Covéa Insurance

Third Parties' (Rights Against Insurers) Act 2010

Brokers Guide
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Major landmark
or just a bump in
the road?

This long-awaited legislation regarding third party claimants' rights against insurers became law on 1 August 2016 but how will it impact the industry?

As we know, litigation generally involves two parties or more, whether individuals or corporate bodies, some or all of whom may have the benefit of insurance. In that situation, the legal action will be between those parties with the insurer/s in the background.

However, the position is different if one of the parties is insolvent. Prior to 1 August 2016, if a third party wanted to bring a claim against an insolvent company or individual, there were a number of steps which had to be taken before that litigation could commence which could be both time-consuming and expensive. There was also no guarantee that the claim would be met by the potentially liable insurer, even if the courts found the insolvent party liable (with a liability judgment).

The Act makes a number of key changes to the existing process of bringing a claim

- Dissolved companies no longer need to be restored to the Companies House Register in order for a claim to be made – removing the need for separate litigation;
- Claimants can pursue insurers directly, without having to first establish liability on part of Insured. This will allow insurers to pursue their own investigations and have earlier involvement than previously;
- There is an obligation on former Directors, brokers and insurers to provide policy information to the third party;
- Insurers can no longer use the 'breaches of condition by the Insured' as defence to the claim – the third party's compliance will count as if carried out by the Insured.

The Act will apply to:

- liabilities incurred after 1 August 2016;
- companies/individuals where insolvency commenced after 1 August 2016.

Let's look at the issues in greater detail...

Under the 1930 Act, a third party would initially need to obtain a liability judgment against the insured, before they could potentially receive the benefit of any insurance policy that the dissolved Insured had held.

From 1 August 2016, however, an insurer can be pursued directly and the court will give judgment, not only on the liability of the insured to the third party, but also on the insurer's liability under the policy, without needing to proceed against the insolvent insured to establish their liability and the amount of that liability.

To qualify, a third party needs to show that an insured was a "relevant person" when the liability arose or that the liability had already arisen when the insured became a relevant person. A relevant person could be either an individual or a company. The Act defines 'relevant person' widely including as dissolved, subject to a voluntary arrangement, bankruptcy order, in liquidation, receivership or administration.

However, once a third party has decided to pursue the insurer directly rather than the insured, it cannot then pursue the insured as well. The Act makes it clear that it can only seek any shortfall not covered by the policy from the insured.

Obligation to provide information to third parties

The lack of policy information available to third parties has also been addressed by the Act. Prior to pursuing a claim, a third party can now ask a former director, insurer or broker to provide the following information:

- Identity of the insurer;
- Terms of their insurance policy;
- Whether insurer has denied liability;
- Whether there are (or have been) proceedings issued in relation to other claims; and
- Whether there is an aggregate limit of indemnity and if so how much and whether there are any fixed charges which would apply to any sums paid out.

That information has to be provided within 28 days or, if it cannot be provided, the response will need to state why not and provide details of any other person who may be able to assist. Failure to comply will allow the third party to ask the Court to compel a response and is likely to result in costs against the defaulting party.

Disclosure

The Act also creates new obligations on insolvency practitioners, directors and officers to disclose documents relevant to that liability. All too often when a company enters liquidation, documentation which does not relate to identifying assets and settling financial liabilities is lost, such as employee personnel files and health and safety policies.

However, now, if the company is defunct and litigation has already commenced against the insurer, the claimant can require documentation which would be disclosable under the Civil Procedure Rules to be disclosed by whomever is holding it. This obligation could fall on former employees or anyone else authorised to hold documentation, including insolvency practitioners or the Official Receiver.

There will therefore have to be thought given by those individuals about the non-financial documentation provided to them in the course of their involvement. Those involved in the professional indemnity insurance world will therefore need to impress on their clients and Insureds the necessity for reviewing internal document retention rules in order not to fall foul of their obligations.

Common types of document that may be required include:

- Accident documentation (including Accident Book entry, Investigation report, RIDDOR, First Aider's Report etc);
- HSE communications;
- Minutes of Health and Safety Meetings;
- Personnel and Occupational Health files;
- CCTV footage;
- Report to DWP;
- Inspection/Service Documentation for work equipment;
- Invoices and Manufacturers' documentation re: work equipment;
- Tachograph charts;
- Training documentation (eg training schedules and records);
- Earnings information (eg payslips, computer printouts);
- Health and Safety generic documentation – eg Risk Assessments and Method Statements;
- Health and Safety Policies eg manual handling, food safety, stress at work;
- HR Policies, eg harassment and bullying, grievance, discrimination;
- Contracts with clients;
- Contracts with sub-contractors.

Defences

A third party claim will now deal with both liability of an insured and the insurer's obligation to compensate for that liability. An insurer's defence will therefore need to cover both liability and policy issues.

An insurer can use any defence which would have been available to the insured to defend a third party's liability claim.

In terms of coverage defences, under the 1930 Act, an insurer could argue for example, that the policy should not respond because the insured had not notified it of the liability. However, under the rules of the 2010 Act, that defence is no longer available if the third party has personally informed the insurer of the claim within the prescribed time in the condition. That defence also falls away if the Insured has died or is dissolved.

Other points

As with the 1930 Act, the 2010 Act:

- allows an insurer to apply any set-off which it would have against its insured to its third party liability, eg unpaid premiums or deductibles;
- does not apply to reinsurance contracts;
- is not retrospective so there is therefore likely to be long lead-in time.

The way forward

On balance, the Act will have a significant impact on how the insurance industry will deal with claims and requests for policy information.

For insureds and insurers looking to recover outlay on property damage or contractual claims, the changes will be a welcome relief and will help to streamline litigation. For those dealing with EL/PL claims, the position is less rosy because there is likely to be an increase in claims. However, across the board, there is likely to be an increase in requests for information and a need for all to ensure good diary management to avoid applications and potential costs awards for non-compliance. Ultimately there is likely to be an increase in litigation because those who were previously put off by the requirements to re-instate the company will now be more likely to bring a speculative claim.

On the positive side, third party costs will be reduced because there is no longer a need to reinstate the dissolved insured to the Companies House Register or to obtain a liability judgment before obtaining cover. In addition, it will mean that earlier investigation will be possible, rather than being presented by a judgment which will need to be paid. Insurers will now be made a party to the proceedings and can have a greater degree of control and may even be able to defend the claim. As ever, good documentation retention and early evidence capture will be key.

In summary brokers should:

- ensure that requests for informaton are dealt with within 28 days;
- encourage their policyholders to review internal documentation and documentation retention policies so that they do not fall foul of their obligations;
- review their own internal documentation procedures to ensure relevant information about their customers can be easily located in the event of a third party claim so that they can fulfil their obligations;
- be aware that claims may be brought against the insurer directly without prior legal action so as always if you or an insured are asked to provide documentation, notify the insurer now so that it can investigate.

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