

The New Insurance Act and Your Professional Indemnity Insurance

The Act is the culmination of several year's work by the Law Commission in conjunction with Insurers, Brokers and their Customers.

It is designed to reflect the requirements of a modern insurance market and reflects best practice in the UK insurance industry.

It applies to most types of commercial insurance but this guidance note relates specifically to professional indemnity insurance.

The Insurance Act 2015 (the Act) came into force in August 2016 and is the most significant update to commercial insurance law in the last 100 years.

Your Duty to make a Fair Presentation

Under the Act you owe a duty of disclosure to the Insurer, which includes your duty to make a 'fair presentation' of the risk. Under Section 4 of the Act, an Insured must disclose all material circumstances known to its 'senior management' and those persons responsible for the relevant insurance.

A fair presentation is one which clearly discloses in a manner that is 'reasonably clear and accessible', every 'material circumstance' which is 'known or ought to be known' by the Insured's senior management and 'those responsible for arranging the insurance', following a 'reasonable search'.

Insurer's Judgement

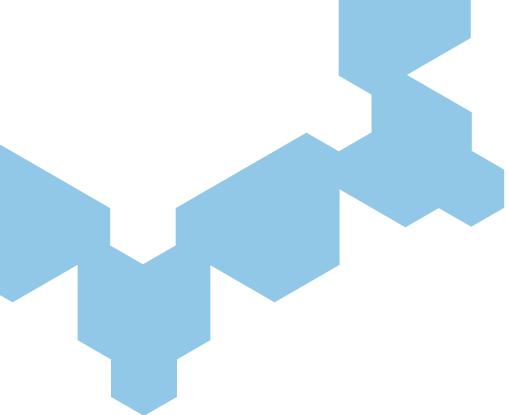
A circumstance is material if it would influence an insurer's judgement in determining whether to take the risk and, if so, on what terms. If you are in any doubt whether a circumstance is material, we recommend that it should be disclosed.

Information must be disclosed in a manner which is clear and accessible to a prudent insurer and data dumping is therefore not permissible.

All statements and facts disclosed on professional indemnity proposal forms and other documents should be full, true and accurate and must be given after undertaking a reasonable search, including consulting with your senior management. This duty applies before the insurance policy is inceptioned, when it is renewed and at any time that it is varied. The policy wording may also state that this duty continues for the duration of the policy.

Breach Of Duty

If this duty is breached, the Act puts in place a new range of proportionate remedies which insurers can apply, dependent upon the action they would have taken had the correct information been disclosed.



Under the previous law, breach of a warranty in an insurance contract allowed the insurer to avoid any liability under the policy from the point of the breach. Insurers were also entitled to avoid liability even when the breach was not relevant to the type of loss suffered.

The Act changes the effect of a breach of a warranty so that cover remains in place for a valid claim arising after a breach has been remedied. In addition, a breach no longer has an effect on the insurer's liability for any valid losses which are unrelated to the breach. They can however impose different terms on the cover, including charging an additional premium and / or proportionately reduce the amount of any valid claim payable.

If the failure in disclosure is deliberate or reckless, or if insurers would not have entered into the contract at all, insurers still remain entitled to avoid the contract entirely.

Terminology

Reasonably clear and accessible All information must be provided to Insurers in a reasonably clear and accessible manner. This means that information must not be provided in an ambiguous way. This prevents key facts being concealed amongst large volumes of less relevant or immaterial information.

Material Circumstance Is anything that would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms. There is no specific limitation on what constitutes a material circumstance, but it would typically include any factors pertaining to the risk to be insured, including prior claims, your financial information, qualifications of personnel, convictions or disciplinary and your split of business activities. Known or ought to be known - You are obliged to disclose material circumstances that you actually know, but also those that you ought to know. This means that if the information is readily available to you but you fail to disclose it owing to either a lack of enquiry or by "turning a blind eye", you will have breached your duty to fairly present the risk.

Senior management Your knowledge, for the purposes of the Act, includes (but is not limited to) that of all senior management. This includes individuals who play a significant role in the making of decisions on behalf of the business, even if they do not sit on the board or if they do not officially have a management role including outside third parties, consultants, advisers.

No further guidance is given by the Act, so this is likely to depend on the circumstances and the management structure of individual insureds.

Those responsible for arranging the insurance This includes risk managers, employees who assist in the collection of data or who negotiate your insurance with your broker.

Reasonable search You are obliged to undertake a reasonable search. What is reasonable will depend upon the nature of your business and when considering the extent of your search, you should take into account who within your organisation is best placed to provide the relevant information.

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