

Update

The impact of the Consumer Insurance (Disclosure and Representations) Act 2012 on private yacht and pleasure craft insurance

Key provisions of the Consumer Insurance (Disclosure and Representations) Act 2012 (the “Act”) come into force on 6 April 2013.

The Act will impact the consumer yacht and pleasure craft market. Underwriters and brokers of these risks need to be aware of the key provisions of the Act and its practical implications from both an underwriting and claims perspective.

Background

The implementation of the Unfair Terms in Consumer Contracts Regulations 1999, establishment of the Financial Ombudsman Service in 2001, publication of ICOBS and recent English case law have all contributed to the development of a pro-insured climate in the consumer insurance sector. An overhaul of the consumer insurance law regime itself has been under consultation by the Law Commission since 2006. With the main provisions of the Act now entering into force we consider in this article the Act's terms and practical effect.

Insured's pre-contractual duties

A consumer has a “*duty...to take reasonable care not to make a misrepresentation to the insurer*” prior to placement or amendment of a policy. This provision limits the general duty of utmost good faith enshrined in s17 of the Marine Insurance Act 1906 and replaces ss18-20. Instead of a duty on the insured and the insured's agents to disclose (ss18 and 19) and not misrepresent (s20) material facts, the burden shifts to the underwriter to ask for specific information which the underwriter wants to know when deciding whether and on what terms to write the risk. Broad, catch-all questions such as “*Are you aware of*

any other information that would be relevant to this insurance application?" may have only limited effect. Underwriters will be expected to ask clear, unambiguous questions. Underwriters must strike a balance between framing specific, targeted questions and not asking an excessive number of questions.

Whether the insured has taken "reasonable care" to answer those questions will be an objective test looked at in context – an application for insurance for a mega-yacht presented by a specialist and experienced broker would likely give rise to different considerations to an individual's application for cover for a rib or dinghy.

The underwriter will need to pay careful attention to an insured's responses to questions. There is no duty on an insured or their broker to draw an underwriter's attention to a particularly important answer. The underwriter will be deemed to have knowledge of any information included on the insured's application or proposal form. If a question is left unanswered or is ambiguous and the underwriter does not press for an answer or for clarification, the underwriter may be deemed to have waived the information the question requires so there would be no misrepresentation.

Remedies

If an underwriter can establish that there has been a misrepresentation through lack of reasonable care and that, but for the misrepresentation, the underwriter would not have written, renewed or varied the risk (or would have only done so on different terms) the underwriter may have a remedy. The nature of the remedy will depend on the severity of the misrepresentation. If the misrepresentation was "deliberate or reckless", the underwriter may be entitled to avoid the contract (and claims) and need not return premium. However, this is and is intended to be a high evidential threshold. If a misrepresentation is found to be "careless", the remedy will depend on an assessment of the effect of the misrepresentation. If the underwriter would have simply charged a higher premium had there had been no misrepresentation, the underwriter will be entitled to "reduce proportionately the amount to be paid on a claim."

Basis of contract clauses

Basis of contract clauses, which seek to convert pre-contractual representations made by an insured in a proposal form into policy warranties, are no longer effective in consumer insurance policies. Clauses of this nature have long been of questionable status in relation to consumers in view of the Consumer Contracts Regulations 1999. The Act clarifies the position.

To what and to whom does the Act apply?

The Act applies, subject to minor exceptions, to English, Welsh, Scottish and Northern Irish consumer insurance contracts entered into on or after 6 April 2013. It will also apply to consumer insurance policy renewals or variations, for example endorsements, agreed after that date even if the policy was issued prior to that date.

"Consumer" under the Act means an individual acting wholly or mainly for non-business purposes. If a policy covers mixed business and non-business use of the insured vessel, the question whether the insured is a consumer will depend on the main purpose of the insurance. If the main purpose is to cover business use e.g. whilst the vessel is chartered to third parties, the Act will not apply and existing marine insurance principles will remain effective.

At the time of the initial insurance application, an underwriter may not know whether they are dealing with a "consumer". Brokers should be alert to this issue and have a role to play in ensuring that the risk is presented in such a way that it is clear whether the underwriter has the burden of asking relevant questions or whether the duty is on the insured to disclose all material facts. The definition of a consumer under the Act will undoubtedly be tested by the Courts in due course. In the meantime, an underwriter should proceed with caution when entering into a contract of insurance with an individual owner of a private or pleasure vessel unless it is clear that the main purpose of that insurance is for purposes related to the individual's trade, business or profession.

Conclusion

The new Act redresses what has long been considered an imbalance in the pre-contractual burden imposed on insurance consumers and shifts the burden to the underwriter to make sufficient and appropriate enquiries when considering whether and on what terms to write a risk.

Further information

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