Insurance Act 2015 – practical tips

With the new Insurance Act 2015 now in force, we are aware that a number of clients have yet to complete rewrites of their policy wordings. In this brief note we highlight five important practical tips to consider when doing so.

1. **Say goodbye to Special Benefits clauses.**

   These existed in the market to alleviate some of the harsher aspects of the old law. Under the new law, intended to provide a fairer balance between the rights of policyholders and underwriters, they are anachronistic and should be entirely unnecessary. Brokers will of course press to retain them wherever possible and it is disappointing for example that the new ICAEW 2016 Approved Wording retains its traditional one and fails to reflect most of the new provisions of the Act.

   From underwriters’ perspective they have now lost some of the protections afforded under the old law and which often sidestepped such clauses. Retaining them will also however prevent underwriters from relying on any of the fairer new remedies available for breach of the duty of fair presentation. This is the worst of all worlds and we hope the market will move away from them completely in time and particularly as the cycle changes.

2. **Retain and expand conditions precedent.**

   One of the uncertainties under the new law is the extent to which underwriters will be able to rely on breaches of conditions precedent under the controversial Section 11 of the Act. If non-compliance with a term could not have increased the risk of the loss that actually occurred then they cannot. Some conditions precedent to liability, commonly claims conditions regarding prompt notification or non-admissions, will certainly pass this test but guidance from the Courts is necessary as the precise ambit of the Section in the context of claims made policies.
Underwriters should also consider greater use of conditions precedent to contract. It is much less likely that Section 11 will apply at all to potentially restrict these. This is potentially because Section 11 is stated not to apply to terms which define the risk as a whole. Further, the effect of a breach of condition precedent to cover is that the contract will be treated as never coming into existence and the language of Section 11, which speaks of liability under the contract, is again such that it arguably shouldn’t apply. If Section 11 does somehow apply to these terms, then it could still provide a substantive remedy but dependent on the test above.

3. Exclude from cover claims arising from pre-existing circumstances.

This is one of the protections available to underwriters and which in our view should be unaffected by the new Act. Although Section 11 in theory also applies to exclusion clauses, it is very difficult to see how it can in practice. This is because most exclusion clauses either define the risk as a whole or because Section 11 applies only to terms which involve some compliance or otherwise by a policyholder.

With other weapons available to underwriters now gone, it is a particularly important one to retain in your armoury. If for whatever reason you do have to retain a special benefits clause take extra care to ensure that its terms are not inconsistent with the exclusion and therefore avoid the problem that arose in *Rothschild v Collyear* [1999] Lloyd’s Rep IR 6. There the Court held the exclusion to be part of the old non-disclosure code but only because poor drafting meant that the exclusion conflicted with the special benefits clause and it was the only sense they could make of it. With clear drafting it need not conflict at all with the new duty of fair presentation.

4. Ensure that the right person signs the proposal form.

One of the potentially very helpful parts of the new Act is Section 4 and which introduces a significant change to the law on attribution for the purposes of the new duty of fair presentation. In respect of any Insured who is not an individual, such as a company or limited liability partnership, they will now be fixed with the knowledge of any individual who is part of the Insured’s senior management or the person responsible for the Insured’s insurance. This introduces much more clarity into the law than exists currently and will be
beneficial to underwriters in taking advantage of the new remedies, provided one of those people has signed the proposal form.

5. **Take care with underwriting guidelines.**

The remedies afforded under the Act still provide powerful opportunities for taking substantive coverage points in appropriate cases. We expect coverage disputes to increase and given the new remedies for breach of the duty of fair presentation. Key however will be the ability to prove what underwriters would have done, whether this is not writing the risk at all, applying other terms or increasing the premium. Detailed written underwriting guidelines will have a very important role and extra care should be taken to keep these regularly updated and safely retained for future reference.

In addition to Beale & Company’s substantial coverage disputes practice, we also have a very experienced wordings team. We regularly draft wordings on an agreed fee basis or review those prepared in-house.

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