What you need to know

What's changing?
The Insurance Act 2015 (the “Act”) makes some very important changes to what you have to do to ensure that your insurance policies are effective and that claims are more likely to be paid in full.

This note deals with the changes to the rules governing the remedies to which the insurer is entitled in the event that you fail to comply with the Duty of Fair Presentation.

Why is it important?
Failure to comply with the Duty of Fair Presentation may give your insurer grounds to avoid your policy (i.e. treat it as if it never existed), refuse to pay your claim, reduce the amount they do pay, or vary the terms of your contract.

When is this happening?
The Act applies to all policies governed by the laws of England, Wales, Scotland and Northern Ireland taken out after 12 August 2016 (this will include any endorsements, variations or amendments entered into after that date). However, as the new remedies for breaches apply to rules about what you are required to do before your insurance policies are in place, you need to start planning for the new rules now.

What should I do now?
Talk to your Lockton contacts about what you need to do in order to comply with the new rules.

The duty to make a fair presentation of the risk

As a reminder, to comply with the Duty of Fair Presentation, prior to the start of the Policy you must:

• disclose “every material circumstance which [you know] or ought to know”, or
• “failing that, [provide] disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purposes of revealing those material circumstances”.

Please refer to our briefing on the Duty of Fair Presentation for more information.

Remedies

The duty of utmost good faith is retained, but the sole remedy of avoidance for its breach is abolished, and is replaced with a new range of proportionate remedies which are based on the severity of the breach and depend on:

• whether the breach is deliberate or reckless, or
• if the breach was not deliberate or reckless, what the insurer would have done if the Duty of Fair Presentation had been complied with.

What if the breach of the duty to make a fair presentation of the risk is deliberate or reckless?
If a breach of the duty is deliberate or reckless, then the position remains the same as under the current law, which is that the insurer is entitled to avoid the policy and can keep the premium. Where a policy is avoided it is deemed to never have existed, so you would have to repay any sums that you have received from the insurer in respect of claims under the policy.
The insurer’s ability to keep the premium is essentially a penalty that is imposed to deter such deliberate or reckless conduct.

A breach is deliberate where you know that you are in breach of the Duty of Fair Presentation; it will be reckless if you do not care whether you are in breach of the Duty of Fair Presentation.

**What if the breach of the duty to make a fair presentation of the risk is not deliberate or reckless?**

If the breach of the duty is not deliberate or reckless, but it is still a breach, there are a range of proportionate remedies available to the insurer.

There are broadly three options available to the insurer based on what they would have done if there had been a fair presentation of the risk:

a) **Avoidance**

If the insurer in question would not have written the risk at all, then they may avoid the policy but must return the premium. This means that avoidance is still available as a remedy for insurers even where the breach is “innocent” (or at the very least, not deliberate or reckless).

To be able to avoid the policy the insurer would have to be able to demonstrate that if you had made a fair presentation of the risk, they would not have been prepared to write the risk at all. This would have to be proved by evidence from the underwriter who was responsible for writing the risk.

b) **Variation of the terms**

If, in the absence of a breach of duty, the insurer would have written the risk but on different terms, the contract will be treated as if it had been written on those terms. This does not include terms relating to premium (as to which, please see below).

This means, for example, that the insurer may impose certain exclusions where they can establish that these would have been imposed if there had been a fair presentation of the risk. This could affect whether they pay the claim in question.

This remedy can also have an effect on losses which the insurer has already paid because it involves treating the contract as if it had been entered into on those different terms, therefore having retrospective effect.

This means that if the insurer proves that it would have contracted on different terms, and those terms would have reduced or extinguished its liability for losses which pre-date the insurer’s discovery of a breach of the duty of fair presentation, you may have to reimburse the insurer for those losses.

c) **Reduction of the claim**

If the insurer would have written the risk, but for a higher premium, then the insurer is entitled to proportionately reduce the claim in the same proportion that the actual premium bears to the premium that the insurer would have been charged if a fair presentation had been made.

For example, if there is a claim for £100 and the original premium charged was £200. If, the higher premium that would have been charged was £300 then the insurer can reduce the claim payment to $200/300 x 100 = £66.67

This remedy may be used on a standalone basis or alongside the variation of terms discussed above.

Please note that, as described in our client briefing note, “Warranties and other terms, contracting out and abolition of basis clauses”, the insurer has the option to contract out of the terms of the Act including the remedies set out above and impose their own terms. If this is the case we will let you know how this affects your rights and policy.

**Act Now**

For more information, please contact your usual Lockton contact.