Consumer Insurance Contracts Act 2019

The Consumer Insurance Contracts Act 2019 ("The Act") was signed into law on 26 December 2019, with many of the recommendations made by the Law Reform Commission in its July 2015 report on Consumer Insurance Contracts finding a place in the Act. Speaking in the Dáil on 13 May 2020, the Minister for Finance made it clear that commencing the Act will be a matter for the next Government. The insurance industry has lobbied extensively to ensure that sufficient time is allowed for the necessary significant changes to be made to policy documentation, work processes and EDI systems. In this article, **Cathie Shannon, Director of General Insurance, Brokers Ireland,** and **Mary Smith of Caytons Law** , examine some of the key changes and the anticipated impact on the insurance industry.

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Scope of the Act

Unless otherwise provided, the Act shall apply to life insurance and non-life insurance contracts that are agreed, varied or renewed post commencement of the Act. The Act disapplies the Marine Insurance Act 1906 and the Life Insurance (Ireland) Act 1866 to those contracts that come within its scope. The Act applies to insurance contracts with consumers as defined in the Financial Services and Ombudsman Act 2017, which includes individuals, unincorporated and incorporated bodies with a turnover of less than €3 million (provided such businesses are not members of a group with combined turnover greater than €3 million).

The Act will significantly impact all those who distribute insurance products. The Act is intended to improve the position for consumers and to make it more difficult for insurers to decline claims, with new proportionate remedies for misrepresentation and for dealing with claims, the replacement of the concept of warranties and the altering of the concept of insurable interest. The Act is intended to correct what has been considered by some to be an imbalance in the pre-contractual burden imposed on consumers and shifts the burden to the underwriter to make sufficient and appropriate enquiries when considering whether and on what terms to write a risk. The Act makes significant changes to the pre and post contract stages of the insurance transaction, as well as the claims process. It provides that in certain circumstances third parties will be able to claim under policies of insurance.

Pre-contractual duty of disclosure – replacement of utmost good faith

The long-standing principle of utmost good faith (uberrima fides) will no longer apply to consumer insurance contracts. Instead, consumers will have to take reasonable care in answering specific questions asked by insurers, with no obligation on the consumer to supply any other information. There will therefore be an obligation on insurers to frame questions such that all information required to write a risk is extracted from the consumer.

There will be a presumption that when answering the questions asked by an insurer a consumer knows that the question is relevant to the risk, or the premium, or both. Ambiguity is to be resolved in favour of the consumer. It should be noted by Brokers that when determining whether a consumer has complied with the duty to use reasonable care, one of the factors to which regard will be had will be whether they were represented by an agent (i.e. a Broker).

Suspensive conditions – replacement of warranties

The Act replaces the concept of insurance warranties. Any term in a contract of insurance that imposes a continuing restrictive condition on the consumer during the course of the contract will be treated as a "suspensive condition". The effect of a suspensive condition will be that for the duration of the condition's breach, the insurer's liability will be suspended and if the breach is remedied at the time of the occurrence of the loss then the insurer will be liable to pay the claim. Once the Act is operative, statements of opinion by consumers will be treated as representations and not as warranties as is generally the case at present.

New proportionate remedies for misrepresentation

The Act introduces proportional remedies for misrepresentation and an insurer will not be permitted to avoid a contract because of an innocent misrepresentation. For fraudulent misrepresentation, an insurer may still avoid a contract. However, for a misrepresentation that is merely negligent, account is to be had of what the insurer would have done if aware of the full facts at the time the policy was taken out. This would allow an insurer to avoid a contract and return premiums to the consumer if they would never have insured the risk had they known the true position, or provide a reduction of the amount to be paid on a claim. These provisions have the merit of providing clarity, but they also set a high standard for insurers to satisfy before they are able to avoid a contract,

Insurers may consider they will encounter difficulties in having to make a determination of whether a misrepresentation is innocent, negligent or fraudulent before being able to decide what if any

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"The Act puts an obligation on the consumer to cooperate with the insurer in investigation of insured events, including responding to reasonable requests for information in an honest and reasonably careful manner and notifying the insurer of occurrence of an insured event in reasonable time. However, unless non-notification within such reasonable time prejudices the insurer, it will not be a valid ground for the insurer to refuse liability. The insurer must inform the consumer where a claim is settled or otherwise disposed of and the amount of the settlement."

remedy may be available to them. Whilst the Act includes a definition of what will constitute a "fraudulent misrepresentation", there is none for "negligent misrepresentation", so it is arguable that the existing common law principles will apply.

The equivalent UK legislation, instead of using fraudulent misrepresentation has used a standard of "deliberate or reckless misrepresentation", which though high, may arguably be easier for an insurance company to meet. Proving that a representation by a consumer was definitely fraudulent may pose a difficulty.

14-day cooling-off period

The Act provides a new 14 day cooling off period for some contracts of insurance, with the consumer being given a right to cancel with no cost other than the premiums applicable to that period.

Post-contractual

The Act applies the EU (Unfair Terms in Consumer Contracts) Regulations 1995 to consumer insurance contracts. These Regulations provide that a contractual term shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The post-contractual duties of insurer and consumer listed in the Act replace the duty of utmost good faith. The consumer will be under an obligation to pay premiums within reasonable time or in accordance with the contract. The Act will allow an insurer to include an "alteration of risk" clause in a contract, which may be grounds for declining a claim. However, it should be noted that such a clause will be void where the change merely modifies the risk, as opposed to altering the subject matter of the contract of insurance. A "material change" will be taken as being a change taking the risk outside what was in the reasonable contemplation of the contracting parties when the contract was entered into. Exclusions from coverage must be explicit and in writing before the contract has commenced.

Renewal

For non-life renewals, an insurer must provide the consumer with a schedule outlining premiums paid by the consumer to the insurer in the preceding five-year period, as well as a list of claims paid out on foot of the contract by the insurer to the consumer during a five-year period (except for health insurance contracts). Where there has been a mid-term adjustment to the policy during the previous five years, the information to be provided is to include an annualised premium figure (for the relevant year) excluding fees or charges applied at the time and a statement indicating that the annualised premium figure shown may not reflect the actual premium paid during that year.

These obligations are more onerous than the obligations within the Renewal Regulations (S.I. No .577 of 2018 – Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) (Amendment) Regulations 2018). For Brokers, EDI quote systems will have to be amended to accommodate these changes.

This section of the Act would seem to overlook the fact that most non-life contracts of insurance are renewable on an annual basis and that in a five-year period a consumer might have had five different insurers, particularly if the consumer has used a Broker who will have re-broked the business to find the most suitable policy of the consumer. However, the intent of the section would seem to be that if a consumer has remained with an insurer for a number of years then the insurer will have to provide information on premiums paid and claims going back up to five years. The wording in this section refers only to "the insurer", suggesting that there is no broader obligation to provide information that "the insurer" will not have.

For life and non-life, on renewal of a contract of insurance, the consumer will once again be under a duty to respond honestly and with reasonable care to requests by the insurer, but under no obligation to volunteer information. If no new information is provided, the previous information shall be taken not to have altered. An insurer must notify the consumer of any alteration of the terms and conditions of the policy at least 20 working days before the renewal date.

Claims

As the Act modifies the concept of insurable interest, an otherwise valid claim cannot be rejected by the insurer only because the party claiming is deemed not to have an interest in the subject matter of the contract. The Act will require an interest where the contract of insurance is also a contract of indemnity, but this is not to extend beyond a factual expectation of the economic benefits or losses that would arise in the ordinary course of events. The Act puts an obligation on the consumer to cooperate with the insurer in investigation of insured events, including responding to reasonable requests for information in an honest and reasonably careful manner and notifying the insurer of occurrence of an insured event in reasonable time. However, unless non-notification within such reasonable time prejudices the insurer, it will not be a valid ground for the insurer to refuse liability. The insurer must inform the consumer where a claim is settled or otherwise disposed of and the amount of the settlement.

Following the making of a claim, where either party becomes aware of information that could support or prejudice the claim, this information must be disclosed. If a consumer knowingly or fraudulently provides false or misleading information, or consciously disregards whether information is false or misleading, then an insurer will still be entitled to decline to pay a claim and to terminate the contract. Where criminal or intentional acts or omissions are excluded from property damage cover, only the claim of the person whose act or omission caused the loss or damage will be affected. For a consumer whose claim is excluded as a result of a criminal or intentional act or omission, the Act obliges them to cooperate with the insurer in respect of investigation of loss (claimed by another party) by submitting statutory declaration or producing documentation as requested by the insurer. a court of competent jurisdiction can reduce the pay-out to the consumer where they are in breach of their duties under the Act, in proportion to the breach involved.

The Act allows third parties to benefit from the rights of the insured party in limited circumstances (e.g. where the insured party is deceased) where liability is incurred by the insured party to a third party. Policy proceeds are to be ring fenced in the event of the insolvency or bankruptcy of the insured. In such circumstances, the third party has the right to seek to recover loss suffered against the insurer and may commence an action against the insurer before liability against the insured party has been established.

What does this Act mean for those distributing insurance?

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"For Brokers, the Act will also impact the Broker / client relationship. Brokers should carefully explain to their clients the nature and effect of the obligations being placed on the consumer as a result of the Act. In particular, the pre-contract duty of disclosure and that they are under a duty to take reasonable care in answering the questions asked by the Insurer. Brokers should ensure that their clients are aware that it is to be presumed that a consumer knows that if an insurer asks a specific question that this is material to the risk, or the calculation of premium, or both."

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The UK experience

The UK is well ahead of this curve, having enacted the Consumer Insurance (Disclosure and Representations) Act 2012 on 6 April 2013. This similarly removed the duty of disclosure upon individual consumers, replacing it with the obligation on insurers to ask questions, and provided for proportional claims payment remedies. Further provisions are also contained in the subsequent Insurance Act 2015, which came into force on 12 August 2016. The Insurance Act 2015 has provisions analogous to those in the Consumer Insurance Contracts Act 2019, particularly the disclosure obligations of the policyholder and insurers' remedies where the policyholder has not complied with their obligations.

The changes in the UK have generally been well received by both insurers and consumers. That said, that legislation was introduced at a time when the market was soft, as opposed to a hardening market as we have now and as such it did not lead to a reduction in premiums. When the measures were introduced in the UK, the insurance team of Caytons UK office advised those insurers that wanted to reflect the terms of the Act into their policies. This was even though legally that was not strictly necessary, because the default position is that the 2015 Act applies: (a) to consumer policies save to the extent the policy is more advantageous and (b) to non-consumer policies (such as PI) save to the extent the policy is more advantageous than the Act or unless there has been a contracting out (such that the policy can be less advantageous than the Act). The legislative changes brought no major shocks to the UK insurance market and the provisions have been found to be relatively uncontroversial. The net result was that the legislation was generally already accepted to be industry good practice and in line with the approach taken to good practice by the Financial Ombudsman Services (FOS) in the UK in any event. The general view in the UK is that the impact helped to restore and increase consumer confidence in purchasing policies relating to motor, health, travel and property.

In Ireland, it will likely take some time after the Act has commenced to ascertain whether the changes will have the desired effect. Some in the industry consider that the Act tilts the balance too much in favour of the consumer and that the increased costs to insurers may simply mean that consumers will end up paying more for their policies.

This article was compiled by Brokers Ireland in collaboration with Mary Smith, Senior Associate, Caytons who provide specialist legal services to the Irish and UK insurance market.

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Amundi, the leading European asset manager, announces that the Central Bank of Ireland confirmed Amundi as a 'Super' Management Company in Ireland. It complements a range of existing authorisations held by the firm including, individual portfolio management and investment advice. With the full scope of AIFMD and UCITS permissions in Ireland, Amundi can now draw on its four major hubs for fund hosting services: France, Luxembourg, Austria and Ireland.

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Guillaume Lesage, Head of Operations, Technology and Services Division comments, "With a team of over 350 professionals in Ireland, Europe's second largest fund domicile, this development will enable Amundi to offer its fund hosting clients the substance, expertise and service levels that they require to support their business. This is also a new step in the development of Amundi Services which integrates this new capability of Super ManCo as part of its range of services and fund hosting platform."