Consumer Insurance Contracts
Bill 2017

Significant changes proposed to Irish Consumer Insurance

On 19 January 2017 the Consumer Insurance Contracts Bill 2017 (the “Bill”) was introduced. The Bill is based on the Law Reform Commission’s 2015 report on consumer insurance contracts. It is currently in the early stages before the Dáil and so we will have to wait to see if it will be enacted as drafted.


As the title suggests, the Bill will apply only to consumers. The definition of ‘consumer’ is wide and includes any natural persons and small businesses with “an annual turnover of €3 million or less” providing such businesses are not part of a larger group with a turnover greater than €3 million. This is the same definition as “consumer” for the purpose of the remit of the Financial Services Ombudsman.

The main provisions of the Bill are as follows:

1. **Pre-Contractual Duties of Consumers and Insurers**

   One of the most significant changes proposed relates to the pre-contractual duties of consumers and insurers.

   + The burden has been shifted away from the consumer and on to the insurer.

   + The Bill replaces the principle of utmost good faith and the general duty of disclosure placed on a consumer and provides that a consumer is now under a duty to only answer questions put forth by the insurer.

   + The consumer is under no obligation to volunteer information and insurers will not be able to ask general open ended questions.
An insurer is obliged to write to a consumer informing them of the “general nature and effect of the pre-contractual duty of disclosure.”

An insurer shall be deemed to have waived any further duty of disclosure on the consumer where it fails to investigate a missing or obviously incomplete answer to a question. This does not apply if the consumer has acted fraudulently, intentionally or recklessly.

This significant change could obviously have far reaching consequences for insurers offering insurance cover to what is defined as a “consumer”, which will include smaller businesses. There will be a significant onus on insurers to ensure all necessary questions are asked in a proposal form or at renewal or run the risk of not obtaining the required information to value and underwrite a risk appropriately. If the right questions are not asked, insurers could possibly face covering claims which may not have been anticipated.

2. Proportionate Remedies for Misrepresentation

The Bill precludes insurers from declining indemnity where there has been innocent misrepresentation on the part of the consumer.

Where the misrepresentation is negligent (not reckless or deliberate) the remedy available to the insurer shall reflect what the insurer would have done had it been aware of the full facts i.e. how would the risk have been treated if the information in question was disclosed. We expect an underwriter will need to be able to confirm how the risk would have been viewed had the misrepresentation not occurred.

Only when a misrepresentation is fraudulent is the insurer entitled to decline coverage.

This will be a significant change as up to now, it has been open to insurers to provide for the right to decline indemnity where there has been misrepresentation of material facts, even perhaps if innocent or negligent and if the misrepresentation was not specifically relevant to the claim ultimately made.

3. Right of Third Party to Claim against an Insurer

In England and Wales the Third Parties (Rights against Insurers) Act was brought in to force in 2010, giving rights to third parties to make claims directly against insurers in certain circumstances - where the policyholder has died, has become insolvent or cannot be found.
Section 18 of the Bill provides for a similar right here in Ireland for the first time.

Furthermore this section provides that a third party shall be entitled to issue proceedings against the insurer without first having to establish the liability of the person. However before the terms of an insurance contract can be enforced against the insurer, liability must be established. This section of the Bill mirrors the provisions of the UK Third Parties (Rights against Insurers) Act 2010.

This change alters the principle of privity of contract and creates some certainty in this arena in Ireland, following a number of judicial interpretations of s 62 of the Civil Liability Act 1961 such as in Dunne v PJ White Construction Co Ltd (in liquidation) and the more recent cases of Hu v Duleek case\(^1\) and Michael Murphy v Allianz.\(^2\)

4. Warranties and “basis of contract” Clauses

Section 16 of the Bill replaces warranties with suspensive conditions. If a condition is breached and a claim is made during the breach, the insurer is not obliged to indemnify the consumer. However if the breach is remedied and a subsequent claim arises, the insurer is obligated to pay any claim under the insurance contract.

Section 16 further provides that any statement made by a consumer prior to entering into a contract of insurance can no longer be converted into a warranty. These “basis of contract” clauses are invalid under the Bill.

5. Notification and Claims Handling

Section 14 provides that where the consumer fails to notify a claim to insurers in the specified period and this delay does not prejudice the insurer, the insurer is not entitled to decline coverage on that basis alone.

An insurer must handle claims “promptly and fairly”.

An insurer must pay sums due to the consumer within a reasonable time. Similar rights are given to consumers to claim damages (as well

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\(^1\) Yun Bing Hu v Duleek Formwork Ltd (in liquidation) & Aviva Direct Ireland Ltd t/a Aviva [2013]IEHC 50

\(^2\) Michael Murphy v Allianz PLC [2014] IEHC 692
as interest) for "unreasonable" withholding or late payment of insurance claims as were introduced in the UK under the Enterprise Act 2016.

6. Failure to Comply

In the event a consumer breaches any duties under the Bill a Court may in its discretion reduce the sum recoverable in a claim under the insurance contract in proportion to the breach involved. Conversely, an insurer in breach of duty may be ordered to pay an increased sum proportionate to any breach.

The Bill expressly provides that the Court may decline to make any order to reduce or increase the sum payable if the breach was not deliberate or if it would be just or equitable to dispense with the requirement to comply with a part of the Bill.

Conclusion

The Bill brings about some significant changes to how consumer insurance contracts will operate in Ireland in future and if enacted as drafted, will align Ireland with the UK position on consumer insurance contract law in many ways.

It most certainly places more onerous obligations on insurers. Insurers will likely need to adapt their proposal forms significantly and be very careful about the information they elicit from customers who fall within the definition of "consumers" when looking to underwrite a risk. There will be less freedom for insurers in stipulating scenarios where cover may be declined and a lot more pressure on insurers to deal with claims as quickly as possible. The Bill also includes possible financial consequences for breaches which could be significant for both insurers and the consumer, although Court involvement is required.

The Bill is in early stages of the process in the Dáil and therefore it remains to be seen what the final form of the Bill will be. We expect insurers may make submissions on the Bill and that there may be amendments made at Committee Stage. We await with interest to see how the Bill evolves.

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