

Insurance contract law reform

Common questions answered

March 2015

The Insurance Act 2015 was passed on February 12, 2015. The Act, which enters into force in August 2016, will reform insurance contract law in relation to misrepresentation and non-disclosure, warranties and remedies for fraudulent claims. We address some frequently asked questions and explain how the Act interacts with existing insurance legislation.

Frequently Asked Questions	Consumer	Non-consumer
Are insurance contracts still contracts of good faith?	Yes. The common law determines that contracts of insurance are of the utmost good faith. Section 17 of the Marine Insurance Act 1906 (MIA) remains in the legislation but it is no longer the case that the remedy for a breach of good faith is avoidance of the contract.	Yes. The common law determines that contracts of insurance are of the utmost good faith. Section 17 of the Marine Insurance Act 1906 (MIA) remains in the legislation but it is no longer the case that the remedy for a breach of good faith is avoidance of the contract.
What does it mean to say that the parties to insurance contracts are still required to show good faith when ss. 18–20 of MIA have been repealed?	<p>Not a lot. However what the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA) has done is to determine what the consumer should do to act in good faith. Now showing good faith means taking reasonable care not to make a misrepresentation to the insurer.</p> <p>Good faith also has to be shown by the insurer (but in limited circumstances).</p>	<p>As mentioned above the duty remains but the qualification of the duty has changed. Insureds are now under a duty to make a fair presentation of the risk. This includes a requirement to:</p> <ul style="list-style-type: none"> • make a (clear and accessible) disclosure of every material circumstances which the insured knows or ought to know • disclose sufficient information to put a prudent insurer on notice that it needs to make further enquiries • ensure that any representations as to a matter of fact are substantially correct. <p>Good faith also has to be shown by the insurer (but in limited circumstances).</p>
Are basis clauses allowed?	No. CIDRA abolished such clauses and it is not possible for parties to contract out.	No. The Insurance Act 2015 (Insurance Act) abolishes such clauses and it is not possible for parties to contract out.

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Are insurers still on the hook when a warranty has been breached?	It depends. Insurers are no longer immediately discharged from further liability once a warranty has been broken. There will be no liability where the loss has occurred before remedy. However, if remedied and the risk remains essentially the same as the risk originally insured, the insurer will be back 'on risk'.	It depends. Insurers are no longer immediately discharged from further liability once a warranty has been broken. There will be no liability where the loss has occurred before remedy. However, if remedied and the risk remains essentially the same as the risk originally insured, the insurer will be back 'on risk'.
What happens if a breach of warranty (or other term) is not relevant to the loss?	<p>Insurers cannot deny liability where a breach of warranty or other contractual term did not have the effect of increasing the risk of the loss that actually occurred.</p> <p>In other words, it will no longer be possible for an insurer to deny liability for a burglary claim where the insured did not have a working sprinkler system.</p>	<p>Insurers cannot deny liability where a breach of warranty or other contractual term did not have the effect of increasing the risk of the loss that actually occurred.</p> <p>In other words, it will no longer be possible for an insurer to deny liability for a burglary claim where the insured did not have a working sprinkler system.</p>
Is it possible to contract out of any of the provisions in either CIDRA or the Insurance Act?	No for provisions in CIDRA. Also for any provisions in the Insurance Act that are contained in consumer contracts (i.e. warranties or fraudulent claims).	<p>Yes. It is possible to contract out of any provision in the Insurance Act with the proviso that a term which would put the insured in a worse position than under the Insurance Act must meet certain transparency requirements (i.e. the disadvantageous term should be brought to the insured's attention before the contract is entered into and should be clear and unambiguous as to its effect).</p> <p>It is not possible to contract out of the Insurance Act where basis clauses are concerned.</p>
What are the implications of the changes for brokers?	The duty to take reasonable care not to make a misrepresentation applies to the insured's agent in the same way as it does to the consumer.	S. 19 of MIA has been repealed. The duty to make a fair presentation extends to brokers. Insureds and their brokers should disclose what should be revealed by a search of information available to the insured/broker (i.e. should make reasonable enquiries and disclose information known to brokers). The duty does not require brokers to disclose confidential information received through other clients.

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What happens where an insured makes a fraudulent claim?	<p>The insurer is not liable to pay that claim and can recover any amounts already paid in relation to that claim. The insurer can also send notice to the insured to treat the contract as terminated from the date of the 'fraudulent act'. It need not return premium paid under the policy. Importantly, terminating the contract does not affect claims made before the time of the fraud.</p> <p>Where one consumer in a group policy makes a fraudulent claim, the rights of other consumer insureds will not be affected by the fraud.</p>	<p>The insurer is not liable to pay that claim and can recover any amounts already paid in relation to that claim. The insurer can also send notice to the insured to treat the contract as terminated from the date of the 'fraudulent act'. It need not return premium paid under the policy. Importantly, terminating the contract does not affect claims made before the time of the fraud.</p> <p>NB – The Insurance Act does not consider the position in relation to fraudulent devices (but see the recent case of <i>Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others (The 'DC Merwestone')</i> [2014] EWCA Civ 1349.</p>
How do these changes affect group insurances?	<p>Where a misrepresentation is made by a group member of a scheme there will only be consequences for that individual, rather than for the group as a whole. Group policies such as those made by businesses on behalf of their employees do not usually fall within the consumer regime. The proposals ensure that any dispute about a misrepresentation made by a person entitled under the group policy will be treated in accordance with the consumer rules.</p> <p>CIDRA establishes that where a consumer takes out insurance on the life of another person, and information is provided by the person insured (but not the policyholder) to the insurer, any misrepresentations will be treated as though they were supplied by a party to the contract.</p>	<p>Where one beneficiary under a group policy makes a fraudulent claim, the insurer may deny liability only to the fraudulent beneficiary. Claims made by non-fraudulent beneficiaries under the group policy are unaffected.</p>
Do the changes have an impact on reinsurance contracts?	Not applicable.	Yes. Contracts of reinsurance and retrocession are treated as insurance contracts at common law and are therefore included for the purposes of the Insurance Act.

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