New ICAEW minimum terms

A new version of the approved minimum terms wording comes into force 12 August 2016 alongside the Insurance Act 2015 – but do the changes make any material difference?

Warranties and no “basis of contract” language

The Insurance Act 2015 (IA 2015) has abolished basis of contract clauses which can transform proposal form answers into policy warranties. Consistent with this, the ICAEW has deleted the basis of contract language found in the old minimum terms pre-amble, although Insurers were never able to take the point anyway absent Insured fraud/deceit (Special Conditions D1). The new minimum terms also confirm that nothing in the policy is to be construed as a warranty (D1.2). Whether this makes any difference in light of (the unchanged) Special Condition D2 is arguable. Regardless, the new wording removes any possible Insurer argument that was available under the old wording that a (non-proposal form) warranty was not a “condition” and breach led to no cover.

Special Conditions D1 and “fair presentation of risk”

The language of the minimum terms has been amended throughout to reflect the IA 2015 which requires the Insured to make a “fair presentation of the risk” as opposed to the obligation to disclose all material facts. However, in light of Special Condition D1 (as discussed below), these amendments are effectively administrative only in nature, rather than material.

The IA 2015 restricts Insurers’ right to avoid ab initio to instances of deliberate or reckless breach of the duty of fair presentation by the Insured. This was already reflected in the old minimum terms Special Condition D1, restricting Insurers’ right to avoid to non-disclosures/misrepresentations where the Insured could not demonstrate an absence of fraudulent conduct/intent to deceive. The new minimum terms, however, reverse the burden of proof and it is Insurers who must now demonstrate that any breach of the duty of fair presentation is not free of “fraudulent conduct or intent to deceive”.

For any other breach of the duty of fair presentation (e.g. negligent breach) rather than allowing Insurers a proportionate remedy as per the IA 2015, the new minimum terms continue to save Insureds 100% from such breaches as long as they are free of “fraudulent conduct or intent to deceive”.

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Claims arising out of prior known circumstance

While not arising out of the IA 2015, minimum terms Special Condition D1.3 has had confirmatory language added to clarify cover is required for prior known circumstances but only limited to the cover available to the policy where the circumstance should have been notified. The minimum terms otherwise remain firmly “claims made” and so will not respond to claims first made during an earlier policy year (subject the obligation to advance defence costs and indemnify on an interim basis while any Insurer/Insurer policy year dispute is played out – see further below).

Fraudulent claims (C9)

The old minimum terms permitted policy avoidance ab initio against any Insured making a fraudulent claim, meaning Insurers’ could potentially recover previously paid valid claims. That remedy has been drastically cut down. The new minimum terms incorporate the IA 2015 confirming Insurers’ right to refuse to pay fraudulent claims, recover related sums and (at their option) treat the policy as terminated (except for innocent Insureds) from the date the fraudulent act was committed. Previous valid claims arising prior to the fraudulent act are unaffected.

Commentary

Disappointingly for Insurers, despite the opportunity to revisit the situation in light of the IA 2015, the pendulum has swung further in favour of the interests of the Insured.

The ICAEW minimum terms were introduced in part to ameliorate the imbalance in the law between Insurers and the Insured including archaic and draconian pro Insurer remedies. The IA 2015 redresses this previous imbalance in the law in a fair, proportionate and modern way. However, the new minimum terms remain mostly non reflective of the proportionate approach introduced by the IA 2015. The ICAEW’s desire to protect the public and ensure cover is in place (whatever the fairness of that between Insurer and Insured) continues to prevail.

Even where an Insurer does have a meaningful coverage point to take (including one based on dishonesty of the Insured towards Insurers), pending resolution of the indemnity dispute, Insurers remain obliged to advance defence costs (C10.2). This also includes cases where dishonesty is alleged against the Insured by the third party claimant, at least up until the point of any admission of dishonesty by the Insured/finding of such dishonesty by the Court (C5). Such Insurer/Insured policy disputes continue to go to arbitration in a private forum (C10.1).

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