Insurance/
Reinsurance

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INSURANCE BULLETIN

Welcome to HFW's first Insurance Bulletin since the summer break. This edition of the Bulletin includes a summary of the key developments which occurred during late July and August.

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1. Regulation and legislation

UK: Insurance Act 2015 and Third Parties (Rights against Insurers) Act 2010 now in force

As foreshadowed in our bulletin of 22 July 2016, two insurance reform statutes came into force over the summer.

On 12 August 2016 the Insurance Act 2015 brought in policyholder-friendly changes to the remedies available to insurers for breaches of warranty (introducing a quasi-causation test), and non-disclosure and misrepresentation of material facts (introducing proportionate remedies). For further detail on the changes, please see our briefing on the Insurance Act, our bulletin of 22 April 2016 or our Dispute Resolution Bulletin of July 2015.

The Third Parties (Rights against Insurers) Act 2010 (as amended by the Insurance Act 2015 and the Third Parties (Rights against Insurers) Regulations 2016) came into force on 1 August 2016, making it easier for claimants to pursue liability insurers where their insured defendant is insolvent. For more information, please see our previous bulletins of 25 February 2016 and 13 May 2016.

For more information, please contact Alison Proctor, Senior Associate, London, on +44 (0)20 7264 8292, or alison.proctor@hfw.com, or your usual contact at HFW.

UK: Through the looking glass – increasing transparency and engagement at renewal in general insurance markets

As part of the FCA's continuing drive to protect consumers, the FCA recently published a policy statement (PS16/21 – *Increasing transparency and engagement at renewal in general insurance markets*) reporting on the main issues arising from a consultation in 2015 (CP15/41) and confirming the final rules and non-handbook guidance that will be published in due course.

Background

These proposals came about following the FCA's concern that pricing practices at the point of renewal in general insurance were resulting in the poor treatment of consumers.

Proposed changes

CP15/41 addressed the FCA's concerns about levels of consumer engagement and the treatment of consumers by firms at renewal, and the lack of competition that results from this. In December 2015, the FCA proposed new rules across all personal lines general insurance requiring firms to:

- Disclose the previous year's premium at each renewal.
- Include text to encourage consumers to check their cover and shop around for the best deal.
- Give an additional prescribed message of encouragement to shop around to consumers who have renewed with them four consecutive times.

Further, the FCA proposed guidance on how firms could maintain records to demonstrate compliance with these measures, including by keeping a record of premiums. Finally, CP15/41 set out non-handbook guidance to help firms meet their obligations towards consumers at renewal, e.g. detailing the importance of issuing clear communication to consumers at renewal, and how firms should treat consumers who want to switch or cancel.

Although the guidance applies only to insurers and intermediaries of general insurance products to retail consumers, the final guidance encourages firms *"to consider whether any of the issues raised by us about retail consumers would also apply to commercial customers and whether there is benefit to making wider changes."*

FCA response

In its policy statement, the FCA confirmed that, in the light of the feedback provided, the final rules and guidance will be made with the following changes incorporated:

- Firms must show the previous year's premium in renewal notices. Where a consumer's circumstances have changed during the course of the policy, firms must give an annualised premium reflecting any mid-term adjustments (inclusive of any administrative fees and charges).
- The previous year's premium and the renewal premium must be presented in a consistent format, so that they are comparable. For example, it would not be acceptable to compare the total annual cost of the previous year's premium with the cost of the monthly installments of the other year's premium. In addition, the total annual premium must always be disclosed.
- For the first three renewals, firms are free to choose the wording they use to encourage customers to "shop around". However, there is a prescribed form of wording for the fourth renewal and any subsequent renewals: *"You have been with us*

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WILL REDDIE, ASSOCIATE

for a number of years. You may be able to get the insurance cover you want for a better price if you shop around."

- The "shopping around" disclosure must encourage customers to consider the scope of their cover, as well as the price of the policy, as can be seen from the prescribed form of wording which is set out above.
- Policies of 10 months or more will be caught by the new rules and guidance, in order to reduce the risk of firms avoiding the FCA's proposals by simply providing shorter policies.
- The proposed implementation deadline will be extended by three months to ensure that all parts of industry have enough time to implement the FCA's proposals.

Next steps

Firms will be required to make the necessary changes to their renewal communications by 1 April 2017.

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

UK: No changes to be made to Chapter 5 of CASS

Following feedback on the FSA's proposals contained in Consultation Paper 12/20 "Review of the Client Money Rules for Insurance Intermediaries", the FCA has released a statement explaining that, following consultation with the industry, it has decided that it will not proceed with any changes to the rules and guidance in Chapter 5 of the FCA's Client Assets Sourcebook (CASS 5) without a further consultation.

The FSA consultation of August 2012 had proposed a number of changes to the rules and guidance in CASS 5, with a view to providing greater protections over client money. However, the industry's feedback, along with a re-consideration by the FCA of the costs and benefits of the proposals in light of the Financial Services Act 2012 and additional data on the potential impact on smaller firms, has led the FCA to its decision not to proceed at the current time with any changes.

The existing rules therefore remain in force. In light of the industry feedback on the FSA's consultation paper and subsequent FCA initiatives aimed at improving the protection of client money, the FCA's statement may be a signal that it will be some time before we see a new consultation on CASS 5.

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UK: Key reforms to insurance mediation activities – the Insurance Distribution Directive

The Insurance Mediation Directive (IMD) as implemented by member states, governs insurance mediation activities carried out within Europe.

Introduced in 2005, the IMD sought to reduce the differences in the distribution of insurance products between member states and create a single European insurance market.

The European Commission's (the Commission) consultation document in 2010 sought responses to its proposals to revise the IMD, as it was considered to be inconsistently applied across Europe.

What is the aim of the IDD?

The Insurance Distribution Directive (IDD) will replace the IMD and must be implemented in each Member State by 23 February 2018. Its key objective is to harmonise the provisions on the sale of insurance and reinsurance products. The IDD is a minimum harmonisation directive meaning that member states may impose or introduce more

stringent provisions if they are for the benefit of protecting customers.

Scope

An individual or firm which distributes insurance or reinsurance products will be affected by the directive, unless exempt.

Unlike the IMD, the IDD focuses on the "distribution" of insurance as well as reinsurance products, which means that it will not only apply to agents and brokers. Rather its scope is wider to cover all market participants selling insurance and reinsurance products, including insurance based investment products. Insurance distributors are therefore identified as insurers, intermediaries and ancillary intermediaries. The latter group refers to those whose main business is not insurance although they may sell certain insurance products which are complementary to their goods or services and where the insurance product does not cover liability risks or life assurance.

Removal of introducing

The definition of distribution under the IDD is similar to the definition of insurance mediation activities under the IMD. Insurance distribution is explained as *"advising on, proposing, carrying out other work preparatory to the conclusion of contracts of insurance or of assisting in the administration and performance of such contracts, in particular in the event of a claim"*. The regulated activity of introducing is not included under the IDD as the directive does *"not apply to mere introducing activities"* such as providing data and information on potential policyholders to insurance or reinsurance intermediaries or undertakings.

Professional requirements

To guarantee a high level of professionalism with the sale of insurance and reinsurance products, the IDD requires insurance and reinsurance distributors and employees of insurance and reinsurance firms carrying insurance or reinsurance distribution activities to possess appropriate knowledge and ability to perform in their role.

What will these changes mean for the UK?

While the IDD is relevant to any firm which sells insurance or reinsurance products to customers, UK regulated firms are unlikely to find the new requirements onerous. Nevertheless, firms should consider the impact of new requirements such as professional knowledge and assess where further guidance is needed to avoid the stringent sanctions for breach of requirements.

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2. Court cases and arbitration

UK: The effect of fraud on an insurance settlement – *Hayward v Zurich Insurance Plc*[1]

In this case the Supreme Court was asked to rule on whether a settlement could be set aside when one party later discovered proof of the other's fraud.

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Following a workplace accident, Hayward claimed damages from his employer's insurers, Zurich. Liability was admitted but quantum was disputed. Despite suspecting that Hayward had exaggerated his injuries, Zurich settled the claim before trial.

Several years later, a neighbour provided proof that Hayward had fully recovered from his injuries at least a year before the settlement date. Zurich brought a claim against Hayward for deceit because the settlement had been made on the basis of his fraudulent misrepresentations of his condition.

At first instance the judge found that the settlement should be set aside because of Hayward's fraud. However, the Court of Appeal disagreed, saying that a settlement could only be set aside on the basis of a fraudulent misrepresentation if the other party had believed it to be true and had been induced to enter the settlement agreement by it. Here, Zurich had not only suspected but also asserted in litigation that Hayward was exaggerating his injuries.

1 [2016] UKSC 48

The Supreme Court found that although Zurich did not believe Hayward's representations, it was induced to enter into the settlement because of the risk that the court would accept them as true. It was not necessary to show that Zurich had believed the representations to be true, but rather to show that it had been influenced by them in its assessment of the claim's value. Mere suspicion of fraud at the time of settlement would not prevent the setting aside of the settlement if definitive proof of fraud was later acquired.

The Supreme Court had to balance the principle that no one should benefit from their own fraud against the desirability of settlements being full and final. This decision provides comfort to insurers who suspect fraud but do not have the evidence to prove it, as they can compromise a claim and revisit it later if proof of fraud is acquired. It may also serve as a warning to dishonest claimants.

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3. HFW news, publications and events

HFW welcomes Partner Christopher Foster

We are delighted to welcome Partner Christopher Foster to the firm's insurance and reinsurance practice based in London, effective 25 July.

Christopher is recognised as one of the London Market's leading insurance and reinsurance lawyers, with broad experience handling complex contentious matters, often international in nature. He focuses in particular on coverage disputes, run-off and professional indemnity work as well as Bermuda Form matters and brokers' E&O disputes. He acts for insurers, reinsurers, brokers, and major corporate insureds and their captive insurers.

A press release can be read in full here: http://www.hfw.com/Holman-Fenwick-Willan-continues-to-strengthen-insurance-practice-with-Partner-hire-July-2016.

HFW to present at Insurance Internal Audit Group seminar on Friday 9 September

HFW Partner Andrew Bandurka will present a seminar at the Insurance Internal Audit Group seminar at Deloitte on Friday 9 September. Andrew will explain the background to and the legal and practical effects on insurers of the Insurance Act 2015, the Enterprise Act 2016, and the changes to the Third Party (Rights Against Insurers) Act 2010.

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