

The [Insurance Act 2015](#) (the Act), which comes into force in England and Wales on 12 August 2016, is the most significant reform of English insurance contract law in more than 100 years.

The provisions of the Act apply to all (non-consumer) contracts of insurance and reinsurance that are governed by English law regardless of the country in which the policy is underwritten. It also applies to any variations to existing insurance contracts that are made after 12 August 2016.

The Act tries to help level the commercial playing field in the English insurance market by addressing what is perceived to be a legal imbalance in favour of insurers. It also updates existing (and arguably outdated) rules which no longer reflect good market practice in the 21st century.

## Key Aspects of the Act

- Introduces a new duty of fair presentation of a risk to be insured by the insured to the insurer before insurance contract entered into.
- Reforms the law relating to knowledge of insured and insurer for the purpose of defining what must be disclosed before the inception of a policy.
- Brings in new, proportionate remedies available to an insurer if there is a breach of the duty of fair presentation by the insured. The existing remedy of avoidance of the policy – the insurer's ability to act as if policy never existed – is, therefore, abolished as sole remedy for breach of the former duty of good faith.
- Reforms the law relating to warranties and terms that are not relevant to the loss. Breach of warranty by an insured will no longer completely discharge an insurer's liability; if the breach of warranty is remedied prior to the loss then insurance cover remains in place.

## The New Duty of Fair Presentation of the Risk

The insured must disclose every "material circumstance" which the insured knows or ought to know to insurer. Or failing that, the insured must provide the insurer with sufficient information in relation to those material circumstances as would put a prudent insurer on notice that it needs to make further enquiries.

There is a new duty on a prospective insured to present information in a manner reasonably clear and accessible to a prudent insurer (to discourage the practice of "data dumping" by insureds and in response "passive" underwriting by insurers).

"Knowledge" includes that of the insured's senior management (those people who play a significant role in making of decisions about how the insured's activities are managed or organised – which includes the board, but could be wider) and those people responsible for arranging insurance (e.g. the risk or insurance manager). The insured is also deemed to know what should have reasonably been revealed by a reasonable search. This includes information which is held within the organisation and may include information held by others (e.g. the broker or outsourced IT provider).

Similar tests are applied to the insurer's knowledge. However, the extent of knowledge that will be attributed to an insurer is limited to the individuals who participate on behalf of the insurer as to whether or not to take the risk and on what terms.

## Proportionate Remedies for Breach of the Duty of Fair Presentation

If an insured fails to make a fair presentation of the risk, then new remedies are available to insurer.

A distinction is drawn between:

- A deliberate breach of duty (i.e. the insured knows it is in breach)/reckless breach (an insured doesn't care whether it is in breach) when the insurer can avoid policy and any claims monies have to be repaid to insurer; and
- Other types of breach of duty (e.g. innocent/negligent). The Act introduces a new regime of proportionate remedies for the breach as opposed to the inflexible, sole remedy of avoidance. Going forward, the onus will be on the insurer to show what it would have done if it had known about the breach:
  - If it can show it would not have entered into the contract of insurance, then it can avoid the policy (but it must return premium)
  - If it can show that it would have entered into the contract but on different terms, the insurance contract is treated as if it included those different terms

(For example, if the insurer can show that it would have included a theft exclusion in the policy had there been a fair presentation, the claim will be dealt with under the policy but subject to application of the theft exclusion – so if the claim was for theft of equipment, the insurer could reject the claim *but not* avoid the policy)

- If an insurer can show that it would have charged an increased premium, then that applies as a proportionate reduction to the value of a claim.

## Reform of the Law of Warranties

“Basis of contract” clauses (a declaration in the policy and/or proposal that certain representations made by the insured want to be true and accurate and that the statements made “form the basis of the contract”) are abolished.

The other changes of note to insurance warranties are:

- An insurer may not rely on a breach of warranty where that warranty relates to a risk that is irrelevant to the type of loss that actually occurred
- An insured’s breach of a warranty suspends, and no longer necessarily discharges, the insurer’s liability under the policy. Going forward, warranties will become suspensive conditions. That means that the insurer is not liable for losses occurring while the insured is in breach of the warranty, but liability restored once the breach is remedied (if it is capable of remedy).

By way of example, an insured warrants that, by 1 January, it will have installed a new intruder alarm. The risk to which this warranty relates is the risk of theft. In fact, the insured (in breach of warranty) does not install the alarm until 20 January. As at 20 January, the insured has remedied the breach. So if a theft claim had been made between 1 and 19 January, the insurer would not be liable to pay the claim as the insured was in breach of the warranty. But the insurer would have to pay the theft claim if it was made say on 20 February as despite the earlier breach, it had been remedied through installation of the alarm.

If you have questions about the Insurance Act 2015 or the Squire Patton Boggs [Insurance Practice](#), please contact:

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