

ARTICLE

The Third Parties (Rights against Insurers) Act 2010

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The Third Parties (Rights against Insurers) Act 2010 (**New Act**) came into force on 1 August 2016. It is intended to address some of the shortcomings of the previous legislation, the Third Party (Rights against Insurers) Act 1930 (**1930 Act**). A detailed explanation of the changes being introduced by the New Act is set out below. However, by way of brief overview:

- Like its predecessor, the New Act allows third parties to bring proceedings directly against insurers when the insured is liable to indemnify the third party but has become insolvent.
- However, under the new legislation, the third party can bring proceedings against the insurer, and seek information concerning the insurance as soon as the insured is subject to an insolvency event. Previously the liability of the insured had to be established first.
- Defences available to the insurer as against its insured can still be raised against the third party. However some of the technical defences that could be raised by insurers under the 1930 Act have been removed.
- The New Act does not apply to liabilities under reinsurance contracts.

We set out below some key aspects of the new legislation.

Establishing Liability

The New Act was drafted following recommendations for change made by the Law Commission and the Scottish Law Commission (**Law Commission**) back in 2001. The New Act operates as the 1930 Act did by transferring the insured's rights under the insurance policy to the relevant third party. However, under the New Act a third party who claims to have rights under a contract of insurance may bring proceedings against the insurer even though he has not yet established the relevant liability of the insured. The third party is then entitled to a declaration that the insured is liable to him, and/or that the insurer is potentially liable to indemnify him under the policy. Where the Court makes a declaration that the insurer is liable to the third party, the Court may give the appropriate judgment against the insurer. The third party may also choose to make the insured a defendant to those declaratory proceedings, in which case the insured is bound by the decision taken by the Court. Finally, where the third party is entitled or required by the contract of insurance to refer disputes with the insurer to arbitration, he may also apply for a declaration as to the insured's liability in the same arbitration proceedings. Hence, once insolvency occurs, the third party has an option to pursue the insurer directly, with or without involving the insured, to establish his rights to an indemnity under the relevant insurance policy.

Conditions affecting the transferred rights

The New Act retains the principle that any defences available to the insurer as against its insured can be raised against the third party. However, some of the more technical defences raised by insurers under the 1930 Act have been removed, in line with recommendations made by the Law Commission. Thus, anything done by the third party which, if done by the insured, would have amounted to or contributed to fulfilment of a condition under the insurance contract is treated as having been done by the insured. For instance this would allow a third party to notify the claim to the insurer in accordance with the claims notification clause under the policy. Also, the transferred rights are not subject to any condition requiring information to be provided to the insurer if the condition cannot be fulfilled because the insured is an individual who has died or a corporate body that has been dissolved. Finally, under the New Act transferred rights are not subject to conditions requiring the prior discharge of the relevant liability by the insured (i.e. "pay first" clauses that require policyholders to pay for insurers to become liable under the policy).

Disclosure of Information

There were uncertainties under the 1930 Act concerning disclosure of information to the third party. The New Act addresses those by providing that a third party who reasonably believes an insolvent insured has incurred a liability to him may, by notice in writing, request the insured to provide the following information:

- whether there is a contract of insurance that covers the supposed liability or might reasonably be regarded as covering it; and
- if there is such a contract:

- who the insurer is;
- what the terms of the contract are;
- whether the insured has been informed that the insurer has claimed not to be liable under the contract in respect of the supposed liability;
- whether there are or have been any proceedings between the insurer and the insured in respect of the supposed liability and, if so, relevant details of those proceedings;
- in a case where the contract sets a limit on the funds available to meet claims in respect of the supposed liability and other liabilities, how much of it (if any) has been paid out in respect of other liabilities; and
- whether there is a fixed charge to which any sums paid out under the contract in respect of the supposed liability would be subject.

The same information can also be requested from another person (most likely a broker) who is able to provide the information.

Other changes and clarifications

The New Act brings the legislation up to date by widening its list of qualifying insolvency events and covering all types of insureds (and not just individuals and companies as was previously the case). It also removes uncertainties concerning its territorial scope: provided the insured is subject to an insolvency procedure in the UK, the New Act applies (regardless the governing law of the dispute between the insured and the third party, the residence or domicile of any of the parties involved, the governing law of the relevant insurance policy and the place where payments have to be made under the insurance). Finally, the New Act also makes it clear that if the insurer was able to set off amounts due by the insured from amounts payable under the policy, this right of set off remains as against the third party.

Comments

The New Act improves the current regime for third parties seeking compensation from an insolvent insured. It comes at a time when the insurance industry in the UK is subject to a series of legislative changes which include: (i) the Insurance Act 2015, which comes into force on 12 August 2016; and (ii) the Enterprise Act 2016, which will come into force in May 2017.

These reforms bring much needed modernisation to insurance law in the UK, with the commendable aim of readjusting the balance between insurers and those seeking protection under insurance policies. It will be interesting to see whether that aim comes to fruition. In any event, with such dramatic changes being made, an interesting period awaits as parties adjust.

Contact

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