Insurance/
Reinsurance

5 February 2016

INSURANCE BULLETIN

Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

In this week's bulletin:

Andrew Bandurka, Partner, andrew.bandurka@hfw.com
Brendan McCashin, Special Counsel, brendan.mccashin@hfw.com
Will Reddie, Associate, william.reddie@hfw.com

2nd Middle East Insurance Industry Awards 2015
LAW FIRM OF THE YEAR

holman fenwick willan hfw

1. Regulation and legislation

UK: PRA consults on changes to the PRA Handbook

The PRA has published a consultation paper (CP3/16) on its proposals to delete rules and guidance from the PRA Handbook. The rules and guidance which are the subject of the consultation paper have been replaced, or are in the process of being replaced, by rules in the PRA Rulebook or by PRA supervisory statements.

The PRA is proposing to delete the following parts of the Handbook:

1. Supervision manual (SUP) Schedule 5A
   This contains guidance on parts of SUP 10B but will be rendered irrelevant following the introduction of the senior managers regime and senior insurance managers regime, which will involve the removal of SUP 10B.

2. Senior Management Arrangements, Systems and Controls sourcebook (SYSC) 1, 4-9 and 21
   The PRA has previously consulted (in CP17/15) on replacing SYSC 4-9 and 21 but did not propose to delete them entirely, as they would still apply to some firms. However, a subsequent PRA consultation paper (CP22/15) proposed to disapply SYSC entirely to these firms, making these parts of SYSC redundant. SYSC 1 contains the application provisions for SYSC so will be unnecessary if SYSC 4-9 and 21 are deleted.

3. Several annexes to SUP 16
   Many of the annexes to SUP 16 have already been deleted. The PRA now proposes to delete the remaining annexes that have either recently been superseded by new parts of the PRA Rulebook or PRA supervisory statements, or will be superseded by a supervisory statement which will be prepared later this year.

4. Fees manual (FEES) Schedules 1-3 and 5
   These schedules were inserted into FEES several years ago as placeholders for substantive content. However, the content was never added and the PRA is now proposing to delete these schedules, given that the rest of FEES will be deleted.

Assuming these proposals are adopted, the deletions will be effective from 7 March 2016.

For more information, please contact Will Reddie, Associate, on +44 (0)20 7264 8758, or william.reddie@hfw.com, or your usual contact at HFW.

UK: Insurance Fraud Taskforce report focuses on data sharing and price-comparison websites

Further to our article[1] last week on the publication earlier this year of the Insurance Fraud Taskforce's final report, we focus this week on the report's handling of price-comparison websites.

The report singles out price-comparison websites as not sharing intelligence with insurers on suspicious consumer behaviour as

With undetected fraud estimated to cost the British economy £2 billion per year, and this costing policyholders approximately £50 each per year, the report nevertheless emphasises that *"overall responsibility for spotting and preventing fraudulent applications ultimately rests with insurers"*.

ANDREW SPYROU, ASSOCIATE

effectively as they could, especially given their unique position to detect fraud at the application stage. The report suggests that by sharing data more effectively and taking a more robust approach to fraud prevention, such websites could stop fraudulent applications before they were ever completed.

It is made clear in the report, however, that the manipulation of application details to achieve a cheaper quote can

1 http://www.hfw.com/Insurance-Bulletin-28-January-2016
2 http://www.hfw.com/Insurance-Bulletin-3-December-2015

in many cases be part of legitimate efforts to compare insurance quotes, but it is suggested further that these websites could do more to monitor any tell-tale signs of application fraud. With undetected fraud estimated to cost the British economy £2 billion per year, and this costing policyholders approximately £50 each per year, the report nevertheless emphasises that *"overall responsibility for spotting and preventing fraudulent applications ultimately rests with insurers"*.

Interestingly, this publication follows the end of the FCA's "Call for Inputs" from insurers on their use of "Big Data", which sought views on how insurers analyse and utilise information about consumers (and which we reported on in December 2015[2]). No results of this review have yet been published, but we look forward to comparing any such results with the recommendations from the Insurance Fraud Taskforce for the insurance industry to share more data and to keep fraud databases updated.

For more information, please contact Andrew Spyrou, Associate, on +44 20 7264 8789, or andrew.spyrou@hfw.com, or your usual contact at HFW.

2. Court cases and arbitration

England and Wales: Professional Indemnity Insurance: definition of "Claim"; Notification Condition Precedent; Retroactive Date; Continuity of Cover

In *ARC Capital Partners Limited v BRIT Syndicates Limited and QBE Underwriting Limited*, some familiar professional indemnity clauses were examined by Mr Justice Cooke.

ARC, an investment manager, claimed indemnity from its professional indemnity insurers, in respect of ARC's alleged liability to an investor for negligent investment of its funds into a property business, "OH".

Insurers relied on two policy defences to decline the claim:

1. The investor's claim against ARC involved acts and omissions committed before the Retroactive Date specified in the relevant policy, and was therefore excluded from cover.

2. A letter to ARC from the investor's lawyers, which had asserted that the investor had a "strong" claim against ARC, was said to constitute a "claim" for the purpose of the relevant policy. This claim had not been notified to insurers "as soon as practicable", in breach of a policy condition precedent.

ARC's insurance programme, which responded on a "claims made" basis, contained a Retroactive Date clause which excluded any claim "arising from or in any way involving any act, error or omission committed or alleged to have been committed prior to 5th June 2009". All ARC's "wrongful acts" (i.e. actionable ones) had occurred in 2010, but insurers relied on the fact that those acts had taken place against background transactions dating back to 2008. The judge held that the Retroactive Date clause was worded broadly enough to capture ARC's acts and omissions which had either a direct or an indirect causal link to ARC's liability. What was required for the exclusion to bite was an act or omission which could give rise to liability, which occurred prior to the retroactive date, and which was genuinely part of a chain of causation which led to liability for the claim. Insurers' defence failed because none of the 2008 factors had any causative connection with ARC's liability for the substantive claim made against it.

As for the investor's lawyer's letter to ARC, this did not constitute a "a written demand for monetary damages or non-pecuniary relief" within the policy definition of "claim", since, although the letter asserted that the investor had a "strong" claim against ARC, its principal purpose was to agree a protocol with ARC for recovering the investment from OH, and it merely reserved the investor's rights against ARC. The letter did assert that ARC should itself fund the costs of the attempted recovery from OH, rather than use monies held on behalf of the investor under the relevant investment management agreement, but the judge regarded this assertion as a "suggestion", rather than a "claim", for policy notification purposes.

As such, ARC's failure to notify insurers of the letter did not amount to a breach of condition precedent. It should be mentioned that there was no equivalent condition precedent regarding notification of circumstances likely to give rise to a claim.

The judge went on to rule that, had the letter amounted to a "claim", and had there had been a corresponding breach of condition precedent in the relevant policy, nevertheless the claim would have been valid under the succeeding year's policy. This was due to the presence there of a Continuity of Cover clause, which extended cover (on expiring terms) in respect of any claim which could or should have been notified under a preceding policy, provided that insurers had remained ARC's insurers "without interruption" throughout (which they had). This was so notwithstanding the presence in the succeeding policy of a claims notification condition precedent, since the judge held this did not nullify the Continuity of Cover clause, as the whole point of the Continuity clause was to extend cover to a claim in circumstances where there had been a breach of condition precedent in an earlier policy.

The full judgment can be found here: http://www.bailii.org/ew/cases/EWHC/Comm/2016/141.html

For more information, please contact Andrew Bandurka, Partner on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

3. Market developments

France: The foreseeable development of cyber risk insurance

Two recent studies show that the frequency and seriousness of cyber attacks in France have increased in the past two years. An average of 21 cyber security incidents affecting French businesses occurred each day in 2015, corresponding to a 51% increase in one year, while over the same period the increase was only 38% on average around the world.

Despite this higher exposure, fewer than 5% of French companies have purchased cyber risk insurance. However, French executives seem increasingly aware of the necessity to insure their companies against the risks resulting from cyber attacks, and to focus on the protection of their companies' online access to bank accounts and means of payment, the protection against identity theft and the protection of their companies' e-reputation.

We understand that the market expects the proliferation of cyber attacks in France to lead to an increase in cyber risk insurance premiums.

For more information, please contact Pauline Arroyo, Senior Associate, on +33 1 44 94 40 50, or pauline.arroyo@hfw.com, or Camille Moncany, Associate, on +33 1 44 94 40 50, or camile.moncany@hfw.com, or your usual contact at HFW.

4. HFW events

HFW receives an honorary mention at the MENA Insurance Awards 2016

On 27 January 2016, HFW Partners Paul Wordley, Sam Wakerley and John Barlow, Consultant Carol-Ann Burton, and Senior Associates Tanya Janfada and Sara Sheffield attended the MENA Insurance Awards 2016. The awards, held annually, recognise insurers, reinsurers, brokers and service providers in the Middle East and North Africa region who have contributed significantly to the development of the insurance industry in the region. HFW was given an honorary mention for the Insurance Law Firm of the Year award, recognising HFW's range and expertise in handling insurance matters.

Lawyers for international commerce hfw.com

São Paulo London Paris Brussels Geneva Piraeus Beirut Riyadh Kuwait Abu Dhabi Dubai
Singapore Hong Kong Shanghai Perth Melbourne Sydney