

The Insurance Act 2015 **Disclosure & fair presentation of the risk**

Under current law, a policyholder is required to disclose all material circumstances that are known or ought to be known by them. A material circumstance is anything that might influence the judgment of a prudent insurer in deciding whether to accept a risk and, if so, on what terms. This places a high duty on the insured as they are expected to assess whether something would affect the terms on which insurance was written.

Under the Act, there is a new duty of “fair presentation”. A policyholder is required to disclose every material circumstance which it knows or ought to know (which is similar to the current law). However, the duty is also met if a policyholder provides sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances. This shifts the obligation towards insurers and recognises that provision of insurance is rarely a simple affair, with questions often being required to draw out all relevant information.

Importantly, the Act also requires the policyholder to disclose information in a reasonably clear and accessible manner. Simply providing your insurers with vast amounts of data, which contains the relevant information along with an array of irrelevant information, will not discharge your duty.

Knowledge of the policyholder:

What a policyholder knows or ought to know is defined by the Act, and it differs according to whether the policyholder is an individual or not. A corporate policyholder is deemed to know what is known to the senior management or any persons responsible for the insurance, such as a risk manager. “Senior management” is defined as individuals who play significant roles in the making of decisions about how the policyholder’s activities are to be managed and organised, and therefore this is likely to go beyond the Board of Directors.

A policyholder “ought to know” what should reasonably have been revealed by a reasonable search, so you cannot just turn a blind eye to information which you suspect is present. This relates to information held within the policyholder’s business, and also information held by the policyholder’s advisors or agent (e.g. insurance broker, accountants etc).

Knowledge of the insurer:

The duty of fair presentation does not require a policyholder to disclose information which the insurer knows or ought to know. This includes the knowledge of those who participate in the decision to take on the risk and what terms (i.e. underwriters), and also information which ought to have been passed on by the claims team. Insurers are required to make internal enquiries as to what is known within its business, as well as enquiries with the policyholder when information is provided which should put them on enquiry.

When does the duty of fair presentation apply:

The new duty of fair presentation applies to contracts of insurance that are placed on or after 12 August 2016. However, it also applies to variations on existing contracts that are agreed on or after 12 August 2016. Each time that a contract of insurance is varied, the duty arises again.

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