

Law Commission Releases Proposals for Reform of Business Insurance Law

On 26 June 2012 the Law Commission released a consultation paper setting out its proposals for the reform of business insurance law, including major changes to the law relating to the disclosure of risks during the insurance placement process, and the remedies available to insurers for breach of disclosure obligations and for breach of warranty. But how successful has the Law Commission been in addressing the issues faced by businesses?

The Law Commission's proposals include:

- Clarifying the disclosure duty that applies during the placing of policies, by providing greater statutory guidance on what proposers are required to disclose, and, if the presentation of the risk suggests potential problems, shifting the onus to insurers to ask further questions.
- Modifying the remedies available to the insurer in the event of a non-disclosure. The insurer's existing remedy of avoidance of the policy would remain in cases of dishonest non-disclosure, and insurers will also be entitled to retain the premium. In other non-disclosure cases a proportional system of remedies may apply:
 - Where the insurer, had it known the true position, would have declined the risk altogether, the policy would still be avoided (but the premium would be returned);
 - Where the insurer would have accepted the risk but included another contract term, the contract would be treated as if it included that term;
 - Where the insurer would have charged a greater premium, the claim would be reduced proportionately.
- Similarly the insurer's existing right to be discharged from liability under the policy where there is a breach of an insurance warranty would be replaced with a system of proportionate remedies:
 - A breach of warranty would suspend an insurer's liability for only such time as the breach is not remedied.
 - For certain terms the breach of warranty would suspend liability in relation to the particular type of risk to which the warranty relates, and not other unrelated risks insured by the policy.

With corporates heavily reliant on insurance as a means of managing risk in an uncertain world, it is more important than ever that policies work as intended. The Law Commission's proposals are a step in the right direction. They will reduce the prospects of insurers refusing to pay claims as a result of accidental or technical breaches of the disclosure duty, or of a warranty. But the Law Commission's proposals only address part of the overall picture.

The ongoing work of the specialist insurance research group, Mactavish, makes alarming reading. Their extensive research, as recently presented in their 2011 report, "Corporate Risk & Insurance – The Case for Placement Reform - The Mactavish Protocols", contains some troubling conclusions, including that:

- most companies are "desperately exposed when it comes to their insurance arrangements";
- the insurance purchased by businesses is "unreliable and becoming more so" involving a "low level of contract certainty";
- companies are running the risk of "devastating losses because of failings in their insurance protection"; and
- there is an urgent need to reconsider the way in which insurance is being placed.

The Law Commission's proposals do not avoid the need, identified by Mactavish, for corporates to engage more fully in the insurance placement process. This will continue to be vital in order to ensure that policies are properly tailored to the risks that businesses face, and will respond in the event called upon. Even if the Law Commission's proposals are enacted, it will still be essential that proper care is taken to make sure that the expectations of insured and insurer are matched from the outset. Whilst insurance can certainly be a valuable means of managing and reducing risk in an increasingly uncertain world, the standard approach to arranging and managing insurance cover requires significant improvements if that objective is to be achieved.

The Law Commission has set a deadline of 26 September 2012 for submissions on its proposals.

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