out

As far as non-consumer insurance is concerned, the insurers will be allowed to contract out of these new provisions provided that they have taken sufficient steps to draw any 'disadvantageous term' to the assured's attention.

Amendments to the Third Parties (Rights against Insurers) Act 2010.

The Third Parties (Rights against Insurers) Act 2010, which received Royal Assent over four years ago, was intended to make it easier for a third party to pursue a claim directly against the liability insurers where the insured is insolvent. However, it has not come into force because it failed to include a wide range of possible administrations under the Insolvency Act 1986 and to take account of recent developments in insolvency law.

The bill will address these gaps by adding all forms of administrations under the Insolvency Act 1986 and accommodating future changes in the law, which will ensure that third parties can recover compensation directly from insurers. From a P&I point of view, the bill should have no real impact since the 'pay to be paid' defence currently available to P&I clubs will survive. The only circumstances where clubs will no longer be able to rely on the defence of prior payment are in respect of crew death or personal injury.

Next steps

The Insurance Bill is likely to be enacted into law before the next general election in May 2015. The progress of the bill and possible amendments to the draft can be monitored on the **UK Parliamentary website**. We will report any possible amendments to the bill as it goes through Parliament on our **website**.

